



Federal sentencing and prison reform now bipartisan issues

BY EJ HURST II, CONTRIBUTOR - 08/13/14 07:00 AM EDT

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Over objections from older drug warriors, the GOP's younger generation — and even some of its elders — are working with Capitol Hill Democrats to shorten federal sentences, reduce populations in overcrowded federal prisons and even to count (and reconsider) the thousands of federal crimes on the books.

Among those leading the charge is Kentucky's junior senator, Rand Paul (R), seemingly a future presidential candidate. Over the past two years, with such diverse Senate voices as Ted Cruz (R-Texas), Elizabeth Warren (D-Mass.), Jeff Flake (R-Ariz.), and Cory Booker (D-N.J.), Paul has introduced or co-sponsored legislation that would

- Reduce mandatory minimum sentences;
- Expand judges' power to sentence defendants below mandatory minimum prison terms (the so-called "safety valve");
- Equalize the punishments for crack and powder cocaine, and reduce certain low-level felony offenses to misdemeanors;
- Require a full count of federal criminal offenses; and
- Change the way criminal records are sealed or expunged, to help offenders and those arrested but never convicted find jobs.

On the House side, similar bills have been co-sponsored by the usual Democrats, like Virginia's Bobby Scott and Michigan's John Conyers. But in the 113th Congress, criminal justice reform has also enjoyed Republican sponsorships from the conservative likes of Spencer Bachus (Ala.), Frank Wolf (Va.), and Paul Ryan (Wis.).

Not all Republicans support changes to federal sentencing laws. An elder generation made their political careers in the 1980s supporting the very laws now on the changing table.

Alabama Sen. Jeff Sessions (R) served as a U.S. attorney throughout Reagan and George H.W. Bush's drug war. While he supported the Fair Sentencing Act of 2010 — a measure that reduced the suggested difference between crack and powder cocaine sentences from a 100-to-1 ratio, to 18-to-1 — Sessions staunchly opposed making that change apply to cases that began before its passage, including through presidential clemency. Iowa Sen. Charles Grassley (R) similarly opposes the Smarter

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Sentencing Act, believing that its mandatory minimum reductions "would put at risk our hard-won national drop in crime," and also "puts our national security at increased risk." On the Senate floor last month, Grassley said that "by slashing in half the mandatory minimum sentences for the local drug dealer down the block, the Smarter Sentencing Act also slashes in half the mandatory minimum sentences for members of the Taliban, al-Qaeda or Hezbollah who deal drugs to fund acts of terror."

This was once GOP orthodoxy: that long and often mandatory prison time was the path to reducing crime and protecting communities. Crime rates did go down after the 1980s' harsh sentencing reforms, although criminal justice experts suggest that longer prison terms were not the cause, but rather a coincidence that followed improved economic conditions and a natural shift to a different generation.

What these long prison terms undoubtedly did cause was an explosion of prison populations, mostly drug offenders who disproportionately came from minority communities. The United States now incarcerates more of its population than any other nation in the world, and its prisons are chronically overcrowded as a result. Even with a number of new prisons and contracts with private prison corporations, the Federal Bureau of Prisons averages around 36 percent overcrowding, with "crowding" rates still worse in its medium- and high-security facilities (the very places where extreme overcrowding puts inmates and guards alike in the most danger). Combined with exponential growth in medical care costs — made necessary by the long prison terms meted out since the 1980s — American taxpayers now spend tens of billions of dollars per year on punishment, without providing the drug treatment and job-training programming proven to reduce re-offending rates.

Against this backdrop, a group of Republican stalwarts have also formed a group called Right on Crime. With support from the likes of anti-tax campaigner Grover Norquist, former U.S. Attorneys General Edwin Meese and Dick Thornburgh, former Virginia Attorney General Ken Cuccinelli and former House Speaker Newt Gingrich (Ga.), Right on Crime points to seven states that have reduced both prison costs and incarceration rates over the past 10 years. The group urges reduced costs of incarceration by reducing both numbers and length of prison sentences. It also seeks more programs in prison that are proven to reduce re-offense, like drug treatment. And it calls for smaller criminal codes, because "Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom."

With just weeks left in this Congress's working life, the GOP will not have to resolve its criminal justice conflicts before 2015. But as the presidential primaries get to speed, the veterans of the GOP's war on crime may have to reconcile not just with Democrats, but their own next generation calling for shorter, smarter criminal justice systems.

Hurst is an attorney based in Durham, N.C. He practices in federal courts across the country, concentrating in criminal sentencing, appeals, and habeas corpus matters.

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