

STATEMENT OF

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ATTORNEY GENERAL OF THE UNITED STATES

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

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HEARING ON

RETROACTIVE APPLICATION OF THE PROPOSED
AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES
IMPLEMENTING THE FAIR SENTENCING ACT OF 2010

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WASHINGTON, D.C.

June 1, 2011

Madam Chair and members of the Sentencing Commission:

Thank you for the opportunity to appear before you today. Along with my colleagues, United States Attorney Stephanie Rose and Acting Bureau of Prisons Director Tom Kane, I am here to discuss our shared goals – and this Administration’s ongoing efforts – to ensure the firm and fair administration of justice in our nation’s sentencing policies.

Thanks to the extraordinary work of this Commission – and the contributions of policymakers and prosecutors, advocates and researchers, law enforcement officers and Administration officials, as well as Congressional leaders on both sides of the aisle – in recent months, significant, long-overdue progress has been made to improve the strength and integrity of our federal sentencing system.

As we can all agree, our sentencing policies must be tough, predictable and aimed at: enhancing public safety; reducing crime; reducing recidivism; eliminating unwarranted disparities; minimizing the negative, often devastating effects of illegal drugs; and inspiring trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals – when President Obama signed the Fair Sentencing Act into law. This new law not only reduced the inappropriate 100-to-1 sentencing disparity between crack and powder cocaine offenses – a disparity that this Commission itself found to be unjustifiable and repeatedly recommended

should be amended – it also strengthens the hand of law enforcement and includes tough new criminal penalties to mitigate the risks posed by our nation’s most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

But I am here today because I believe – and the Administration’s viewpoint is that - we have more to do. Although the Fair Sentencing Act is being successfully implemented nationwide, achieving its central goals of promoting public safety and public trust – and ensuring a fair and effective criminal justice system – requires the retroactive application of its guideline amendment.

Of course, in considering retroactive application of this amendment, protecting the American people is – and will remain – the Administration’s top priority. President Obama and I, along with leaders across the Administration, understand how illegal drugs – including crack – ravage communities. Crack offenders – especially violent ones – should be punished. And the Justice Department will make every effort to prosecute them. However, as years of experience and study have shown, there is simply no just or logical reason why their punishments should be dramatically more severe than those of other cocaine offenders – a position that Congress overwhelmingly supported with the passage of the Fair Sentencing Act.

The Commission’s Sentencing Guidelines already make clear that retroactivity of the guideline amendment is inappropriate when its application poses a significant risk to public safety – and the Administration agrees. In fact, we believe certain dangerous offenders –

including those who have possessed or used weapons in committing their crimes and those who have significant criminal histories – should be categorically prohibited from receiving the benefits of retroactivity, a step beyond current Commission policy.

The Administration’s suggested approach to retroactivity of the amendment recognizes Congressional intent in the Fair Sentencing Act to differentiate dangerous and violent drug offenders and ensure that their sentences are no less than those originally set. However, we believe that the imprisonment terms of those sentenced pursuant to the old statutory disparity – who are not considered dangerous drug offenders – should be alleviated to the extent possible to reflect the new law.

As a federal prosecutor and as Attorney General – and as a former judge, United States Attorney, and Deputy Attorney General – this issue is deeply personal to me. While serving on the bench, here in Washington, D.C., in the late ‘80’s and early ‘90’s, I saw the devastating effects of illegal drugs on families, communities, and individual lives. I know what it is like to sentence young offenders to long prison terms, and I did so to protect the public from those who were serious threats and who had engaged in violence. However, throughout my tenure as this city’s U.S. Attorney, I also saw that our federal crack sentencing laws did not achieve that result. Our drug laws were not perceived as fair and our law enforcement efforts suffered as a result. That is why it was a special privilege for me to stand with President Obama when he signed the Fair Sentencing Act into law. And that is why I feel compelled to be here in person today, to join my colleagues in calling for the retroactive application of the guideline amendment.

I recognize that some disagree with this approach. We have heard this before. In 2008, after the Commission decided to apply retroactively an amendment that reduced the base offense level for crack by two levels – known as the “crack minus two” amendment – some, including several within the Justice Department, predicted that such a move would cause a dramatic rise in crime rates. However, as a study released by the Commission just yesterday shows, those whose sentences were reduced after that amendment was applied retroactively actually had a slightly lower rate of recidivism than the study’s control group.

Three years ago, the Bureau of Prisons, Marshals Service, federal prosecutors, judges, probation officers, and others stepped up and did the necessary work to ensure the successful and effective retroactive application of the “crack minus two” amendment. Today – despite growing demands and limited budgets – my colleagues across the Department of Justice and the criminal justice community stand ready to do that which is necessary to make our sentencing system fairer and more effective. And, once again, we are relying on the Commission to lead the way.

Recently, some have suggested that – since the Fair Sentencing Act contains no specific provision regarding retroactivity – it is beyond the role of the Sentencing Commission to make the guideline amendment retroactive without direction from the Legislative Branch. We disagree with this position. Based on the Commission’s authorizing statute, we believe that the Commission would be well within its authority to make the Fair Sentencing Act amendment retroactive along the lines that we suggest.

Madam Chair, and distinguished members of the Commission, it is time to honor, not only the letter of this law, but also the spirit of its intent. Our nation's ability to do so rests in your hands.

Again, I want to thank you for the opportunity to appear before you. I look forward to continuing to work with each of you – and with leaders across Congress and the Administration – to strengthen federal sentencing policy, and to ensure that our nation's criminal justice system serves as a model of effectiveness and fairness.

I'm now pleased to turn this over to my colleagues, U.S. Attorney Rose and Acting Director Kane. They will elaborate further on the Administration's position and also will be available to answer questions.

Thank you.