jurisprudence

Rocks and Powder

Will Congress listen to the courts and fix drug sentencing?

By Larry Schwartztol

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In federal court, crack offenses generate sentences 100 times greater than comparable powder-cocaine crimes. In other words, while it takes 500 grams of cocaine to trigger a five-year mandatory minimum sentence, 5 grams of crack earns the same punishment. Last month, four senators introduced a bill to close that gap. The proposed bipartisan legislation, sponsored by Republicans John Cornyn and Jeff Sessions along with Democrats Mark Pryor and Ken Salazar, would reduce the penalty ratio from 100-to-1 to 20-to-1 by increasing powder penalties slightly while decreasing crack sentences significantly.

The 100-to-1 penalty ratio dates from 1986, when lawmakers established mandatory minimum sentences in response to widespread fear of a crack epidemic. For years judges have railed against the heavy crack sentences as unfair, and Congress has considered amending them before. What's different this time is that the judges are doing more than complaining. Seizing on a Supreme Court decision that expanded their discretion over sentencing, judges have justified less harsh punishments for some crack offenders by trumpeting the sentencing scale's many faults. And rather than ignoring the judges or trying to silence them, Congress may actually be listening, for a change.

Federal judges have long blasted the 100-to-1 ratio for punishing street-corner crack peddlers more harshly than major powder traffickers. But the biggest judicial gripe has been that the disproportionate penalties treat African-Americans unfairly. Blacks account for 80 to 90 percent of defendants convicted of crack offenses; whites and Hispanics for more than 70 percent of powder offenders. In 1992, one federal appellate judge said that the 100-to-1 ratio "makes the war on drugs look like a 'war on minorities.' "

Yet equal protection challenges to the crack penalties failed. A string of Supreme Court opinions in the 1970s established the proposition that a law that doesn't explicitly classify people on the basis of race will only violate the constitutional right to equal protection if the government was motivated by a desire to harm a particular racial group. This is a nearly impossible standard to meet because government agencies don't go around advertising their discriminatory intentions.

Some judges noted the racial flavor of some of the legislative debate that led to the crack penalties—when the law was originally proposed, one senator inserted into the *Congressional Record* a news article reporting that "less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists." But such remarks weren't enough to establish a constitutional violation. Nor was the statistical evidence showing that the crack-cocaine sentencing scheme burdened minorities more than whites. Eventually, judicial criticism petered out.

Then last year the Supreme Court issued a blockbuster ruling on sentencing, *United States v. Booker*. In

Booker, the court found that mandatory sentencing guidelines violate a defendant's constitutional right to a jury trial (by requiring courts to assign a sentence based on facts found by judges, after the jury has issued a conviction). The federal sentencing guidelines, mandatory since they went into effect in 1987, became merely "advisory." Many trial judges saw *Booker* as authorization to renew the attack on the 100-to-1 ratio because of its impact on black defendants. One judge in Wisconsin reduced a 10-year recommended crack sentence to 18 months. Another judge pointed out that the penalty scheme "leads to, at the very least, a perception that the crack/powder disparity is racially-motivated" and knocked down a crack offender's sentence to 10 years, from 16 to 20. In the year and a half since *Booker*, about two dozen district courts have issued sentences below the ranges in the sentencing guidelines at least in part because the crack penalties were too harsh.

But three appellate courts around the country have refused to go along. They have thrown out the reduced sentences for crack offenders on the grounds that *Booker* allows courts to take into account the specifics of each case at sentencing, not to disregard a penalty because it has statistically pernicious effects. Other appellate courts may see the matter differently, and eventually, the Supreme Court may weigh in. But for the time being, the maneuvering room eagerly claimed by many district courts may be disappearing.

This is why the senators' new bill to remake the sentencing ratio is so remarkable. Some members of Congress are heeding the trial judges' call—and they're proposing to make some sentences more lenient, hardly the usual congressional course. The last time Congress made a major change in sentencing law, in 2003, Republicans attached a far-reaching provision to a bill targeting child exploitation. The legislation made it harder for judges to sentence below the ranges in the guidelines (which were then mandatory) and easier for the government to win appeals of sentencing decisions. That move generated a storm of protest, including a letter from then-Chief Justice Rehnquist opposing the changes. Congress went ahead and passed the legislation.

The proposed change to the crack-vs.-powder sentencing scale doesn't reflect a newfound lenient disposition. Recalibrating the 100-to-1 ratio is an easy call because the crack penalties have become an embarrassment. Still, it's nice to see a group of Republican and Democratic lawmakers taking a cue from the judiciary. The legitimacy of both branches is enhanced if they are seen as engaging each other rather than constantly clashing. It is rare for judges to use their opinions as a forum for editorializing about what Congress should be doing. So, when a particular policy attracts persistent judicial protest, Congress does well to listen carefully.

This is especially true when it comes to potentially discriminatory laws. Courts have a special role to play in protecting minorities when lawmakers appear indifferent to policies with uneven effects across racial lines. Judges are also insulated from the kind of frenzied politics that drove the initial adoption of the drug penalties. And they operate the machinery of the criminal justice system on a daily basis. Congress should respond, finally, to what judges are telling them about drug sentencing.

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