BARNES & THORNBURG LLP

Federal Prisoner Release: The First Step Of A More Ambitious Plan

November 23, 2015 | | Department Of Justice,The GEE Blog

The Federal Bureau of Prisons has caused quite a stir recently due to its anticipated early release of an approximately 6,000 prisoners convicted of drug possession and/or drug trafficking crimes. Much of the debate between opponents and advocates of the mass release has focused on its impact on public safety. Yet, many of its critics are completely unaware of the fact that these events were set in motion more than a year ago, when the U.S. Sentencing Commission unanimously voted to amend the federal sentencing guidelines with respect to drug offenses. What may be even more troubling to critics of the Bureau and Commission's actions is that this is likely only the first step toward a more ambitious reform – the elimination of mandatory minimum sentences. In April 2014, the independent and bipartisan U.S. Sentencing Commission (Commission) voted to lower the base offense level for many federal drug offenses (commonly referred to as the "drugs minus two" amendment). In July 2014, the commission unanimously voted to apply the reductions retroactively. The result was that thousands of inmates serving time for certain drug crimes had their sentences significantly shortened – by an average of 25 months by some estimates. For those currently serving the tail end of their sentence, this meant immediate release. Although sentencing guidelines were amended in 2014, the Commission instructed the Federal Bureau of Prisons to wait a year before releasing prisoners in order to give federal judges sufficient time to consider whether eligible offenders (of which there are approximately 46,000) were appropriate candidates for early release. As a result, much of the general public and ardent opponents to criminal justice reform are only now paying attention to the issue. The most interesting aspect of the chronology of events leading to the prisoner release is the timing of the Commission's amendments and the work of the bipartisan Over-Criminalization Task Force. The Over-Criminalization Task Force was formed by the House Judiciary Committee in May 2013 and re-authorized in February 2014, shortly before the Commission's vote in April 2014 to amend the guidelines. The purpose of the task force (led by Republican Representative Jim Sensenbrenner of Wisconsin) was to examine current federal criminal statutes and make recommendations for reform. From May 2013 until August 2014, the task force conducted its study, hearing testimony from hundreds of experts and organizations with a vested interest in criminal justice reform. On July 11, 2014, Chief Judge Patti B. Saris, Chair of the Sentencing Commission, testified before the task force on behalf of the Commission. During her testimony, Judge Saris noted the Commission's April 2014 amendment to the guidelines, but also took the opportunity to address the Commission's concern about mandatory minimum sentences. She acknowledged that the authority of the Commission was limited, and that changes to statutory mandatory minimum penalties could only be made by Congress. However, the Commission was charged with assessing whether sentencing, penal and correctional practices were fulfilling their purpose. As such, she identified three deleterious effects of mandatory minimums. First, mandatory minimum provisions tended to be applied too broadly, resulting in inconsistent and disparate applications. This result is counter to the purpose

RELATED PRACTICE AREAS

Financial and Regulatory Litigation
Government Litigation
Securities and Capital Markets
White Collar and Investigations

RELATED TOPICS

Federal Bureau of Prisons

of the sentencing guidelines. Second, mandatory minimum drug penalties were being applied to lower-level offenders, as opposed to the major drug traffickers for which mandatory minimums were intended. Lastly, mandatory minimums contributed to a significant rise in prison populations. According to the Commission's calculations, the number of offenders convicted under mandatory minimum statutes increased from 40,104 in 1995 to 111,545 in 2010 – a 178.1 percent increase. In light of the harmful impact of mandatory minimum penalties for drug offenses, the Commission recommended to the task force, and Congress, that they be reduced with respect to drug trafficking cases. The task force submitted its final report on December 16, 2014. Not surprisingly, the report took a strong position on mandatory penalties. The Task Force recommended the repeal of all federal mandatory minimums, stating "[t]hey discriminate, transfer unchecked sentencing powers to prosecutors, waste taxpayer money, and frequently require judges to impose sentences that violate commonsense." The report recommends reducing the length of mandatory penalties as an interim step towards their complete repeal, a clear kudos to the Sentencing Commission's earlier efforts to reduce the guidelines. Now, it is time to see how Congress will respond. Since the submission of the task force's report in December 2014, Congress has wrestled with a couple of criminal justice reform bills. Sensenbrenner and Representative Robert "Bobby" Scott (Democrat from Virginia) introduced the Safe, Accountable, Fair and Effective Justice Act (or SAFE Act for short) which called for the criminal sentence reductions to curb the ever increasing federal prison population. The SAFE Act was too ambitions and never saw the light of day. Representative Bob Goodlatte of Virginia and John Conyers of Michigan proposed a narrower bill, but it also did not get much traction in Congress. The current criminal justice reform bill under consideration is Republican Senator Chuck Grassley's Sentencing Reform and Corrections Act. It appears to be well on its way to getting passed. Although it is thought by some to be a weak attempt at substantial criminal reform, it does provide for a reduction in mandatory minimum sentences and creates a "safety valve" for those with longer criminal histories to have their cases reviewed. Taking into consideration the current attitude about criminal justice reform and the bipartisan nature of the movement, it is likely the bill will pass. The early release of prisoners convicted of drug offenses is the first test of the general public's resolve with respect to criminal justice reform. The uproar the releases caused may be the first litmus test, as Congress is likely to propose more significant changes in the not-to-distant future. It will be interesting to see how committed Congress will be to significant criminal justice reform if public opinion challenges the current bipartisan agenda.