

## What's the Hold Up?

*Johanna Zapp, Esq.*

*The article below is an edited Editorial piece from the New York Times. It talks about the roadblocks we are running into with Sentencing Reform. Every time I visit a client, he or she asks what the latest is with the change in the “good time” policy, etc. As you can see from the article below, there is no answer to questions like that yet. Sentencing reform has become a political hot button issue and when that happens, unfortunately, very little gets done.*

### **The Roadblock to Sentencing Reform**

*By the Editorial Board, Feb 17, 2015*

For more than a year, members of Congress have been doing a lot of talking about the need to broadly reform harsh federal sentencing laws, which are a central factor in the explosion of the federal prison population.

It's an overdue conversation, and one of the few in which Democrats and Republicans find some agreement — but, so far, they have nothing to show for it.

In the last session, senators introduced three bipartisan bills. Two proposed “front end” reforms, like reducing or eliminating ridiculously long mandatory minimum sentences for some drug crimes. The other focused on “back end” fixes, like increasing opportunities for good-time credit to allow certain prisoners early release.

None of the bills got anywhere, but it was encouraging to see all three reintroduced in the new Republican-led Senate. At least it was until they ran into a roadblock in the shape of Senator Charles Grassley, Republican of Iowa. Mr. Grassley, the chairman of the Judiciary Committee, wields great power over any sentencing legislation.

His predecessor, Senator Patrick Leahy, Democrat of Vermont, is a co-sponsor of the most far-reaching bill, which would

allow judges to ignore mandatory minimum sentences in certain circumstances.

But Mr. Grassley, for reasons that defy basic fairness and empirical data, has remained an opponent of almost any reduction of those sentences. In a speech from the Senate floor this month, he called the bills “lenient and, frankly, dangerous,” and he raised the specter of high-level drug traffickers spilling onto the streets.

Mr. Grassley is as mistaken as he is powerful. Mandatory minimums have, in fact, been used to punish many lower-level offenders who were not their intended targets.

The bill that appears to have the best chance of passing anytime soon is known as the Corrections Act — that's actually a sprawling acronym for Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System.

The bill's name is more ambitious than its goals, which include giving a narrow group of inmates the chance to participate in educational and other programs in exchange for earlier release. (The bill authorizes no financing for these programs, relying instead on, among other things, the volunteer efforts of faith-based groups.)

Rehabilitation is a laudable aim, and it should be a part of any sentencing reform package. But the bill would exclude nearly half of all federal prisoners — in many cases without any evidence that they pose a greater risk to public safety.

The bill also relies on an inmate's criminal history. This is a legitimate measure when it is used with the awareness that law enforcement disproportionately targets minorities. The danger is that white-collar prisoners, who are most often white, will receive the law's benefits, while, say, drug offenders, who are disproportionately African-American, will be left out.

Finally, the bill pushes the use of data-based risk-assessment tools, which sound smart but again — because they rely on factors like a person's employment history, neighborhood and education level — often have racially disproportionate effects.

Obviously, any meaningful reform must include both significant reductions in sentences and back-end measures that do not unfairly exclude certain groups.

Sentencing reform is a big and complicated issue, and may take some time to get right. It would be a mistake to pass an incomplete bill and pretend that the hard work of reform is done.

## Wit and wisdom

*By David Zapp, Esq.*

### **You're Not Smarter Than The Government**

Before the Federal government presses charges, it weighs all the pros and cons the same way a defendant would. They have thought of every defense a defendant has thought of. So if a narcotics defendant is overheard saying that “the cows” have to be in Miami by Thursday,” you can bet the government will check whether the defendant is in the cattle business.

### **He Said He Was Innocent!**

Lawyers should not think they can escape an “ineffective assistance of counsel” claim by claiming that the client said he was innocent. A lawyer is obligated to protect a client from himself. In *Burt vs. Titlow* 571 U.S. \_\_\_\_ (2013) Supreme Court Justice Sotomayor said:

“Regardless of whether a defendant asserts her innocence (or admits her guilt), her counsel must ‘make an independent examination of the facts, circumstances, pleadings and laws involved and then . . . offer his informed opinion as to what plea should be entered.’ A defendant possesses “‘the ultimate authority’” to determine her plea.” *Florida v. Nixon*, 543 U. S. 175, but we state that ‘a defendant’s proclamation of innocence does not relieve counsel of his normal responsibilities . . .’”

“[Our] statement about the facts of this case does not imply that an attorney performs effectively in advising his client to withdraw from a plea whenever the client asserts her innocence . . . . Had respondent made a better factual record—had she actually shown, for example, that counsel failed to educate himself about the case before recommending that she withdraw her plea—then she [the respondent] could well have prevailed [on her ineffective assistance of counsel claim.] id.

## Dead Men Tell No Tales But Inmates Do

Inmates in federal and state jails are always looking for a way to get out of jail and throwing another inmate under the bus is one of those ways. So if you conspire with a fellow inmate, don't be surprised if he turns you in. Some of you will see this as a warning, but, unfortunately, others will still see it as a challenge.

### Ex-Brooklyn Prosecutor Charles J. Hynes Accused of Misuse of Funds

Just what an 80-year old man needs, a criminal investigation against him. And what is causing him the most concern: e-mails! Corrlinks is no place for serious and incriminating conversations.

### No One is Above the Law: Prosecutors Said to Recommend Charges Against Former Gen. David Petraeus

The F.B.I. and Justice Department prosecutors have recommended bringing felony charges against retired Gen. David H. Petraeus for providing classified information to his former mistress while he was director of the C.I.A., a charge that could send the pre-eminent military officer of his generation to prison.

### Judge denies ex police chief Kerik's bid to end supervised release to battle ISIS

Bernie Kerik said he could help save the world from ISIS if he were a free man — but a federal judge on Friday wasn't buying the disgraced former NYPD chief's bizarre claim, rejecting a bid for an early end to his post-jail supervised release.

In a one-page ruling, chief Manhattan federal Judge Loretta Preska said the ex-top-cop "has demonstrated no extraordinary circumstances to warrant" getting out of his parole supervision early. Kerik had argued that travel restrictions prevented him from accepting lucrative consulting gigs and helping to stop ISIS.

But Preska sided with federal prosecutors — who said Kerik lacks credibility and "has shown an utter lack of contrition" for crimes including lying to White House officials vetting him for the job of Homeland Security chief.

*Commentary: The big, the little. Doesn't matter to the government. You gotta respect that.*

## Everything You Want to Know About OFAC and the "Clinton List" but Didn't Know Whom to Ask

By David Zapp, Esq.

OFAC stands for the Office of Foreign Assets Control. It is a U.S. agency that puts people and nations on the so-called "Clinton list," which is a sanction list made up of allegedly rogue corporations, rogue nations, rogue civic associations, and just plain rogues. Any one and anything that OFAC believes is involved in certain illicit activity is put on this list. In the case of people and corporations who engage in money laundering and/or narco-trafficking, they are placed on the so-called "Kingpin" list. The vast majority of these people are not kingpins but OFAC does not care and neither do the courts.

So what can you do? Hire a lawyer. It's the best way to deal with government agencies. And have patience, and the equanimity to tolerate what you will perceive as abuse and arrogance. I always say I would rather argue a case before the Supreme Court than deal with administrative agencies such as BOP, OFAC, and the Veterans' Administration to name a few. These agencies have a tendency to piss off the people they are dealing with, and, I suspect, even get a perverse pleasure from doing so. For example, they could easily respond to your attorney's query as to why you are on the list by enumerating the reasons. But instead they could just as easily say "we think your client is a drug dealer because he is a drug dealer." Period. That's not an exaggeration. I once received such a response, and when I see such arrogance I believe there a reason for it, something or someone made them confident that they could be that arrogant, and I suspect it is the deference the courts generally give them.

Getting on the list though does not mean you staying on the list and there is good law that allows you to get off that list. Wait a respectable six months to a year during which you disassociate yourself from people and places that got you on the list in the first place, then make a request to OFAC to be de-listed and you are on your way to be able to get off the list. As President Obama said recently referring to Cuba, "a nation that meets our conditions and renounces the use of terrorism should not face this sanction." Substitute "individual" for "nation" and "narco-trafficking" for "terrorism" and you have the same working legal principle.

OFAC's main tool to thwart you, however, is to delay the process, slow it down, knowing that so long as it does not respond to

your request to be de-listed you will continue to be on the list. And you cannot go directly to the court because there is an "exhaustion of remedies" rule that states that you must exhaust your administrative remedies before going to court. In other words you must first ask OFAC to reconsider its decision, and so long as OFAC does not answer, you cannot be said to have "exhausted" your administrative remedy. No response, no "exhaustion."

So how do you deal with that? Document all you do. Stay on top of them. Apply the pressure but do it reasonably, perhaps more than reasonably so that no one can say you are acting unreasonably. If OFAC does not respond in two weeks, give them three weeks and follow it up with a reminder letter so that by the time you get to a court you are viewed as an indisputably reasonable person.

Now if they still do not respond or they deny your request for reconsideration, go to court, sue them. That way things will start moving in earnest. It is one thing to ignore a lawyer, it is quite another to ignore a federal judge or, worse, present him with a bogus justification for keeping an individual on the list. And the lawyer who will represent OFAC, a Department of Justice lawyer, will be sensitive to that fact. OFAC personnel are not lawyers. They are cops in plain clothes. They have no interest in getting you off the list.

If the case cannot be settled among the parties, the judge will decide and as I say the law is very good for a person on the list. You see, it is not about what you were doing. It is about what you are doing that determines whether you should still be on the list.

You are like Iran. You get off the sanction list if you get rid of your "uranium." So get rid of your "uranium."

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