

Notes from the Defense Bar: Fighting for Reform on Three Fronts During the Obama Administration



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Shortly after the 2008 elections, a relatively diverse assortment of interest groups collaborated on a lengthy transition memo to the new administration, advocating a long list of sought-after criminal justice reforms.¹ Several months earlier, this publication also spotlighted a handful of measures for policymakers and the public to consider.² Although both collections set forth many well-reasoned and well-grounded criminal justice proposals, these and other election-year exercises were primarily meant to take into account the widest array of policy options, not whittle them down to the readily achievable. Among social liberals, reformist optimism had reached its zenith; after all, it was the first time since 1994 that Democrats controlled the White House, the Senate, and the House of Representatives.

Some of this optimism was, of course, fueled by campaign rhetoric. On the campaign trail, candidate Barack Obama was resolute in his desire to close Guantanamo and “reduce the ineffective warehousing of non-violent drug offenders.”³ Expectations grew after the election, when several criminal justice reform initiatives found their way onto the White House Web site, including eliminating the crack-cocaine disparity and curtailing racial profiling.

After years of governance by the tough-on-crime crowd, the smart-on-crime community entered 2008 with an optimism about criminal justice reform that has not been seen in decades. Unfortunately, although there has been progress, it has been limited. Perhaps the most notable success has been a significant reduction in the crack-cocaine sentencing disparity, but that success was measured and has not been replicated in other criminal justice reform areas, such as national security and corporate crime. On the national security front, progress has been difficult to identify, whereas in the white collar and business regulation arena, public outrage against corporate malfeasance has stymied nascent bipartisan efforts to combat overcriminalization.

The politics of crime is a well-trodden area of discourse, rife with overgeneralizations that must seem trite to most readers of *Federal Sentencing Reporter*. Even highbrow newsweekly *The Economist* falls prey to this trap, explaining in a recent cover story, “Since no politician wants to be tarred as soft on crime, such laws, mandating minimum sentences, are seldom softened.”⁴ With the passage of

time, it is time to take stock and consider whether recent experiences have challenged or proved the conventional wisdom about crime policymaking. Firm conclusions may be premature, but some reflection on political dynamics is warranted.

I. Crack-Cocaine Reform

In watching the House floor debate on the bill to significantly reduce the sentencing disparity between crack and cocaine, crime policy wonks and political junkies could not help but marvel at the cloud of rationality that seemingly enveloped the chamber. True, the leading House Republican for crime policy, Judiciary Committee Ranking Member Lamar Smith (R-Tex.), opposed the bill, but his objections seemed, to the authors, *de rigueur*—that is, intended to protect his image as the leading supporter of tough sentences rather than to rally his colleagues to defeat the bill. Most significantly, he allowed the bill to pass anonymously, by a voice vote as opposed to a roll call vote, thereby forgoing the political reckoning that would have deterred many Republicans and moderate Democrats from voting their conscience.⁵

The scenario feared by advocates, that the bill would be amended to include unacceptably punitive provisions or “poison pills,” never materialized.⁶ Given that Lamar Smith has made known his dissatisfaction with advisory guidelines, the fact that he did not attempt to capitalize on the bill is noteworthy.⁷ And, although the bill does include certain sentencing enhancements, it did not go so far in that direction as to tilt the scale.⁸

Despite the singular political achievement the passage of the sentencing reduction represents, the actual policy change is a modest one in the view of most active supporters of crack cocaine reform. When news of the Senate compromise broke, the 18:1 ratio was hardly greeted with fanfare among those dedicated to parity. In keeping with the nature of the reform, most reform advocates did not challenge any of the sacred cows of the drug war and its political constituents. Specifically, the efficacy of mandatory minimums or incarcerating low-level drug offenders was not called into question; instead, advocates condemned the unwarranted racial disparity and misallocation of federal law enforcement resources. Echoes of this refrain

Federal Sentencing Reporter, Vol. 23, No. 2, pp. 121–125, ISSN 1053-9867 electronic ISSN 1533-8363.
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could be heard in the floor statement of Rep. Daniel Lungren (R-Cal.), who argued that the bill “serves the interests of law enforcement in reaching wholesale and mid-level traffickers while reducing the crack powder ratio to 18-to-1 from the current 100-to-1.”⁹ Inasmuch as the bill sought to recalibrate, rather than restructure, drug sentencing, it strategically navigated the narrow stretch between tough on crime and progressive reform ideologies.

Does crack cocaine sentencing occupy a unique space on the political grid or does it offer lessons that might be applied to other areas of reform? In some ways, the crack cocaine story is pretty unique: The administration and its attorney general supported equalization, and law enforcement groups either voiced support or remained relatively silent. As such, active opposition was scarce or nonexistent. Even the Fraternal Order of Police, which had supported maintaining the existing crack penalties and increasing powder cocaine penalties, did not fight the bill in any way that was evident to its supporters.¹⁰

The tactics that proved successful in reforming the crack-cocaine sentencing disparity are not wholly unique. Law enforcement support also played a role in the sweeping repeal of mandatory minimums that took place in 1970. As detailed in a report by Families Against Mandatory Minimums, Congress repealed all but one drug mandatory minimum in 1970, despite a hotly contested midterm election with tough law-and-order rhetoric.¹¹ As with the recently enacted crack reform, the 1970 repeal exempted the most serious offenders and was heralded for promoting respect for the law, which was being undermined by inequitable and disproportionate sentences.

“The public’s attitude about drug crime, as documented in numerous public opinion surveys, and waning reliance on crime as a national campaign issue, played a significant role in passing this legislation.”¹² Reporting on this trend in the context of reentry legislation in 2006, the *New York Times* observed, “In today’s political environment, crime policy has so receded from controversy that the Republican-led House Judiciary Committee could approve the Second Chance Act in July under the assumption that the full House might take it up on the eve of an elections in which the Republican majority was at stake.”¹³

As demonstrated by repeal of the Boggs Act in 1970, passage of the Second Chance Act in 2008, and reform of crack cocaine sentencing in 2010, rational crime policy can overcome an inhospitable political environment if certain factors—bipartisan agreement, law enforcement support, and favorable public sentiment—are present. If the success of this reform effort is to be duplicated, the most obvious candidates are bills that share these aforementioned factors, such as the National Criminal Justice Commission Act and proposals related to reentry and problem-solving courts.¹⁴

II. National Security

If the legislation to reduce crack cocaine sentences represents a victory for Democrats and progressives, its success

does not appear easily replicated in other criminal justice areas. The reform effort on national security issues has faltered due to a lack of strong political leadership and a contagious fear of appearing soft on terrorism in an election year. Issues involving the detention, interrogation, and trial of detainees have become politically toxic and, if there is any remaining hope of reform in the near term, the President must begin to use the bully pulpit to defuse conservative hysteria and support his allies.

Less than two years ago, President Obama stood before the nation to deliver his inaugural address and emphatically declared, “We reject as false the choice between our safety and our ideals.”¹⁵ Optimism was rampant about the prospect of reforming Bush-era national security policies, complete with a second, 320-page transition memo intended to serve as a blueprint for the new administration.¹⁶ And, at least initially, progressives were not disappointed. On his second full day in office, in a moment that appeared to embody the fever of hope and change that propelled then candidate Obama into the White House, the President resolutely signed a series of executive orders banning torture, halting the military commissions, and pledging to empty the prison camps at Guantanamo Bay within one year.¹⁷

Yet just eighteen months later, the administration’s truly admirable commitment to restoring the rule of law appears to have weakened and morphed into a political vulnerability. Guantanamo remains open, home to 178 detainees. Military commissions have resumed, beginning with the first prosecution of a child soldier in modern U.S. history, and are likely to continue in as many as thirty-five other cases.¹⁸ And in conformity with a recommendation by the Guantanamo Review Task Force, at least forty-eight men will be indefinitely detained without charge or trial.

The Obama administration is not entirely to blame. Congress has passed a series of frustrating limitations on the President’s ability to transfer detainees out of Guantanamo. And, to the President’s credit, despite these hurdles his administration has successfully transferred or repatriated sixty-seven Guantanamo detainees since 2009. But as Paul Krugman put it, “[P]rogressive disillusionment isn’t just a matter of sky-high expectations meeting prosaic reality.”¹⁹ The decisions to embrace indefinite detention and military commissions fell to the President alone.

Rather than rejecting the untested and unconstitutional military commissions established under President Bush, President Obama signed into law the new Military Commissions Act with significant, but ultimately inadequate improvements.²⁰ Among other problems, the supposedly reformed commissions still permit the admissibility of hearsay and coerced confessions, the implications of which became readily apparent in the recent trial of Omar Khadr. The military judge in that case admitted a confession obtained from Khadr after a military interrogator threatened the badly wounded 15-year-old with gang rape.

President Obama’s decision to use military commissions for some detainees seems part of a disappointing

pattern not confined to national security issues in which the President compromises fundamental values in an effort to avoid confrontation with Republicans intent on obstructing his entire agenda. As a candidate, then senator Obama resolutely promised to close Guantanamo and reject the military commissions, calling them “a flawed system that has failed to convict anyone of a terrorist act since the 9/11 attacks, and compromised our core values.”²¹ Yet less than four months after taking office, the President told civil libertarians that the commissions were a fait accompli, seeking to minimize the damage to his legislative agenda from an increasingly vocal conservative opposition.²²

A similar scenario unfolded when the White House put a hold on the Attorney General’s plan to try Khalid Sheikh Mohammed and four other alleged 9/11 conspirators in a federal court in New York City. The administration felt compelled to backtrack after taking heavy fire from Republicans who argued that the trial would invite another terrorist attack and New York Democrats who feared that high security would hurt the local economy. Instead, the administration reportedly discussed a “grand bargain” with Republican Sen. Lindsey Graham of South Carolina whereby Republicans would help the President close Guantanamo in return for a military trial for the 9/11 defendants and some form of indefinite detention authority.²³ The deal fell apart when Sen. Graham could not muster enough Republican support to close Guantanamo, and the White House is unlikely to announce the trial forum before the November 2010 midterms.

White House press secretary Robert Gibbs has angrily scolded the “professional left” for criticizing the administration’s political deal-making and not expressing sufficient appreciation for its legislative achievements, citing health care reform and a \$787 billion stimulus package.²⁴ An 82 percent reduction in the crack-cocaine sentencing disparity also surely scores as a big win. But on national security and civil liberties issues, similar achievements have been difficult to identify.

The difficulty with trying to model national security reform after the successful push to reduce the crack-cocaine disparity is that a merely proportional reduction in torture, military commissions, or indefinite detention is simply not enough. Basic constitutional guarantees are nonnegotiable. Yet the old politics of fear have resurfaced with a startling intensity that seems to have hijacked the President’s promise of a clean break from the most controversial policies of the Bush era. Without stronger, more vocal leadership from the White House, advocates for national security reform may not soon share the success of crack-cocaine legislation.

III. Corporate Crime

Much like national security, efforts to curtail the expansion of federal criminal law have faced nearly insurmountable hurdles. The public’s resentment toward any alleged corporate malfeasance is at an all-time high, prompted by this

past year’s economic downturn, numerous corporate and political scandals, and one of this nation’s worst environmental disasters. Politicians on both sides of the aisle have been quick to appear responsive to the public’s concerns on these issues with speeches that call for long jail sentences for mortgage brokers, Wall Street mavens, and oil company CEOs. These catalyst events have also provided vital support for President Obama’s ambitious business and regulatory reform agenda.

On July 21, 2010, President Obama signed into law the nation’s most expansive financial regulations since the days of the Great Depression. He touted the new law as one that will “empower consumers and investors [and] bring the shadowy deals that caused this crisis into the light of day. . . .”²⁵ The law accomplishes quite a bit—it substantially increases federal oversight authority over those in the financial sector with the creation of the Financial Stability Oversight Council,²⁶ it creates a consumer protection agency to oversee financial products that directly affect consumers,²⁷ and it provides regulatory oversight on the derivatives market²⁸—financial products that were blamed for causing the financial crisis. But it also creates massive new criminalization that potentially will victimize innocent people who never meant to violate the law.

The 884-page law contains more than two dozen new criminal offenses, which prohibit conduct ranging from public disclosure of certain broadly defined information, to margin lending, to failure to reasonably foresee the bad acts of others.²⁹ In addition to the approximately two dozen new criminal offenses the law explicitly creates, virtually every new provision of the law also includes regulatory criminalization wherein Congress hands over the power to define criminally punishable conduct to unelected agency bureaucrats. Like many new crimes created by Congress in recent years, the new criminal provisions received no review by the Judiciary Committees of either the House or the Senate, despite the fact that those committees are granted express jurisdiction over new criminal laws. And disturbingly, most of the criminal laws that are contained in the financial reform legislation lack an adequate mens rea (criminal intent) requirement. Laws that lack adequate criminal intent requirements run the grave risk of allowing overzealous prosecutors to go after people who have accidentally, or inadvertently, run afoul of the law—despite the fact that a core principle of the U.S. justice system is that no one shall be subjected to criminal prosecution for conduct that he or she did not know was illegal.³⁰

The inclusion of more than two dozen new criminal offenses in the financial services reform bill was disappointing—particularly in light of the recent scholarship that highlights the rampant and unprincipled overcriminalization of conduct and the harm overcriminalization causes.³¹ At exactly the same time that members of Congress were working on the financial services reform bill, other members of Congress were announcing the release

of a bipartisan report on the federal criminal legislative process, titled “Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law.”³² The National Association of Criminal Defense Lawyers and The Heritage Foundation reviewed all criminal bills introduced during the 109th Congress³³ and were able to identify as many as 446 proposed criminal provisions that did not involve violence, firearms, drugs, pornography, or immigration violations. Of those 446 proposed nonviolent and nondrug criminal offenses—mostly paperwork violations and business or regulatory crimes—57 percent lacked an adequate mens rea requirement.³⁴

The fact that the recently enacted financial services reform bill contained multiple criminal offenses lacking adequate mens rea requirements buttresses a concern that Congress as a whole is continuing its race to carelessly overcriminalize business and economic conduct. It seems safe to anticipate that, even with midterm elections potentially diminishing the number of seated Democrats, Congress will respond to the environmental crisis in the Gulf and any other significant headlines with support for new crimes and penalties, without regard for whether the targeted conduct is adequately addressed by current statutes and regulations.

IV. Conclusion

What can be taken away from the disparate results of efforts to achieve criminal justice reform since the start of the Obama administration? Although it may be a bit too early to draw firm conclusions, some lessons are clear. The President alone does not set criminal justice policy. Indeed, in an era when the nation seems to be caught permanently in an election cycle, there is often equal motivation to stand against, as stand with, a president. Accordingly, there is significantly more room for success with bipartisan support, which is far easier to achieve when the reform at issue is not directly battling current news headlines and public outrage. It is also critical for advocates to craft a reform message that enables supporters to avoid a soft-on-crime attack. For national security and corporate crime issues, these obstacles may continue to pose a significant impediment to achieving reform. For other reform areas, where the arguments can more closely track those successful in the effort to reduce the crack-cocaine sentencing disparity, such as proposals to improve reentry and create more effective problem-solving courts, the climate is more hopeful.

Notes

- 1 Smart on Crime: Recommendations for the Next Administration and Congress, <http://2009transition.org> (last visited Aug. 17, 2010).
- 2 *Federal Sentencing Reporter*, Volume 20, Number 5 (2008).
- 3 Barack Obama and Joe Biden: Creating Equal Opportunity and Justice for All, http://www.barackobama.com/pdf/issues/Fact_Sheet_Civil_Rights_and_Criminal_Justice_FINAL.pdf (last visited August 17, 2010).
- 4 Rough justice in America: Too many laws, too many prisoners, *THE ECONOMIST*, July 22, 2010, <http://www.economist.com/node/16636027>.

⁵ Most votes are taken by a simple voice method, in which the yeas and nays are called out, respectively, without a record of each individual Member's vote. However, under the Constitution, if one-fifth of those Members present request a recorded vote, it must occur. A quorum of 218 Members must be present for the House to conduct business. As such, a recorded vote will be required upon the request of just forty-four Members.

⁶ The reason, perhaps, is because the bill was brought to a vote under suspension of the Rules and thus no amendments were allowed. The procedure for passing a bill under suspension is as follows: (1) a Member makes a motion to suspend the rules and pass the bill; (2) debate is limited to forty minutes, divided equally between the majority and minority; (3) no amendments are in order unless submitted by the Member at the time he or she moves to suspend the rules; (4) a single vote to suspend the rules and pass the bill is taken; and (5) passage under suspension requires a two thirds vote of Members present. If the vote does not receive two thirds, then the bill can be reconsidered under the Rules.

⁷ Perhaps not coincidentally, on the same day the Senate Judiciary Committee approved the crack bill, Rep. Lamar Smith issued a press release stating, “The Sentencing Commission's report confirms why we need mandatory sentencing guidelines because [w]e must have fair and equal sentences for defendants in our courts, without regard to race, gender, education or citizenship.”

⁸ Section 5 directs the United States Sentencing Commission “to amend Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.” Fair Sentencing Act of 2010, Pub. L. 111-220 (2010). Section 6 also directs the Commission to amend the guidelines to ensure an additional increase of at least 2 offense levels if the defendant bribed or attempted to bribe a government official; the defendant maintained an establishment for the manufacture or distribution of a controlled substance; the defendant has a leadership role in the drug trafficking activity and the offense involved one or more of certain aggravating factors; the defendant was involved in importation of a controlled substance; the defendant engaged in witness intimidation, evidence tampering or obstruction of justice; or the defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood. *Id.*

⁹ 156 Cong. Rec. H6202 (2010) (statement of Rep. Lungren).

¹⁰ Absent from the House floor debates is any mention of FOP or other opposition, although FOP Executive Director James Pasco was quoted in subsequent news stories as being “disappointed” that the bill passed. Gary Fields, *House Eases Crack-Cocaine Sentences*, WALL ST. J., July 29, 2010, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704895004575395591711029722.html (last visited Aug. 17, 2010).

¹¹ Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT. REP. 55 (2008).

¹² As the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), illustrates, crime and the death penalty still loom large in state and local judicial elections. See also *Hearing on Examining the State of Judicial Recusals after Caperton v. A.T. Massey Before the Subcomm. On Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (Dec. 10, 2009) (written statement of Norman Reimer, executive director, National Association of Criminal Defense Lawyers).

¹³ Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES, Dec. 24, 2006, <http://query.nytimes.com/gst/fullpage>.

html?res=9C0CE0DA1331F937A15751C1A9609C8B63&page wanted=1.

- 14 The crack bill requires a Government Accountability Office study of drug court funding programs and their efficacy.
- 15 President Barack Obama, Inaugural Address (January 20, 2009), available at http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address/ (last visited Aug. 17, 2010).
- 16 "Liberty and Security: Recommendations for the Next Administration and Congress," Nov. 18, 2008, available at <http://2009transition.org> (last visited Aug. 17, 2010).
- 17 Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) ("Ensuring Lawful Interrogations"); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) ("Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities"); Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) ("Review of Detention Policy Options").
- 18 Guantanamo Review Task Force, Final Report 19-22 (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf> (last visited Aug. 18, 2010).
- 19 Paul Krugman, *Curbing Your Enthusiasm*, N.Y. TIMES, July 30, 2010, at A23, available at <http://www.nytimes.com/2010/07/30/opinion/30krugman.html> (last visited Aug. 17, 2010).
- 20 Military Commission Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010 (2009).
- 21 Carrie Dann, *McCain on Guantanamo ruling, age*, MSNBC, Jun. 12, 2008, available at http://firstread.msnbc.msn.com/_news/2008/06/12/4436969-mccain-on-guantanamo-ruling-age (last visited Aug. 17, 2010); Sen. Barack Obama, Remarks at the Wilson Center, *The War We Need to Win* (Aug. 1, 2007), http://www.barackobama.com/2007/08/01/the_war_we_need_to_win.php (last visited Aug. 17, 2010) ("As President, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions.").
- 22 Marc Ambinder, *The Rubicon of Indefinite Detention*, THE ATLANTIC, May 22, 2009, available at <http://www.theatlantic.com/politics/archive/2009/05/the-rubicon-of-indefinite-detention/18087/> (last visited Aug. 17, 2010).
- 23 Charlie Savage, *Closing Guantanamo Fades as a Priority*, N.Y. Times, Jun. 26, 2010, at A13; Dana Milbank, *Lindsey Graham runs afoul of GOP purity police with Guantanamo stance*, WASH. POST, Mar. 14, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/12/AR2010031203099.html> (last visited Aug. 18, 2010).
- 24 Sam Youngman, *White House unloads anger over criticism from "professional left"*, THE HILL, Aug. 10, 2010, available at <http://thehill.com/homenews/administration/113431-white-house-unloads-on-professional-left> (last visited Aug. 17, 2010).
- 25 President Barack Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act> (last visited Aug. 17, 2010).
- 26 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Title I §§ 101-123 (2010).
- 27 *Id.* at Title X §§ 1001-1100H.
- 28 *Id.* at Title VII §§ 701-774.
- 29 For more information, including a detailed outline and analysis of the criminal provisions in the Financial Reform Bill, visit <http://www.nacdl.org/public.nsf/whitecollar/HR4173>.
- 30 See generally Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (2010), available at <http://www.nacdl.org/withoutintent> (last visited Aug. 17, 2010).
- 31 See ONE NATION UNDER ARREST—HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY (Paul Rosenzweig & Brian W. Walsh eds., 2010); HARVEY A. SILVERGLATE, THREE FELONIES A DAY—HOW THE FEDS TARGET THE INNOCENT (2009); Marie Gryphon, *It's A Crime?: Flaws in Federal Statutes That Punish Standard Business Practice*, CIVIL JUSTICE REPORT, Manhattan Institute, No. 12 (Dec. 2009).
- 32 On May 5, 2010, Rep. Bobby Scott (D-Va.) and Rep. Louie Gohmert (R-Tex.), chair and ranking member of the House Judiciary Subcommittee on Crime, respectively, jointly announced the release of "Without Intent" during a press conference at the Capitol.
- 33 The 109th Congress was in session from 2005 to 2006.
- 34 The 109th Congress enacted twenty-three of those criminal offenses into law.