The Doing Time Times

Federal Defender Services
Of Wisconsin, Inc.

Fall 2007
Issue No. 9

OUT FRONT

When we launched this publication back in 2002, one of our goals was to counter the many rumors and false information about the law that naturally breed in prisons. We also want to be a reliable source of information for the many inmates "doing time" in federal custody and their families. The latest fodder for misinformation and possible exploitation are the proposed amendments to the crack sentencing guidelines.

Apparently some lawyers and non-lawyers have been promising federal inmates early release based on the proposed amendments, despite the fact that the amendments are for now just proposals. Moreover, the issue of retroactivity of these amendments has not been addressed. (Page 14). In response to solicitations and promises of early freedom based on these proposed amendments, on September 1, 2007, Families Against Mandatory Minimums (FAMM) issued a letter of caution to its members. (Available at www.famm.org). We too urge federal inmates and their families to be cautious and to evaluate the source of their information. For our part, we will continue to monitor and update this important development, as we do in this issue. In the same vein, we also report on other proposals before Congress to address the crack/cocaine sentencing disparity. (Page 14)

In this issue, we also continue the second part of our Adam Walsh Act coverage with an article on the Sex Offender Registration & Notification Act (SORNA). (Page 1). Additionally, we follow-up on our reporting on compassionate discharge, a topic on which many inmates have requested information (Page 32) and on proposed legislation to assist those coming out of prison. (Page 20). Finally, for those wanting to "Get What Lewis Libby Got," turn to page 22.

Nancy Joseph
Federal Defender Services of Wisconsin, Inc.

BOP Policies and Procedures

Legislative News

Resources for Inmates

CHANGE IN THE BUREAU OF PRISONS' POLICY FOR RESPONDING TO SENTENCING RECOMMENDATIONS

On June 4, 2007, Harley G. Lappin, Director of the Bureau of Prisons (BOP), wrote to Judge Paul G. Cassell, Chair of the Criminal Law Committee of the Judicial Conference, to notify the courts of an upcoming change in the BOP's policy for responding to judicial sentencing recommendations. In past practice, the BOP provided a written explanation to the sentencing judge whenever the BOP was unable to comply with the judge's sentencing recommendations. Beginning July 2, 2007, the BOP will only supply such an explanation to the sentencing judge upon request. The change in policy comes in response to the BOP's efforts to control costs by reducing or eliminating certain practices.

The BOP will continue to maintain statistics on the rate of compliance with judicial recommendations for placement within a specific facility, which is currently at 72 percent.

THE SEX OFFENDER REGISTRATION & NOTIFICATION ACT (SORNA)

Keith Heidmann, Summer Associate 2007

In 1990, Wesley Gray was convicted under Washington state law of one count of rape of a child. He received a 68-month suspended prison sentence after he agreed to receive treatment and to register as a sex offender wherever he lived. Gray followed the Washington registration requirements until 1999. Then he registered in California, where he lived from 1999 until 2003. However,

when he returned to Washington in December of 2003, he failed to update his registration as a sex offender in Washington. On May 25, 2007, Gray entered into a plea agreement to serve five years in federal prison for the new federal crime of failing to register as a sex offender. He is scheduled to be sentenced on September 21, 2007.[1]

In July of 2000, Michael Mihaley pleaded guilty in Washington state to raping a child. For this offense, Mihaley was sentenced to a period of imprisonment. Upon release from prison, he traveled to Nevada and registered there as a sex offender. Subsequently, Mihaley left Nevada and traveled to Colorado, where he also registered as a sex offender. However, in December of 2005, when he left Colorado and traveled to Tyler, Texas, he failed to register as a sex offender in Texas. In November of 2006, police on an unrelated investigation interviewed Mihaley, and they found that he had failed to register as a sex offender in Texas. On February 16, 2007, Mihaley pleaded guilty to the federal charge of failing to register as a sex offender, and on May 2, 2007, he was sentenced for that offense to twelve months in federal prison.[2]

These are two examples of the increasing number of federal prosecutions for violations of the Sex Offender Registration and Notification Act ("SORNA"). SORNA is contained in Title I of the Adam Walsh Child Protection and Safety Act of 2006, which took effect on July 27, 2006.[3]

Sex offender registration and notification programs in United States jurisdictions have developed rapidly since the early 1990's.[4] Presently such programs, including publicly accessible sex offender websites, exist in all of the states and the District of Columbia.[5] In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act established national standards for sex offender registration.[6]

These standards addressed such questions as which offenses require registration, how registration information should be verified and updated, how offenders should be tracked, and how the public should be notified of their whereabouts.[7] SORNA was enacted to close potential gaps under the old law and to strengthen and standardize the nationwide network of

---

[1] *Offender Sentenced for Failing to Register*, The Seattle Times, May 30, 2007, Fourth Edition, at B3.

[2] U.S Dept. of Justice Press Release, *Sex Offender Sentenced for Failing to Register in Texas*, U.S. Fed. News, May 2, 2007.

[3] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat.587 (2006). SORNA is contained in Title I of the Walsh Act. SORNA creates a new sex offender registry law at 42 U.S.C. §§ 16901-16962, repeals the current sex offender registry law at 42 U.S.C. §§ 14071-14073 as of July 27, 2009, and creates new criminal offenses and penalties for failure to register at 18 U.S.C. § 2250.

[4] Office of the Attorney General: The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30210 (May 30, 2007).

[5] *Id.* at 30210-30211

[6] 42 U.S.C. § 14071.

[7] 72 Fed. Reg. at 30211.

sex offender registration and notification programs.[8]

SORNA sets forth requirements for both individual sex offenders and governmental jurisdictions within the United States. This article focuses on the duties and obligations the law places on individual offenders.[9]

Under SORNA, What Convictions Create a Duty to Register as a Sex Offender?

Under SORNA, all individuals convicted of a "sex offense" are required to register.[10]

Criminal convictions that create a duty to register include all sex offense convictions under federal, state, tribal, local, military, territorial, or foreign law.[11] However, a foreign conviction may not create a duty to register if the conviction was not obtained with "sufficient safeguards" to ensure fairness and due process.[12]

A sex offense conviction creating a duty to register under the statute falls into one of five categories. The first category of offenses creating a duty to register is sexual acts and sexual contact offenses.[13] This category includes criminal offenses involving (a) any type or degree of genital, anal, or oral penetration, or (b) any sexual touching of or contact with another person's body, either directly or through the clothing.[14]

The second category of offenses creating a duty to register is "specified offenses against minors."[15] These offenses include offenses involving the kidnaping or false imprisonment of a minor; solicitation of a minor to engage in sexual conduct or to practice prostitution; the use of a minor in a sexual performance; video voyeurism involving a minor; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor or the use of the internet to facilitate or attempt such conduct; or any conduct that is "by its nature" a sex offense against a minor.[16]

[8] *Id.*

[9] SORNA requires jurisdictions to "substantially implement" its requirements by July 27, 2009. Jurisdictions who fail to do so may face a substantial loss of federal funding. *See* 42 U.S.C. §§16924- 16925(a); *see also* National Guidelines for Sex Offender Registration and Notification, Parts II(B), II(E), and III, 72 Fed. Reg. at 30212-30216.

[10] *See* 42 U.S.C. § 16911(1).

[11] *See* 42 U.S.C. § 16911(6).

[12] *See* 42 U.S.C. § 16911(5)(B). Convictions under the laws of Canada, Great Britain, Australia, and New Zealand always create a duty to register, as do convictions in countries that the State Department declares in its Country Reports on Human Rights Practices enforce the right to a fair trial. In other foreign convictions, the registering jurisdiction is not required to register the offender if the jurisdiction finds that the conviction "does not constitute a reliable indication of factual guilt." However, the proposed guidelines allow the registering jurisdiction to require registration in such cases. *See* National Guidelines for Sex Offender Registration and Notification, Part IV(B), 72 Fed. Reg. at 30216-17.

[13] 42 U.S.C. § 16911(5)(A)(i).

[14] Part IV(C), 72 Fed. Reg. at 30217.

[15] 42 U.S.C. § 16911(5)(A)(ii).

[16] 42 U.S.C. § 16911(7). For a more detailed explanation, see the proposed regulations,

The third category of offenses creating a duty to register is specified federal offenses.[17] These are spelled out specifically in the statute, and include most sexual offenses under federal law.[18]

The fourth category of offenses creating a duty to register is certain military offenses specified by the Secretary of Defense.[19]

The final category of offenses creating a duty to register includes any attempt to commit any of the offenses in the first four categories or participation in a conspiracy to commit any of the offenses in the first four categories.[20]

Under a SORNA exception, an offense involving consensual sexual conduct is not considered a sex offense requiring registration if either (a) the victim was an adult not under the custodial care of the offender at the time of the offense, or (b) the victim was at least thirteen years old and the offender was not more than four years older than the victim.[21] However, under the proposed regulations, a local jurisdiction may require registration in such cases.[22]

Subject to the time limitations of the registration requirement (discussed below), the statute applies to all persons who committed any sex offense under the statute, no matter when they committed those offenses.[23] The statute gives the Attorney General the authority to decide if the registration requirement applies to those convicted before SORNA was enacted.[24] On February 28, 2007, the Attorney General, citing the authority given him by the statute, published an interim rule declaring that SORNA applies retroactively to anyone who was convicted of an offense defined by the statute.[25] However, the new regulations do not outline procedures for notice to and registration of persons who were convicted before the statute took effect.[26]

SORNA's Three-Tier System for Offender Classification

Under SORNA, persons having a duty to register are classified as belonging to one of three "tiers" or classes of offender.[27] The tier that an offender is in

---

Part IV(D), 72 Fed. Reg. at 30217-30218.

[17] See 42 U.S.C. § 16911(5)(A)(iii) for specific offenses covered by this category.

[18] Part IV(C), 72 Fed. Reg. at 30217.

[19] 42 U.S.C. § 16911(5)(A)(iv).

[20] 42 U.S.C. § 16911(5)(A)(v).

[21] 42 U.S.C. § 16911(5)(C).

[22] *See* Part IV(C), 72 Fed. Reg. at 30217.

[23] 28 C.F.R. 72.3.

[24] 42 U.S.C. § 16913(d).

[25] 28 C.F.R. 72.1-72.3.

[26] For a detailed critique of the new rule from both a legal and public policy perspective, see Amy Baron Evans' memorandum to defenders, *Supplement to Adam Walsh Act- Part II* (May 7, 2007), *available at* http://www.fd.org, and NACDL comment letter to David J. Karp, *Comments on OAG Docket No. 117* (April 30, 2007), *available at* http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/Rules&Reg_attachments/$FILE/SORNA.pdf.

[27] 42 U.S.C. § 16911(2)-(4).

can have three different ramifications.[28] First, the duration of time for which registration is required depends on the tier classification of the offender.[29] Second, the frequency of required in-person appearances to verify registration information depends on the tier classification of the offender.[30] Finally, for Tier I offenders not convicted of specified offenses against minors, certain information may be exempted from public website disclosure.[31]

Tier III offenders are those persons convicted of the most serious sex offenses. To be classified as a Tier III offender, a person's offense must be punishable by imprisonment of more than one year. In addition, the offense must (a) be comparable to or more severe than aggravated sexual abuse under 18 U.S.C. § 2241, sexual abuse under 18 U.S.C. § 2242, or abusive sexual conduct against a minor under the age of thirteen under 18 U.S.C. § 2242; or (b) involve the kidnaping of a minor (unless committed by a parent or guardian); or (c) have occurred after the person became a Tier II sex offender.[32]

To be classified as a Tier II offender, a person's offense must not fit the criteria of Tier III, but must still be punishable by imprisonment of more than one year. In addition, the offense must (a) be committed against a minor and be comparable to or more severe than aggravated sex trafficking under 18 U.S.C. § 1591, coercion and enticement under 18 U.S.C. § 2422(b), transportation with intent to engage in criminal sexual activity under 18 U.S.C. § 2423(a), or abusive sexual conduct under 18 U.S.C. § 2244; or (b) involve the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or production or distribution of child pornography; or (c) have occurred after the person became a Tier I sex offender.[33]

Under SORNA, Tier I offenders are persons convicted of the least serious sex offenses. Persons whose offenses do not fit the criteria for Tier II or Tier III offenses are classified as Tier I offenders.[34]

What are the Possible Penalties for Violating SORNA's Registration Requirement?

Under SORNA, failure to register as a sex offender can result in penalties under both federal and state law.

SORNA creates a new federal offense for failure to register. The offense applies to any person who has a duty to register under SORNA whose conviction was not under state or foreign law. In addition, the offense applies if the person has any conviction creating a duty to register (including under state or foreign law) and travels across state or international boundaries.

---

[28] Part V, 72 Fed. Reg. at 30218.

[29] *See* 42 U.S.C. § 16915.

[30] *See* 42 U.S.C. § 16916.

[31] This exemption is optional for the registering jurisdiction. *See* 42 U.S.C. § 16918(c)(1).

[32] 42 U.S.C. § 16911(4).

[33] 42 U.S.C. § 16911(3).

[34] 42 U.S.C. § 16911(2). For a more detailed explanation of the tier system, see the proposed SORNA guidelines, Part V, 72 Fed. Reg. at 30218-20.

To be convicted under the statute, a person fitting one of the above criteria must knowingly fail to register or update registration as required under SORNA.[35]

Under the statute, there is an affirmative defense available if the offender can prove that (1) uncontrollable circumstances prevented him from registering, (2) the offender did not create such circumstances, and (3) the offender registered as soon as such circumstances no longer existed.[36]

The maximum penalties for failing to register under the federal law include up to ten years of imprisonment and/or a fine of up to $250,000.[37] The statute also provides for an additional punishment of between five and thirty years of imprisonment if the person who fails to register commits a federal, District of Columbia, territorial, or tribal crime of violence during the period of failed registration.[38]

The United States Sentencing Commission has issued proposed sentencing guidelines for the general failure to register offense. These guidelines are scheduled to go into effect on November 1, 2007.[39] The proposed guidelines set a base level of 16 for Tier III offenders, 14 for Tier II offenders, and 12 for tier I offenders. If, while the offender was in a failure to register status, he or she committed a sex offense against a non-minor or a felony non-sex offense against a minor, the guidelines increase the base level by six. If the offender commits a sex offense against a minor while in a failure to register status, the guidelines increase the base level by eight. The guidelines decrease the base level by three if the offender voluntarily corrected his or her failure to register or was prevented from registering by uncontrollable circumstances.[40]

In addition to the new federal offense for failure to register, SORNA requires states and other jurisdictions to provide criminal penalties for sex offenders who fail to register in that jurisdiction. These state penalties must include a maximum period of imprisonment that is greater than one year.[41] As with all SORNA jurisdictional requirements, states have until July 27, 2009 to comply with this requirement.[42]

Where are Offenders Required to Register?

Under SORNA, a sex offender must register and keep his or her registration current in each jurisdiction where the person resides, is employed, and is a student.[43] A person is considered to

[35] 18 U.S.C. § 2250(a).

[36] 18 U.S.C. § 2250(b).

[37] *See Id.* and 18 U.S.C. § 3571

[38] 18 U.S.C. § 2250(c).

[39] See Proposed Sentencing Guidelines, Part 4, Sex Offenses, 72 Fed. Reg. 28562, 28562-63 (May 21, 2007).

[40] *Id.*

[41] 42 U.S.C. § 16913(e).

[42] 42 U.S.C. § 16924(a).

[43] 42 U.S.C. § 16913(a).

reside where he or she habitually lives.[44] A person is employed wherever he or she does work, including work done while self-employed or work for which there is no compensation.[45] Finally, a person is considered a student wherever he or she is enrolled in or is attending any educational institution, including a secondary school, a trade or professional school, or any other institution of higher education.[46]

Initially, an offender must register in the jurisdiction in which he or she was convicted, if it is different from where the person resides.[47] The initial registration must occur before completing the sentence, or if the offender is not sentenced to prison, it must occur within three business days of sentencing.[48] Shortly before release from custody or immediately after sentencing, an "appropriate official" is required to inform the offender of his or her duties to register and explain these duties. The official must also require the offender to read and sign a written form stating that the duty to register has been explained and that the offender understands the registration requirement. Finally, it is the official's responsibility to ensure that the offender is properly registered.[49]

If there is any change in an offender's name, residence, employment, or student status, he or she must, within three business days of the change, report the change in person to at least one of the jurisdictions where the person resides, is employed, or attends school. At that time, the offender must report all changes of information required for the sex offender registry. The jurisdiction to which the offender reports the change(s) is responsible for providing the new information to all other jurisdictions where the offender is required to register.[50]

Periodic In-person Appearances and Duration of the Reporting Requirement

Under SORNA, all offenders required to register are also required to periodically appear in person before all jurisdictions in which they are required to register. The purpose of the periodic appearance is to verify the information contained in the registry and to allow the jurisdiction to take a current photograph.[51] How often the appearances are required depends on the tier classification of the offender. Tier I offenders are required to appear in person at least every three months, Tier II offenders are required to appear at least every six months, and Tier I offenders are required to appear at least once each year.[52]

An offender is subject to SORNA's registration, reporting, and updating requirements for an extended period of time. A Tier III offender is subject to

[44] 42 U.S.C. § 16911 (13). For a more detailed explanation, see the proposed SORNA guidelines, Part VIII, 72 Fed. Reg. at 30226-30227.

[45] 42 U.S.C. § 16911(12).

[46] 42 U.S.C. § 16911(11).

[47] 42 U.S.C. § 16913(a).

[48] 42 U.S.C. § 16913(b).

[49] 42 U.S.C. § 16917(a).

[50] 42 U.S.C. § 16913 (c).

[51] 42 U.S.C. § 16916.

[52] *Id.*

these requirements for his or her lifetime. A Tier II offender must fulfill these requirements for twenty-five years, and a Tier I offender must fulfill the requirements for fifteen years.[53] The time requirement is measured from the time of release from custody, or, if there is no incarceration, from the time the sentence is given.[54] The time requirement does not include any time the offender is in custody or civilly committed.[55]

The duration of time for which a Tier III offender is required to register because of being adjudicated delinquent or the duration of time for which a Tier I offender must register can be reduced if the offender maintains a "clean record" for a period or time.[56] A reduction of duration is not available to Tier III offenders who were not initially required to register on the basis of a juvenile delinquency adjudication, nor is it available to Tier II offenders.[57] To qualify for a "clean record" reduction, an offender cannot be convicted of any sex offense or any offense for which more than one year of imprisonment can be imposed. In addition, the person must have successfully completed any periods of supervised release, parole, and probation, as well as any appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.[58]

To qualify for a "clean record" time reduction, a Tier III offender adjudicated delinquent must maintain a "clean record" for twenty-five years, and a Tier I offender must maintain a "clean record" for ten years.[59] For a Tier I offender, the "clean record" reduces the duration of the reporting requirement by five years, and for a Tier III offender judged delinquent, the "clean record" reduction shortens the duration of the reporting requirement to twenty-five years, the time period the "clean record" was maintained.[60]

What Information does SORNA Require be Included in the Jurisdiction Offender Registry?

SORNA requires jurisdictions to maintain a registry of offender information and specifies what information is required to be in the jurisdiction's offender registry. The offender must provide some of the information at registration, and the jurisdiction is responsible for ensuring that the rest of the required information is contained in the registry.[61] The offender must provide the following information: (1) his or her full name, including any aliases used; (2) his or her social security number; (3) the address of each residence where he or she resides or will reside; (4) the name and address of any place the offender is employed or will be employed; (5) the

[53] 42 U.S.C. § 16915(a).

[54] Proposed SORNA guidelines, Part XII, 72 Fed. Reg. at 30232.

[55] 42 U.S.C. § 16915(a).

[56] 42 U.S.C. § 16915(b).

[57] *See* Proposed SORNA guidelines, Part XII, 72 Fed. Reg. at 30232.

[58] 42 U.S.C. § 16915(b)(1).

[59] 42 U.S.C. § 16915(b)(2).

[60] 42 U.S.C. § 16915(b)(3).

[61] *See* 42 U.S.C. § 16914.

name and address of any place where the offender is a student or will be a student; and (6) the license plate number and description of any vehicle owned or operated by the offender. In addition, the statute gives the Attorney General discretion to require any other information from the offender.[62]

The jurisdiction registering the offender is responsible for ensuring that the following information is also included in the offender registry: (1) a physical description of the offender; (2) the text of the law defining the criminal offense for which the offender is registered; (3) a complete criminal history of the offender; (4) a current photograph of the offender; (5) a set of the offender's fingerprints and palm prints; (6) the offender's DNA sample; and (7) a copy of the offender's driver's license or jurisdiction identification card. Once again, the statute gives the Attorney General discretion to require the jurisdiction to include any other information about the offender.[63]

What is done with the offender registry information?

SORNA establishes a community notification program whereby immediately after an offender registers or updates a registration, registry information is shared with a number of entities.[64] As noted above, the registration jurisdiction must share the information with each jurisdiction where the offender resides, is an employee, or is a student. In addition, the information is sent to each jurisdiction from or to which a change of residence, employment, or student status occurs.[65]

However, the SORNA notification and information sharing requirements are much broader than that. Registry information must be sent to the Attorney General for inclusion in the National Sex Offender Registry.[66] In addition, the information must be shared with all schools, public housing agencies, and appropriate law enforcement agencies in the jurisdiction where the offender resides, is an employee, or is a student.[67] Finally, the information must be shared with agencies conducting employment background checks under 42 U.S.C. § 5119(a), child welfare social service agencies, volunteer organizations in which contact with minors might occur, or any other organization, company, or individual requesting the information.[68] Volunteer organizations and organizations or individuals requesting such information may opt to receive updates no less frequently than once every five business days.[69]

In addition to the community notification program, SORNA requires each jurisdiction to make certain registry information available to the

[62] 42 U.S.C. § 16914(a).

[63] 42 U.S.C. § 16914(b).

[64] 42 U.S.C. § 16921.

[65] 42 U.S.C. § 16921(b)(3).

[66] 42 U.S.C. § 16921(b)(1).

[67] 42 U.S.C. § 16921(b)(2).

[68] 42 U.S.C. § 16921(b)(4)-(7).

[69] 42 U.S.C. § 16921(c). For a more detailed explanation of these requirements, see the proposed SORNA guidelines, Part VII (B), 72 Fed. Reg. at 30225-26.

public on an internet website.[70] SORNA also requires the establishment of a National Sex Offender Public Website coordinated with the websites of the jurisdictions.[71]

The publicly accessible jurisdiction website must include all of the information in the registry, except for certain mandatory and optional exemptions.[72] Mandatory exemptions, which include victim identity, the offender's social security number, and any arrests of the offender that did not result in a conviction, cannot be disclosed on public websites.[73] In addition, the Attorney General has used the discretion given him under the statute to add a fourth mandatory exemption, travel and immigration document numbers.[74]

In addition to the mandatory exemptions, jurisdictions may optionally exempt other information from website disclosure. Optional exemptions include the name of the offender's employer, the name of the educational institution where the offender is a student, and any information about a Tier I sex offender convicted of an offense other than a specified offense against a minor.[75] In addition, the Attorney General has apparently used the discretion given him under the statute to allow jurisdictions to exempt the offender's remote communication routing addresses (such as email addresses) and information primarily of interest to law enforcement, such as fingerprints, palm prints, and DNA information.[76]

The guidelines make clear that there are certain core items that must be included in public sex offender websites, including the name and aliases of the offender, the addresses of the residences where the offender resides or will reside, the addresses of any place where the offender is employed or will be employed, the addresses of any place where the offender is a student or will be a student, the license plate number and a description of the vehicle owned or operated by the offender, a physical description and current photograph of the offender, and a listing of the sex offense for which the offender is registered and any other sex offense for which the offender has been convicted.[77]

Conclusion

The Sex Offender Registration and Notification Act creates extensive duties for persons convicted of sex offenses. These duties include registering with the appropriate jurisdictions, updating registration when there are any changes, and appearing periodically in person to confirm registration information.

---

[70] 42 U.S.C. § 16918(a).

[71] 42 U.S.C. § 16920.

[72] 42 U.S.C. § 16918.

[73] 42 U.S.C. § 16918(b).

[74] 42 U.S.C. § 16918(b)(4); 72 Fed. Reg. at 30223-24.

[75] 42 U.S.C. § 16918(c).

[76] 42 U.S.C. § 16918(c)(4); *see* 72 Fed. Reg. at 30224-25. The guidelines recommend that jurisdictions provide public access to remote communication address information in the form of a function that allows checking whether specified addresses are included in the registries as the addresses of sex offenders.

[77] 72 Fed. Reg. at 30224.

Registration information is shared with other agencies, and much of it must be made available to the public through publicly accessible offender websites.

Although jurisdictions have until July 27, 2009, to implement SORNA, the federal government is already enforcing SORNA's new federal "failure to register" statute. In his April 17, 2007 testimony to the Senate Judiciary Committee, Attorney General Gonzales stated that nationally, 84 arrest warrants have been issued and 66 fugitives have been apprehended for violating the law.[78] Indictments have been issued nationwide, and as outlined above, sentences (which can range up to ten years' imprisonment) are now being imposed for violation of the law. Thus, it is important for offenders to take seriously SORNA's requirements to register and to update their registration when they move to another jurisdiction or when their registry information changes.

Further Information: Internet Resources

The National Guidelines for Sex Offender Registration and Notification
U.S. Department of Justice
http://www.ojp.usdoj.gov/smart/pdfs/proposed_sornaguidelines.pdf

Fact Sheet:
THE PROPOSED GUIDELINES FOR THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA)
U.S. Department of Justice
http://www.ojp.usdoj.gov/smart/pdfs/sorna_factsheet.pdf

Frequently Asked Questions:
THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) PROPOSED GUIDELINES
U.S. Department of Justice
http://www.ojp.usdoj.gov/smart/pdfs/sorna_faqs.pdf

MEMORANDUM TO DEFENDERS REGARDING ADAM WALSH ACT-PART II (SORNA)
Amy Barron-Evans, Sara F. Noonan, Office of Defender Services
http://www.fd.org/pdf_lib/adam%20walsh%20part%20ii.pdf Memorandum to Defenders Regarding Supplement to Adam Walsh Act-Part II (SORNA)
Amy Barron-Evans, Office of Defender Services
http://www.fd.org/pdf_lib/Adam%20Walsh%20II%20Supplement.pdf

[78] Alberto J. Gonzales, Statement Before the Senate Judiciary Committee Concerning Oversight of the Department of Justice (April 17, 2007), p. 10, *available at* http://www.usdoj.gov/ag/testimony.html

Figure 1: Summary of Offense Convictions Creating a Duty to Register under SORNA

CATEGORY	OFFENSES	HOW DEFINED
First	Sexual acts and sexual contact offenses	Any type or degree of genital, anal, or oral penetration, or any sexual touching of or contact with another person's body, either directly or through the clothing
Second	Specified offenses against minors	Offenses involving the kidnaping or false imprisonment of a minor; solicitation of a minor to engage in sexual conduct or to practice prostitution; the use of a minor in a sexual performance; video voyeurism involving a minor; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor or the use of the internet to facilitate or attempt such conduct; or any conduct that is "by its nature" a sex offense against a minor
Third	Specified federal offenses	Specified in 42 U.S.C. § 16911(5)(A)(iii)
Fourth	Military offenses	Specified by the Secretary of Defense
Fifth	Attempts or conspiracies	Any attempt to commit or participation in a conspiracy to commit any of the offenses in the first four categories

Figure 2: Summary of Offender Tiers and their Implications under SORNA

TIER	HOW DEFINED	DURATION OF REGISTRATION	MINIMUM FREQUENCY OF APPEARANCES	EXEMPTION OF INFORMATION FROM PUBLIC DISCLOSURE?
III	Offense punishable by imprisonment of more than one year and (a) is comparable to or more severe than aggravated sexual abuse under 18 U.S.C. § 2241, sexual abuse under 18 U.S.C. § 2242, or abusive sexual conduct against a minor under the age of thirteen under 18 U.S.C. § 2242; or (b) involves the kidnaping of a minor (unless committed by a parent or guardian); or (c) occurred after the person became a Tier II sex offender	Lifetime	Every three months	No
II	A non Tier III offense punishable by imprisonment of more than one year that (a) is committed against a minor and comparable to or more severe than aggravated sex trafficking under 18 U.S.C. § 1591, coercion and enticement under 18 U.S.C. § 2422(b), transportation with intent to engage in criminal sexual activity under 18 U.S.C. § 2423(a), or abusive sexual conduct under 18 U.S.C. § 2244; or (b) involves the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or production or distribution of child pornography; or (c) occurred after the person became a Tier I sex offender	25 years	Every six months	No
I	Sex offense under SORNA that does not fit criteria for Tier III or Tier II	15 years	Every year	Optional for the jurisdiction for offenses other than a specified offense against a minor

UPDATE ON CRACK/POWDER COCAINE SENTENCE DISPARITY LEGISLATION

Keith Heidmann, Summer Associate 2007

As noted in the last issue of this newsletter, on May 1, 2007, the United States Sentencing Commission submitted proposed amendments to the crack cocaine sentencing guidelines. In the last issue we had opined that the proposed guidelines if passed would not apply retroactively or would not apply to those already sentenced. To be clear, the issue of retroactivity has not yet been decided by the Commission. Last month the Commission called for public comment, to be submitted by October 1, 2007, on whether the new proposals should be applied retroactively. [79]

Under the proposed new guidelines, guideline sentencing ranges for offenders with a criminal history category I will include the statutory mandatory minimums, but will not have a low end above the mandatory minimum, as they had in the past. The result is that the new guidelines will include but extend below the mandatory minimums.[80] If Congress makes no changes by November 1, 2007, the new guidelines will result generally in a two level reduction in the guideline offense level for most crack cocaine offenses.[81]

The Commission has made it clear that the new guidelines, along with its exhaustive new report to Congress on cocaine sentencing, are part of a challenge to Congress to pass legislation to fix the unjustifiable and discriminatory 100 to 1 disparity between crack and powder cocaine sentencing.[82] The 100 to 1 disparity mandates the same minimum sentence for an offender possessing, for example,

---

[79] See also "A Judicial Pitch For Making Crack Reductions Retroactive," Douglas Berman, July 26, 2007 blog entry, at www.sentencingtypepad.com, discussing Judge Lynn Adelman's (Eastern District of Wisconsin) letter to the Commission recommending retroactive application of the new guidelines; August 22, 2007 American Bar Association letter to the U.S. Sentencing Commission supporting retroactivity available at www.abanet.org.

[80] *United States Sentencing Commission Sentencing Guidelines for United States Courts Part II, Subpart 9, Cocaine Base Sentencing,* 72 Fed. Reg. 28558, 28573 (May 21, 2007).

[81] Federal Defender Services of Wisconsin, Inc., *U.S. Sentencing Commission Proposes Changes to Crack Guidelines*, The Doing Time Times, Issue 8 (Summer 2007) at 14.

[82] *Id.* at 28572-73. The commentary included with the proposed changes could not be clearer: the Commission views these changes as part of a complete package needed to fix the crack/powder disparity. The Commission views congressional action as another essential part of that package. The massive and well-researched Sentencing Commission Report to Congress also strongly urges congressional action. It suggests reducing the crack/powder disparity to at least 20 to 1 and eliminating mandatory minimums for simple possession of crack. *See* United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007), pp. 6-9, *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf.

five grams of crack and another offender possessing 500 grams of powder, despite the fact that both offenders possess what is chemically the same substance: cocaine.
This article reviews current legislation in Congress proposed to help decrease the crack/powder sentencing disparity. Although it is yet to be determined, any proposed changes would probably not apply retroactively to offenders who have already been convicted. Instead, it is likely that any changes would apply only to offenders who are convicted after the changes become law.

S. 1685: Fairness in Drug Sentencing Act of 2007

Senate Bill 1685, the Fairness in Drug Sentencing Act of 2007, was introduced in the Senate on June 25, 2007. It was introduced on the Senate floor by Republican Senator Orrin Hatch of Utah, and currently has three additional cosponsors: Republican Arlen Specter, and Democrats Edward Kennedy and Dianne Feinstein.[83]

The bill would reduce the crack/powder disparity from 100 to 1 to 20 to 1 by increasing five-fold the amount of crack needed to trigger a mandatory minimum sentence. The amount of crack needed to trigger a ten-year minimum would increase from 50 to 250 grams, and the amount of crack needed to trigger a five-year minimum would increase from five to 25 grams.[84] The bill would also lower penalties for crack offense charges not subject to the mandatory minimum, aligning those penalties with the penalties for offenses involving other controlled substances.[85] Finally, the bill would direct the Sentencing Commission to increase the emphasis the guidelines place on aggravating factors such as an accompanying threat of violence or use of a gun, and other enumerated mitigating and aggravating factors.[86]

As of July 19, 2007, no action had been taken on the bill. After the bill was read, it was referred to the Senate Committee on the Judiciary. It is currently in committee, and no further action is scheduled.[87] However, with the push from the Sentencing Commission (which suggested the 20 to 1 disparity contained in the bill as a maximum ratio) and the bipartisan backing of four influential Senators, it may at some time see the light of day on the Senate floor.

If the bill does pass the Senate, it would still face an uncertain fate in the House, and even if the bill passes both houses of Congress, it will face an uphill battle

[83] Cong. Rec. S8356 (daily ed., June 25, 2007). Mr. Specter's introductory remarks are at 8358-59.

[84] *See* Fairness in Drug Sentencing Act of 2007, S. 1685, 110th Cong. § 2 (2007).

[85] *See Id.* § 3.

[86] *Id.* §§ 4-5.

[87] The Library of Congress Thomas database provides complete updated official information on proposed bills and resolutions. See http://thomas.loc.gov. In the "search bill text" box, enter the bill number (in this case, S 1685).

to become law. The Bush administration has generally opposed changes in crack sentencing laws, maintaining that any such changes should be part of a comprehensive look at sentencing issues.[88] Thus, any such bill passed by Congress may be subject to a presidential veto.[89] Still, Senator Hatch's bill is probably the best hope for legislative action this session on the crack/powder sentencing disparity.

S. 1711: Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007

Senate Bill 1711, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, was introduced in the Senate on June 27, 2007. It was introduced on the Senate floor by Democratic Senator Joseph Biden of Delaware,[90] and currently has two additional cosponsors: Democrats John Kerry and Russ Feingold.[91]

The bill would completely eliminate the crack/powder sentencing disparity by increasing the crack threshold for a five-year minimum sentence to 500 grams from five grams, and by increasing the crack threshold for a ten-year minimum sentence to 5000 grams from 50 grams.[92] It also would eliminate the five-year mandatory minimum sentence for simple possession of crack.[93] In addition, the bill would increase penalties for major drug traffickers, would provide additional resources for federal agencies that investigate and prosecute drug offenses, and would provide funds for prison-based drug treatment programs.[94] Finally, as with Senator Specter's bill, this bill would direct the Sentencing Commission to make changes that increase the emphasis placed on various aggravating and mitigating factors in the sentencing process.[95]

As of July 19, 2007, no action had been taken on the bill. After the bill was read, it was referred to the Senate Committee on the Judiciary. It is currently in committee, and no further action is scheduled.[96] This bill faces an uncertain future. First, the bill reduces the crack/powder sentencing disparity more than the minimum amount suggested by the Sentencing Commission, a reduction which may be politically unpalatable to the President

---

[88] Mark Sherman, *Court to Review Cocaine Sentencing Case*, L.A. Times, June 11, 2007.

[89] Although before his first inauguration, Mr. Bush was quoted as saying that the crack/powder disparity "ought to be addressed by making sure the powder cocaine and crack cocaine penalties are the same. I don't believe we ought to be discriminatory." Mr. Bush may be willing to work with the newly elected Democratic Congress on this issue. *See* Kevin Sabet, *A Third Way on Drug Laws*, The Washington Post, December 4, 2006, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/01/AR2006120101324.html.

[90] Cong. Rec. S8610 (daily ed., June 27, 2007). Mr. Biden's introductory statement is at S8614-15.

[91] Cong. Rec. S8693 (daily ed., June 28, 2007) and Cong. Rec. S8945 (daily ed., July 10, 2007).

[92] Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007, S. 1711, 110th Cong. § 3 (2007).

[93] *Id.* § 4.

[94] *Id.* §§ 6, 7, 9.

[95] *Id.* § 5.

[96] *See* http://thomas.loc.gov

and many in Congress. Second, unlike Senator Specter's bill, this bill has only Democratic sponsorship.

S. 1383: Drug Sentencing Reform Act of 2007

Senate Bill 1383, the Drug Sentencing Reform Act of 2007, was introduced in the Senate on May 14, 2007 by Republican Senator Jeff Sessions of Alabama, and currently has three additional cosponsors: Democrats Ken Salazar and Russ Mark Pryor, and Republican John Cornyn.[97]

The bill would reduce the crack/powder sentencing disparity to 20 to 1 by increasing the crack threshold for a five-year minimum sentence to twenty grams from five grams, and decreasing the powder threshold to 400 grams from 500 grams. Similarly, it would increase the crack threshold for a ten-year minimum sentence to 200 grams from 50 grams, and decrease the powder threshold to four kilograms from five kilograms.[98] Thus, the bill reduces the disparity by both raising the threshold amounts for crack cocaine and lowering the threshold amounts for powder cocaine. In addition, the bill would increase penalties for those involved in leadership roles in drug offenses, would limit sentences of those with lesser roles in drug offenses, and would create a pilot program for the home detention of nonviolent prisoners over age 65.[99]

As of July 19, 2007, no action had been taken on the bill. After the bill was read, it was referred to the Senate Committee on the Judiciary. As with the other bills, it is currently in committee, and no further action is scheduled.[100]

By decreasing the sentencing disparity partially by lowering the threshold amounts of powder required to trigger the mandatory minimums, this bill is at odds with the Sentencing Commission recommendations. The Sentencing Commission report concludes that crack sentencing is too harsh. Nowhere in the report (or elsewhere in the research) is there any data supporting the notion that powder sentences are too lenient. As the organization Families Against Mandatory Minimums asserts, this bill only gets it "half right."[101]

H.R. 460: Crack-Cocaine Equitable Sentencing Act of 2007

In addition to the three Senate bills discussed above, two bills addressing the crack/powder sentencing disparity have also been introduced in the House of Representatives. Democratic Representative Charlie Rangel of New York introduced House Bill 460, the

[97] *See* Cong. Rec. S6054 (daily ed., May 14, 2007) and Cong. Rec. S8945 (daily ed., July 10, 2007).

[98] Drug Sentencing Reform Act of 2007, S. 1383, 110th Cong. Title I § 101 (2007).

[99] Id. Title I §§ 201-203..

[100] *See* http://thomas.loc.gov

[101] Families Against Mandatory Minimums, *Senator Sessions' Crack Bill Gets It Half Right*, *available at* http://www.famm.org/ExploreSentencing/FederalSentencing/BillsinCongress/S1383TheDrugSentencingReformActof2007.aspx.

Crack-Cocaine Equitable Sentencing Act of 2007, in the House on January 12, 2007.[102] The bill currently has twelve Democratic cosponsors.[103] The bill would completely eliminate all crack/powder penalty disparities by making all crack penalties the same as current penalties for other forms of cocaine.[104]

As of July 19, 2007, no action had been taken on the bill. After the bill was read, it was referred to the House Judiciary and Energy and Commerce Committees. On February 2, 2007, the bill was referred out of each committee to a subcommittee. Since that time, the bill has been languishing in the Subcommittee on Health and the Subcommittee on Crime, Terrorism, and Homeland Security, and no further action is scheduled.[105]

In light of the data presented by the Sentencing Commission, this bill makes sense. However, the bill's complete elimination of sentencing differences between crack and powder cocaine offenses may be too much for the political mainstream. Old myths die hard, especially in politics. It is likely that this bill will never emerge in its present form from a House subcommittee, at least in the present Congress.

H.R. 79: Powder-Crack Cocaine Equalization Act of 2007

Finally, a survey of crack/powder legislation would not be complete without mentioning Republican Representative Roscoe Bartlett's Powder-Crack Cocaine Equalization Act of 2007, introduced on January 4, 2007.[106] The bill, which has no cosponsors, would eliminate the crack/powder penalty disparities by raising the penalties for powder offenses to make them equal to the current penalties for crack offenses.[107] This is, of course, completely at odds with the Sentencing Commission Report data and recommendations, and this bill will almost certainly (thankfully) never be brought up for a vote on the House floor.

[102] Cong. Rec. H514 (daily ed., January 12, 2007).
[103] http://thomas.loc.gov
[104] Crack-Cocaine Equitable Sentencing Act of 2007, HR. 460, 110th Cong. §§ 2-4 (2007).
[105] *See* http://thomas.loc.gov

[106] Cong. Rec. H113 (daily ed., January 4, 2007).
[107] Powder-Crack Cocaine Equalization Act of 2007, HR. 79, 110th Cong. §§ 2-4 (2007).

Figure 1:Summary of Current Bills in Congress Addressing the Crack/Powder Sentencing Disparity (as of July 19, 2007)

NAME	Num.	HOUSE	DISPARITY ADDRESSED BY	NOW IN	FUTURE ACTION
Fairness in Drug Sentencing Act of 2007	S. 1685	Senate	1. Fivefold increase in amount of crack required to trigger mandatory minimums 2. Align other crack offense penalties with other controlled substance penalties	Judiciary Committee	None scheduled
Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007	S. 1711	Senate	1. Increase amount of crack required to trigger mandatory minimums to current powder amount 2. Eliminate mandatory minimum for simple possession of crack	Judiciary Committee	None scheduled
Drug Sentencing Reform Act of 2007	S. 1383	Senate	Fourfold increase in amount of crack required to trigger mandatory minimums and 20% reduction in amount of powder required to trigger mandatory minimums	Judiciary Committee	None scheduled
Crack-Cocaine Equitable Sentencing Act of 2007	H.R. 460	House	Decrease all crack offense penalties to make them the same as current powder offense penalties	1. Judiciary Subcommittee on Crime, Terrorism, and Homeland Security 2. Energy and Commerce Subcommittee on Health	None scheduled
Powder-Crack Cocaine Equalization Act of 2007	H.R. 79	House	Increase powder offense penalties to make them the same as current crack offense penalties	1. Judiciary Subcommittee on Crime, Terrorism, and Homeland Security 2. Energy and Commerce Subcommittee on Health	None scheduled

A "SECOND CHANCE" FOR RELEASED PRISONERS: CURRENT PROPOSALS IN CONGRESS

Keith Heidmann, Summer Associate 2007

More than two million people in the United States are currently in prison, and 95% of those men and women will eventually return to the community. Each year, more than 650,000 offenders are released from state and federal prisons.

Unfortunately, few of those released are prepared for their release. Most corrections departments do not offer transitional programs, and one-third provide no services at all to released offenders. Released offenders often face serious problems finding jobs, housing, and medical care; many are addicted to drugs or alcohol. The stigma of a criminal record adds another barrier to the ability of an offender to move on with his or her life. As a result, two out of three released offenders are re-arrested for new crimes within three years of their release.[108] In response to these concerns, the 110th Congress is considering two different bills: the Second Chance Act of 2007, and the Second Chance for Ex-Offenders Act of 2007.

Money for Transition Programs: The Second Chance Act of 2007

The Second Chance Act aims to reduce recidivism among offenders who leave prison. The act authorizes spending $200 million annually on services to prisoners returning to the community. The money would primarily be in the form of grants to state and local agencies to develop and strengthen various programs designed to help offenders reintegrate into the community. Such programs would provide ex-prisoners with education, housing, and employment assistance; medical care assistance; and mental health services such as addiction treatment and family counseling. In addition, the bill would provide money for research on what can effectively reduce rates of recidivism. Finally, the bill directs the Bureau of Prisons to establish a prisoner reentry program and a pilot project for the release of nonviolent offenders over the age of sixty.[109]

In the House of Representatives, the bill was introduced by Danny Davis, and currently has 92 bipartisan cosponsors. It was reported out of the Judiciary Committee on March 28, 2007, and was scheduled for a vote on the House floor on May 15, 2007.[110] Unfortunately, the bill was pulled just before the vote, because Democratic leaders were concerned that there were not enough votes to ensure passage.[111] The sponsors

---

[108] *See* Congressman Dannny Davis, *Statement Introducing the Second Chance Act of 2007*, Cong. Rec. H5691 (daily ed., May 23, 2007).

[109] Second Chance Act of 2007, H.R. 1593 and S. 1060, 110th Cong. (2007).

[110] http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01593:@@@X.

[111] The bill was scheduled on the so-called "suspension calendar," which allows quick passage without amendment of legislation that has broad support. However, suspension calendar items require a 2/3 vote, or 290 yes votes, to pass the House, and last minute politicking put in doubt the ability of the bill to garner that many votes on the floor. See Housing Works, *Tough Luck for Second Chance*, May 25, 2007,

are working to bring the bill to a vote sometime in the near future.[112]
The Senate version of the bill was introduced by Joseph Biden, and currently has 30 bipartisan cosponsors. After its introduction, the bill was referred to the Judiciary Committee.[113] The bill was favorably reported out of Committee on August 2, 2007, and will be considered soon by the full Senate.[114] If the House version passes, the Senate is expected to pass the bill easily.[115] If Congress passes the bill, President Bush has indicated that he would sign it.[116]

Removing the Stigma: Second Chance for Ex-Offenders Act of 2007

Although it is also aimed at reducing recidivism and has a similar name, Rep. Charles Rangel's House bill is far more narrowly focused than the Second Chance Act. The Second Chance for Ex-Offenders Act of 2007, which currently has 14 cosponsors, would allow an offender to file a petition to clear his or her criminal conviction record after his or her release from prison.[117] Record expungement (eliminating public records of the crime committed) could make it easier for offenders to find jobs after being released to the community, because it would allow offenders to apply for jobs without disclosing their criminal record, which is often an excuse for employers to deny employment to ex-prisoners.[118]

Under the bill, nonviolent offenders convicted only of the offense to be expunged may petition the court to have their records cleared. To be eligible for expungement, the offender must also have (1) fulfilled all court requirements, (2) remained free from alcohol or drug abuse or dependency for at least a year, (3) been rehabilitated to the satisfaction of the court, (4) obtained a high school diploma or its equivalent, and (5) completed at least one year of community service. Under the bill, if a person is later convicted of a crime, the expungement would be reversed, and the offender's complete criminal record would once again be accessible to the public.[119]

On January 22, 2007, the bill was referred to the House Judiciary Committee, and on March 1, 2007, it was referred to the Subcommittee on Crime, Terrorism, and Homeland Security. No action is currently scheduled on the bill.[120] Its chances of becoming law are far smaller than the chances for the

---

available at http://www.hwupdate.org/update/2007/05/tough_luck_for_second_chance.html.

[112] Families Against Mandatory Minimums, *Second Chance Act Suddenly Stalls in Congress*, May 18, 2007, *available at* http://www.famm.org/ExploreSentencing/FederalSentencing/BillsinCongress/TheSecondChanceAct.aspx

[113] http://thomas.loc.gov

[114] See *Id.*

[115] *See* Housing Works, *supra* note 4.

[116] Dannny Davis, *Statement Introducing the Second Chance Act of 2007*, Cong. Rec. H5691 (daily ed., May 23, 2007).

[117] Second Chance for Ex-Offenders Act of 2007, H.R. 623, 110th Cong. (2007).

[118] Charles Benninghoff, *Why Charlie Rangel Wrangles Sponsors for HR 623-Doin' What's Right in Washington*, American Chronicle, June 27, 2007, *available at* http://www.americanchronicle.com/articles/viewArticle.asp?articleID=30487.

[119] Second Chance for Ex-Offenders Act of 2007, H.R. 623, 110th Cong. (2007) § 2(a).

[120] http://thomas.loc.gov

Second Chance Act. It has far fewer cosponsors (14 versus 92), and unlike the Second Chance Act, the cosponsors are exclusively liberal Democrats.[121] Despite that, the bill continues to gain support, and Congressman Rangel and others continue to work passionately for its passage.[122]

PRESIDENTIAL CLEMENCY: HOW CAN I GET WHAT LEWIS LIBBY GOT?

Keith Heidmann, Summer Associate 2007

On July 2, 2007, President George W. Bush commuted the 30-month federal prison sentence of I. Lewis Libby Jr., a former top aid to Vice President Dick Cheney. Libby had been convicted in March of 2007 of obstructing justice and lying both to a grand jury and to FBI agents who were investigating the disclosure of the identity of a CIA operative. In June of 2007, Libby was sentenced to 30 months in prison, a $250,000 fine, and two years of supervised release. The President announced his decision to commute the prison sentence (but not the fine or supervised release) within hours of a federal appeals court's denial of Libby's request to remain free pending appeal of his sentence. Because of the President's action, Libby will never have to report to federal prison.[123]

Under the Constitution, the President has almost unlimited power to grant clemency to persons convicted of federal crimes.[124] Presidents can pardon offenders (officially forgive and restore lost rights) and/or commute (reduce or eliminate) sentences. However, this broad power of executive clemency applies only to violations of federal laws, not to violations of state laws or convictions in state court.

For state law violations, requirements and procedures for granting clemency vary considerably from state to state. In Wisconsin, for example, the constitutional power to grant clemency belongs exclusively to the governor, who can exercise it essentially in any manner he sees fit.[125] As a practical matter, however, Wisconsin governors generally follow a procedure in granting executive clemency whereby clemency applications are funneled through the Pardon Advisory Board. This Board is governed by rules promulgated by the Governor's office, and makes recommendation on clemency applications.[126]

---

[121] *Id.*

[122] *See* Charles Benninghoff, *Congressman Bob Filner Gives Rangel's Second Chance Act Big Boost*, American Chronicle, July 18, 2007, *available at* http://www.americanchronicle.com/articles/viewArticle.asp?articleID=32518.

[123] Scott Shane and Neil Lewis, *Bush Commutes Libby Sentence, Saying 30 Months 'Is Excessive,'* N.Y. Times, July 3, 2007, at A1, *available at* http://www.nytimes.com/2007/07/03/washington/03libby.html?ex=1341115200&en=44a2fa970498d6f2&ei=5088&partner=rssnyt&emc=rss.

[124] *See* U.S. Const. art. IV, § 2.

[125] *See* Wis. Const. art. 5, § 2.

[126] Donald Bach, *To Forgive, Divine*: *The Governor's Pardoning Power, Wisconsin*

Wisconsin governors use their clemency power sparingly. Between 1979 and 2004, they granted a total of 604 pardons and 46 sentence commutations. Of the 46 commutations, 35 were granted by Tony Earl (governor from 1983-87), and none were granted by the last two governors, Jim Doyle and Scott McCallum.[127] The remainder of this article focuses only on the presidential power to grant clemency for federal offenses, not on state clemency procedures.

Two Major Types of Presidential Clemency

Almost all presidential grants of clemency fit into one of two classes: pardons or commutations. A presidential pardon is an official statement of forgiveness for the commission of a federal crime. Although it restores basic civil rights lost as the result of a conviction, a pardon does not connote innocence. A pardon often is granted after a sentence has been completely served.[128] For example, in March, 2005, President Bush pardoned Raul Marin, who in 1982 had served a six-month sentence for failing to appear in court. Marin had sought a pardon because even though he had already served his sentence, he wanted society to forgive him.[129]

In contrast to a pardon, a commutation cancels all or some portion of a court-ordered punishment. It does not connote any official forgiveness; it simply reduces or eliminates any term of incarceration or amount of fine the offender must serve or pay. The amount of reduction is determined by the President.[130] In Mr. Libby's case, President Bush granted Libby a commutation, canceling Libby's 30-month prison term while allowing the court's order of a $250,000 fine and two years of supervised release to remain unchanged. Libby was not officially forgiven; his sentence was simply reduced.[131]

Lawyer, vol.78 no. 2 (Feb. 2005), available at http://www.wisbar.org/AM/Template.cfm?Section=Current_Issue1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=39460. This article contains a detailed review of Wisconsin executive clemency practice.

[127] *See Id.*

[128] *See* Roger Adams, Pardon Attorney, Department of Justice, *Statement Before the Committee on the Judiciary United States House of Representatives Concerning The Use and Misuse of Presidential Clemency Power for Executive Branch Officials* (July 11, 2007), p.2, *available at* http://judiciary.house.gov/media/pdfs/Adams070711.pdf.

[129] Judy Keen, *Bush Grants Pardons Less than Predecessors*, USA Today, Dec. 29, 2005, *available at* http://www.usatoday.com/news/washington/2005-12-29-bush-pardons_x.htm.

[130] *See Id.*

[131] In his statement announcing the commutation, President Bush said, "I respect the jury's verdict." However, he went on to say that the sentence was excessive under the circumstances. See *Statement by the President on Executive Clemency for Lewis Libby*, White House News, Office of the Press Secretary (July 2, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html.

Requesting Presidential Clemency

There are two ways an offender can request presidential clemency. First, an offender may file a request for clemency with the Department of Justice through the Office of the Pardon Attorney. Such a request is governed by the procedures set out in internal DOJ regulations and policies.[132] Although most requests are filed through the Office of the Pardon Attorney, the President has complete discretion to independently consider requests for clemency or to order clemency based on no request at all. Thus, it is also possible to submit requests for clemency directly to the White House. However, if an offender has no White House connections, a request submitted outside of the standard Pardon Attorney Office procedures will almost certainly be ignored or denied.[133]

[132] 28 C.F.R. §§ 1.1-1.12; *Standards for Consideration of Clemency Petitions*, United States Attorney's Manual, §§ 1-2.110-113, *available at* http://www.usdoj.gov/pardon/petitions.htm.

[133] In fact, President Bush vowed at the beginning of his term to adhere strictly to the Justice Department's review process. Until the Libby commutation, he had done so. Thus, Libby's commutation was the first Bush Administration clemency grant where the request did not go through Pardon Attorney Office procedures. See commentary of Margaret Love, former U.S. Pardon Attorney, *Rethinking the President's Pardon Power*, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/rethinking_pardons_by_love.doc.

Pardon Petition: Rules and Procedures

Under Justice Department rules, an offender cannot file a petition for a pardon until at least five years after the completion of the sentence. The waiting period begins on the day the applicant is released from confinement.[134] If the sentence did not include imprisonment, the waiting period begins on either the date of conviction or the date of sentencing.[135] The waiting period begins upon release from confinement for the offender's most recent conviction, whether or not that is the offense for which the pardon is sought.[136]

Although rarely granted, a waiver of the waiting period can be requested by submitting with the completed pardon application a letter explaining why the waiting period should be waived.[137] In addition to the five-year waiting period, the petitioner must have completely satisfied all penalties imposed at sentencing.[138]

Except for military offense pardons, the petition for pardon should be addressed to the President and submitted to the

[134] 28 C.F.R. § 1.2.

[135] 28 C.F.R. § 1.2. *But see* Office of the Pardon Attorney, *Petition for Pardon*, *available at* http://www.usdoj.gov/pardon/pardon_petition.htm. The regulation states "date of conviction," but the pardon petition article states "date of sentencing."

[136] Office of the Pardon Attorney, *Pardon Information and Instructions*, ¶ 3, *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm.

[137] *Id.*

[138] *See* 28 C.F.R. § 1.2.

Office of the Pardon Attorney using the standard pardon application form.[139] The application must be filled out completely. For pardon of a military offense, the pardon application should be submitted to the secretary of the appropriate military branch.[140] On the application, the petitioner must state the specific purpose for which he or she is seeking the pardon (question 20) and attach any documentary evidence indicating how a pardon would accomplish that purpose.[141]

The application must include a complete record of all arrests, charges, and convictions, including all arrests and charges for traffic violations. A failure to include all such information may be considered a falsification of the petition.[142] For requested information on federal convictions beyond the most recent conviction, additional pages may be attached to the application.[143] The application must also include all delinquent credit obligations, a list of all lawsuits in which the applicant is named as a party, and a list of all unpaid tax obligations.[144] Finally, the application must include at least three character affidavits or notarized letters from persons who know of the applicant's conviction, support the applicant's pardon request, and are unrelated to the applicant.[145]

Once submitted, the application is checked for completeness and eligibility under the rules. The applicant is informed if he or she is not eligible for a pardon, and is asked for more information if the application is incomplete.[146]

Once the application is complete, the United States Probation Office is asked for input on the pardon request. If a review of the application and the Probation Office information indicates that the request should be denied, a report to the President is prepared recommending denial, and the report is sent to the Deputy Attorney General.[147]

Alternatively, if the application shows some merit, the case is referred to the FBI, which conducts a background investigation of the applicant. If there is information in the FBI report indicating the request should be denied, a report to the President is prepared recommending denial, and the report is sent to the Deputy Attorney General. If the FBI report is favorable to the applicant, input is solicited from the prosecutor and the sentencing judge. In

[139] 28 C.F.R. § 1.1. Application forms are available on request from the Office of the Pardon Attorney, from the Warden of the institution where the applicant is incarcerated, or online at http://www.usdoj.gov/pardon/forms.htm

[140] 28 C.F.R. § 1.1.

[141] Office of the Pardon Attorney, *Pardon Information and Instructions*, ¶ 4, *supra* note 14.

[142] *Id.* ¶ 7.

[143] *Id.* ¶ 5.

[144] *Id.* ¶ 8.

[145] *Id.* ¶ 9.

[146] Roger Adams, *Statement Before the Committee on the Judiciary United States House of Representatives,* p.3*, supra* note 6.

[147] *Id.*

appropriate cases, the victim is notified and invited to submit comments.[148]

After all information has been submitted, the Office of the Pardon Attorney prepares a report recommending granting or denying the pardon. The report is sent to the Deputy Attorney General. If the Deputy Attorney General agrees with the recommendation, the report is sent to the Counsel to the President for the President's action. If the Deputy Attorney General disagrees with the recommendation, the report is sent back to the Pardon Attorney for revisions. When the Deputy Attorney General is satisfied with the final recommendation and report, it is sent to the Counsel to the President for the President's action.[149]

The following five factors are used to help determine what the final recommendation to the President will be: (1) the seriousness and time of the offense; (2) the applicant's post-conviction conduct, character, and reputation; (3) the applicant's remorse and acceptance of responsibility for the crime; (4) the reason given for seeking a pardon; and (5) input from the prosecutor and sentencing judge.[150] In addition to these factors, the Pardon Attorney considers negatively any dishonesty of the applicant in the course of the application process.[151]

Once the President receives the recommendation from his counsel, he may act on it in any way and at any time he sees fit. There is no appeal from the final presidential decision.[152]

Commutation Petition: Rules and Procedures

A request for commutation is used when seeking a reduction in sentence. Requests for commutation of a prison sentence are generally not accepted until all appeals and court proceedings have ended in the case and the person requesting the commutation has begun serving the sentence.[153]

Except in the case of military sentence commutations, the petition for commutation should be addressed to the President and submitted to the Office of the Pardon Attorney using the standard commutation application form. For commutation of a military sentence, the commutation application should be submitted to the secretary of the appropriate military branch.[154] The form should be filled out completely. The application must include a complete record of all arrests, charges, and convictions, including all arrests and charges for traffic violations. A failure to include all such information may be

[148] *Id.* at 4. See 28 C.F.R. § 1.6 for detailed victim notification regulations.
[149] *Id.* at 4-5.
[150] *Standards for Consideration of Pardon Petitions*, United States Attorney's Manual, § 1-2.112, *supra* note 10.
[151] Roger Adams, *Statement Before the Committee on the Judiciary United States House of Representatives,* p.5, *supra* note 6.
[152] *See* 28 C.F.R. § 1.11.
[153] *See* 28 C.F.R. § 1.3.
[154] *See* 28 C.F.R. § 1.1.

considered a falsification of the petition.[155]

Once the application is complete, the Warden of the institution where the applicant is incarcerated is asked for complete information on the applicant. In addition, the Office of the Pardon Attorney reviews court opinions relating to the applicant's conviction. In most cases, this initial review indicates that a commutation would not be appropriate, a report to the President is prepared recommending denial, and the report is sent to the Deputy Attorney General.[156]

Alternatively, if the application shows some merit, input is solicited from the prosecutor, the sentencing judge, and in some cases, other government agencies. In appropriate cases, the victim is notified and invited to submit comments.[157]

After all information has been submitted, the Office of the Pardon Attorney prepares a report recommending granting or denying the commutation. The report is sent to the Deputy Attorney General. If the Deputy Attorney General agrees with the recommendation, the report is sent to the Counsel to the President for the President's action. If the Deputy Attorney General disagrees with the recommendation, the report is sent back to the Pardon Attorney for revisions. When the Deputy Attorney General is satisfied with the final recommendation and report, it is sent to the Counsel to the President for the President's action.[158]

Under Department of Justice standards, a commutation of sentence is considered an extraordinary form of clemency that should rarely be granted. Among others, three factors that may support a commutation recommendation include (1) disparity of the sentence as compared to others involved in the same crime, (2) extraordinary medical issues making prison life unduly difficult, and (3) previous unrewarded cooperation with the government.[159] The third factor does not support commutation if some relief has already been granted under Rule 35.[160]

Once the President receives the recommendation from his counsel, he may act on it in any way and at any time he sees fit. There is no appeal from the final presidential decision.[161]

---

[155] Office of the Pardon Attorney, *Commutation Instructions*, ¶ 8, *available at* http://www.usdoj.gov/pardon/commutation_instructions.htm.

[156] Roger Adams, *Statement Before the Committee on the Judiciary United States House of Representatives,* p.6*, supra* note 6.

[157] *Id.* at 7. As with pardon applications, victim notification regulations are at 28 C.F.R. § 1.6.

[158] *Id.*

[159] *Standards for Consideration of Commutation Petitions*, United States Attorney's Manual, § 1-2.113, *supra* note 10.

[160] Roger Adams, *Statement Before the Committee on the Judiciary United States House of Representatives,* p.8*, supra* note 6.

[161] *See* 28 C.F.R. § 1.11.

Chances of Success: Slim to None under Bush

President Bush grants few requests for pardons and virtually no requests for sentence commutations. Through June 30, 2007, President Bush had received a total of 1,424 petitions for pardons, and had granted 113, a grant rate of 7.9%. In the same time period, the President had received a total of 5,625 petitions for sentence commutations, and had granted three, an incredibly stingy grant rate of .053%.[162] Mr. Libby's commutation, which did not go through Department of Justice channels, was the fourth commutation granted by the President during his entire administration.

In general, Mr. Bush grants clemency requests only for penitent lawbreakers whose crimes were relatively minor and occurred years before he took office.[163] Among the 113 people pardoned by Mr. Bush during his administration are a Jehovah's Witness minister sentenced in 1957 for ignoring a draft notice, a California man convicted in 1969 for stealing $32 worth of eight-track audio tapes, and a postal employee sentenced in 1971 for stealing $10.90 from the mail.[164]

It Was Not Always So: A Historical Comparison

Although the Republic's first two presidents granted fewer clemency petitions than George W. Bush, most presidents have been far more generous.[165] Twentieth century presidents generally made the greatest use of presidential clemency power. Franklin Roosevelt granted 3,687 clemency requests in twelve years, Woodrow Wilson granted 2,480 requests in eight years, and Harry Truman granted 2,044 clemency requests in eight years.[166]

Among more recent presidents, there has been a gradual trend towards using presidential clemency power more sparingly. Richard Nixon granted 863 pardons out of 1,699 requests, a grant rate of 51%. He also granted 60 commutations out of 892 requests, a grant rate of 7%. Gerald Ford granted a total of 382 pardons out of 978 requests, a grant rate of 39%, and he granted 22 commutations out of 549 requests, a grant rate of 4%.[167]

Jimmy Carter Granted 534 pardons out of 1,581 requests, a grant rate of 34%, and he granted 29 commutations out of

---

[162] Data and calculations based on *Presidential Clemency Actions by Administration, 1945 to Present,* prepared by the Office of the Pardon Attorney, July 1, 2007*, available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/presidential_clemency_stats_1945present.doc.

[163] *See* Judy Keen*, Bush Grants Pardons Less than Predecessors, supra* note *7.*

[164] *Id.*

[165] *See A History of Pardons*, USA Today, December 29, 2005, *available at* http://www.usatoday.com/news/washington/2005-12-29-pardons-history_x.htm.

[166] *Id.*

[167] *See Presidential Clemency Actions by Administration, 1945 to Present,* prepared by the Office of the Pardon Attorney, July 1, 2007,*supra* note 40. President Ford's figures exclude those granted clemency after action by Ford's Presidential Clemency Board.

1,046 requests, a grant rate of 3%. Ronald Reagan granted 393 pardons out of 2,099 requests, a grant rate of 19%, and he granted 13 commutations out of 1,305 requests, a grant rate of 1%. George H.W. Bush set the pre-George W. Bush low for recent use of presidential clemency power, granting 74 of 731 pardon requests, a grant rate of 10%, and granting just 3 of 735 commutation requests, a grant rate of just .4%.[168] In the use of presidential clemency power, the old adage "like father, like son" holds true.

The administration of Bill Clinton saw an explosion of requests for clemency and a significant increase in the number of requests granted. Clinton granted 396 of 2,001 pardon requests, a grant rate of 20%. In addition, he granted 61 of 5,488 commutation requests, a grant rate of 1% (note that because of the exploding number of requests under Clinton, the commutation grant rate roughly doubled as compared to George H.W. Bush, but the actual number of commutations granted went up by twenty times).[169]

---

[168] *See Id.* The figures for Jimmy Carter do not include Carter's blanket order granting a pardon to certain Vietnam era offenders.
[169] *See Id.*

Figure 1: Clemency Requests Granted by President: January 20, 1969-July 1, 2007

PRESIDENT	PARDONS GRANTED	PARDON REQUESTS	GRANT RATE (%)	COMMUTATIONS GRANTED	COMMUTATION REQUESTS	GRANT RATE (%)
NIXON	863	1,699	51%	60	892	7%
FORD	382	978	39%	22	549	4%
CARTER	534	1,581	34%	29	1,046	3%
REAGAN	393	2,099	19%	13	1,305	1%
H.W. BUSH	74	731	10%	3	735	.4%
CLINTON	396	2,001	20%	61	5,488	1%
W. BUSH	113	1,424	8%	3	5,625	.05%

The Clinton administration was also notable in the number of clemency grants that resulted from direct requests to the White House, bypassing the normal Justice Department Pardon Attorney procedures. In his final hours in the White House, Clinton issued 176 grants of clemency, more than one third of the total grants of clemency for his entire administration.

Many of these came from direct appeals to the White House, and a common ingredient in this final group of clemency grants was access of the individual to either the President or the White House Counsel. Indeed, Clinton's willingness to grant pardons in the waning days of his administration was not communicated through the legal grapevine, but through a loose network of longtime friends, campaign contributors, and White House insiders.[170]

At the beginning of his first term, George W. Bush vowed to restore and adhere to the Justice Department review process for clemency applications. Up until the Libby sentence commutation, he had done so.[171] The Libby commutation, however, resurrects obvious questions about access and presidential clemency, especially since the justification given for the Libby commutation directly contradicts previous (and presumably future) Bush Justice Department policy and action.

A comparison of Libby and Rita: What A Difference Knowing The President Makes

In granting Mr. Libby's commutation, President Bush maintained that the thirty-month sentence was unduly harsh, that it was based on facts not proven to the jury, and that it ignored Mr. Libby's positive contributions to society and the collateral damage a term of imprisonment would cause Libby's

[170] Don Van Natta and Marc Lacey, *Access Proved Vital in Last-Minute Race for Clinton Pardons*, N.Y. Times, February 25, 2001, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B07E1D91139F936A15751C0A9679C8B63&n=Top%2FReference%2FTimes%20Topics%2FPeople%2FI%2FIckes%2C%20Harold%20M.

[171] Margaret Love, former U.S. Pardon Attorney, *Rethinking the President's Pardon Power*, *supra* note 11.

family. These are all arguments that defense lawyers routinely make in arguing for sentences lower than the federal sentencing guidelines, and the President's arguments are likely to be quoted in numerous sentencing briefs.[172]

However, the Libby commutation probably does not reflect a sea change in longstanding Bush Administration sentencing policy; rather, it is most likely a one-time act designed to help out a former aid to the Vice President. First, the Libby commutation is contrary to longstanding Bush policy severely limiting executive clemency, a policy extending back to his time as Texas Governor.[173] Second, a comparison of the Bush Administration handling of Mr. Libby's case with the arguments the Bush Justice Department successfully made in the recent Supreme Court case, *Rita v. United States*, shows a stunning inconsistency between the arguments Bush's Solicitor General made in *Rita* and Bush's arguments in commuting Libby's sentence.[174]

Both Mr. Libby and Mr. Rita were federally indicted on two counts of making false statements under oath, two counts of perjury, and one count of obstruction of justice. Both men were convicted by a jury, and given sentences based in part on facts never presented to a jury. Libby's sentence included a 30-month prison term, and Rita's included a 33-month prison term. Neither man was the initial target of the underlying federal criminal investigation. Both men have extensive civil service backgrounds and are dedicated family men.[175]

Both sentences were within federal sentencing guidelines. At his sentencing, Rita argued that he should receive a sentence that is below the guidelines, because he was elderly and sick, had served 24 years as a Marine, including tours in Vietnam and the first Gulf War, and he could be abused in prison because of his past work in the criminal justice system on behalf of the government. When the sentencing court rejected these arguments, Rita appealed, arguing that his sentence was unreasonable given his personal circumstances and the nature of the offense. On appeal to the United States Supreme Court, the Bush administration argued forcefully and successfully that Rita's sentence was reasonable, because

---

[172] Adam Liptak, *Commuting Prison Term is Implicit Critique of Sentencing Standards*, N.Y. Times, July 4, 2007, at A1, *available at* http://select.nytimes.com/gst/abstract.html?res=F50A15F93E5A0C778CDDAE0894DF404482.

[173] Adam Liptak, *For Libby, Bush Seemed to Alter His Texas Policy*, N.Y. Times, July 8, 2007, at AI, *available at* http://select.nytimes.com/gst/abstract.html?res=F50D1FF9385A0C7B8CDDAE0894DF404482.

[174] *See Rita v. United States*, 168 L. Ed. 2d 203 (2007). This case was decided on June 21, 2007.

[175] For a detailed comparison of the two cases, see Thomas Cochran, *Statement to House Judiciary Committee on the Use and Misuse of Presidential Clemency Power for Executive Branch Officials*, July 11, 2007, *available at* http://judiciary.house.gov/media/pdfs/Cochran070711.pdf. Mr. Cochran was Mr. Rita's attorney.

it fell within the federal sentencing guidelines.[176]

In fact, the Bush Justice Department has consistently argued for uniform sentencing, and requires prosecutors to advocate for sentences that follow the guidelines.[177] Thus, the Libby commutation is the exception that proves the rule, and is not likely to be repeated with offenders having no connection to the White House.

Conclusion: You Can Try, But You May Not Get What Lewis Libby Got

Presidential clemency generally occurs when the president either pardons an offender for a crime when the sentence has already been served, or commutes part or all of the sentence given to an offender. The Justice Department, through the Office of the Pardon Attorney, has established procedures for applying for both types of presidential clemency. Requests for clemency can also be directly submitted to the White House, although except in the case of Lewis Libby, President Bush has never granted a direct request for clemency.

Under President Bush, requests for clemency are rarely granted. The Lewis Libby commutation appears to be an exception that does not give any real hope to petitioners seeking clemency, unless they have a personal connection of some sort to the White House.

[176] Harlan Protass, *The Quality of Mercy is Strained*, Slate, July 3, 2007, *available at* http://www.slate.com/id/2169792/.
[177] *Id.*

COMPASSIONATE DISCHARGE UNDER 18 U.S.C. § 3582(c)

Keith Heidmann, Summer Associate 2007

Under extraordinary circumstance, the so-called "compassionate discharge statute" provides a way for inmates doing time for a federal offense to be released from prison before serving their entire prison sentence.[178] The statute states that the sentencing court may, "upon motion of the director of the Bureau of Prisons," reduce the term of imprisonment if it finds that "extraordinary and compelling reasons warrant such a reduction."[179] In reducing a sentence under the statute, the sentencing court is required to review the original sentencing factors set out in section 3553(a) if they are applicable.[180]

Bureau of Prisons Criteria for Compassionate Discharge

Because compassionate discharge can only be considered by the sentencing court "upon motion of the director of the Bureau of Prisons," the Bureau of Prisons ("BOP") is the central agency in any request for compassionate discharge. If BOP does not file a motion with the sentencing court to reduce an inmate's sentence, the court has no jurisdiction under the statute and cannot grant a request for compassionate discharge under section 3582(c).[181] Thus

[178] 18 U.S.C. § 3582(c)(1)(A)(i).
[179] *Id.*
[180] § 3582(c)(1)(A). The sentencing factors originally considered by the sentencing court are set forth in 18 U.S.C. § 3553(a).
[181] *See United States v. Smartt,* 129 F.3d 539 (10th Cir. 1997) (holding prisoner with medical condition is not entitled to a special

following the standards and procedures set forth by BOP is essential for success in any request for compassionate discharge under the statute.

What are the present criteria BOP uses in granting inmate requests and moving the sentencing court for compassionate discharge under the statute? The statute states broadly that the sentencing court may grant compassionate discharge if it finds that "extraordinary and compelling reasons warrant such a reduction."[182] The administrative regulations governing the statute also give broad authority to BOP to grant requests under the statute, requiring only "particularly extraordinary or compelling circumstances which could not have been reasonably foreseen by the court at the time of sentencing."[183] In 1998, BOP adopted these regulations in its program statement on compassionate release and implementation of the statute.[184] In reality, however, BOP grants requests for compassionate discharge only rarely and in very narrow circumstances. Since the year 2000, BOP has filed between 15 and 25 motions annually under § 3582(c)(1)(A)(i), and in recent years, BOP has filed motions almost exclusively in cases where an inmate was within months or even weeks of death.[185] Thus BOP, the gatekeeper under the statute, applies the statute much more narrowly than the statute or the regulations require. BOP's policy generally restricts compassionate discharge to inmates who have less than one year to live or who have severely debilitating and irreversible conditions that render them unable to care for themselves.[186]

In addition to BOP's narrow criteria for application of the compassionate discharge statute, application of the statute is further limited by restrictions on the classes of offenders to which the statute applies. Under federal regulations, BOP cannot move a sentencing court for compassionate discharge of inmates confined to federal institutions who are state prisoners or District of Columbia code offenders.[187]

---

circumstances sentence reduction without a motion by the Director of BOP); *see also Morales v. United States*, 353 F.Supp. 2d 204 (D. Mass. 2005) (holding court could not grant prisoner request for compassionate relief under 18 U.S.C. § 3582(c)(1)(A) because the Director of BOP had not moved for a reduction in sentence).

[182] § 3582(c)(1)(A)(i).

[183] 28 C.F.R. 571.61(a).

[184] Federal Bureau of Prisons Program Statement 5050.46, *Compassionate Release; Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)*, *available at* http://www.bop.gov//policy/progstat/5050_046.pdf.

[185] ABA comment letter to Ricardo H. Hinojosa, Chair of the United States Sentencing Commission, *Re: Request for comment on criteria for sentence reduction under USSG 1B1.13*, p. 3 (March 12, 2007), *available at* http://www.abanet.org/poladv/letters/crimlaw/2007mar12_sentencereduc_l.pdf.

[186] In an unpublished opinion, the Fifth Circuit held that as a discretionary "interpretive rule," this BOP policy on compassionate discharge was not subject to the "notice and comment" requirements under the *Administrative Procedure Act*. *See Williams v. Van Buren*, 117 Fed. Appx. 985 (5th Cir. 2004).

[187] 28 C.F.R. 571.64. The proposed new rules do provide for compassionate discharge

Additionally, BOP cannot initiate such a motion on behalf of any federal offender who (a) committed his or her offense prior to November 1, 1987 and (b) received a non-parolable sentence.[188]

Proposed "New" Standards

On December 21, 2006, BOP released proposed changes to its regulations governing compassionate discharge.[189] The changes were proposed in part to "more accurately reflect" current BOP policy.[190] The proposed rules will codify BOP's very restrictive policy criteria for compassionate discharge discussed above.

Under the proposed rules, BOP will only consider requests from inmates with extraordinary and compelling medical conditions; BOP will not consider compassionate discharge requests for any non-medical conditions or situations. Specifically, proposed section 571.62 will only consider an inmate's request for compassionate discharge under the statute if a BOP medical staff member or a BOP-selected doctor concludes with reasonable medical certainty that the inmate either (1) suffers from a terminal illness with a life expectancy of one year or less, or (2) suffers from an irreversible, profoundly debilitating condition that prevents the inmate from attending to basic bodily functions and personal care needs. Clearly, BOP's "new" regulations will be implementing a much narrower criteria than the statute's "extraordinary and compelling reasons" for a sentence reduction.[191]

Procedure for Petitioning BOP for Compassionate Discharge

Ordinarily, the inmate requesting compassionate discharge submits the request in writing.[192] However, other persons can submit requests on behalf of the inmate, and such requests are given the same consideration as requests from the inmate.[193] Whether from the inmate or from other persons, a request for compassionate discharge must contain (1) an explanation of the extraordinary or compelling circumstances that the inmate believes could not have been foreseen by the court at the time of sentencing, and (2) a proposed release plan.[194] The proposed release plan must include information about where the inmate will live upon release, how the inmate will support him/herself, where the inmate will receive medical

---

under the statute for D.C. code offenders. *See* Reduction in Sentence for Medical Reasons, 71 Fed. Reg. 76619 (proposed December 21, 2006) (section to be codified at 28 C.F.R. 571.68-571.74).

[188] *Id.*

[189] 71 Fed. Reg. 76619 (to be codified at 28 C.F.R. 571.60-572.40).

[190] *Id.*

[191] For a thorough discussion of legislative intent, previous regulatory history, and BOP's proposed narrowing of the scope of the criteria for compassionate discharge under the statute, see the ABA comment letter on the proposed rule, *Re: Proposed Rule Reduction in Sentence for Medical Reasons 28 CFR Parts 571 and 572* (February 20, 2007), *available at* http://www.abanet.org/poladv/letters/crimlaw/2007feb20_medreduction_l.pdf.

[192] 28 C.F.R. 571.61(a).

[193] 28 C.F.R. 571.61(b).

[194] 28 C.F.R. 571.61(a).

treatment, and how the inmate will pay for such treatment.[195]

The complete request for compassionate discharge must be submitted directly to the Warden of the institution where the inmate is confined.[196] Once the request has been submitted to the Warden, it then must undergo a series of reviews before the Director of BOP can act on it.[197]

Reviews of Inmate Request for Compassionate Discharge.[198]

The Warden is required to promptly review and investigate the inmate's request for compassionate discharge. If after the investigation the Warden determines that the request should be approved, the Warden must submit a written recommendation along with a number of other supporting documents to the Regional Director.[199] If the Regional Director determines that the request should be approved, the Regional Director must submit a written recommendation to the Office of General Counsel. If the General Counsel determines that the request should be approved, the General Counsel must obtain an opinion on the merits of the request from either the Medical Director or the Assistant Director of the Correctional Programs Division.[200]

The General Counsel must then forward the entire matter along with the required opinion of the Medical Director or Assistant Director to the Director of BOP. If the Director determines that the request should be approved, the Director will move the sentencing court for a reduction in sentence under the statute and inform the U.S. Attorney in the sentencing district of his or her action.

Under the proposed new rules, there will be additional steps required before a final approval of a request for compassionate discharge.[201] In addition to the steps already outlined, BOP medical staff or a BOP-selected doctor must determine that the inmate has a medical condition covered by the proposed "new" criteria for compassionate discharge. Another additional step will require BOP staff at the institution where the inmate is housed to determine that the inmate will not be a danger to society.[202] Finally, if both of these requirements are met, BOP staff must "carefully assess" other factors relevant to a reduction in sentence.[203]

Denial Notices and Appeals[204]

If the Warden or the Regional Director denies an inmate's request for

---

[195] 28 C.F.R. 571.61(a)(2).
[196] 28 C.F.R. 571.61(a).
[197] 28 C.F.R. 571.62.
[198] *See Id.*
[199] Federal Bureau of Prisons Program Statement 5050.46, *supra* note 8, part 6(a)(1).
[200] The choice here depends on whether the request is based on medical or non-medical circumstances. Because current BOP policy is to grant only medical requests, the required opinion will almost always be from the Medical Director.
[201] *See* 71 Fed. Reg. 76619 (section to be codified at 28 C.F.R. 571.65).
[202] *Id.*
[203] *Id.*
[204] *See* 28 C.F.R. 571.63.

compassionate discharge, they must provide the inmate with a written notice of the denial and a statement setting out the reasons for the denial. The inmate may then appeal the denial through the Administrative Remedy Procedure.[205]

If the General Counsel denies the inmate's request for compassionate discharge, the General Counsel is again required to provide a written notice of the denial and a statement setting out the reasons for the denial. However, unlike a denial at the first two stages of the process, a denial by the General Counsel is considered a final administrative action and cannot be appealed through the Administrative Remedy Procedure.[206]

If the Director of BOP denies the inmate's request for compassionate discharge, the Director is required to provide the inmate with written notice of the denial along with a statement setting out the reasons for the denial. The notice must be provided to the inmate within twenty workdays from the Director's receipt of the referral of the matter from the General Counsel. Once again, the denial of the inmate's request is considered a final administrative decision that cannot be appealed through the Administrative Remedy Procedure.[207]

Role of the Sentencing Court Upon Motion by BOP

Once the Director of BOP approves a request for compassionate discharge, the Director presents a motion to the sentencing court requesting a reduction of sentence. Largely because of BOP's very strict criteria for granting requests over the past seven years, virtually all motions for compassionate discharge are granted by the sentencing court.[208]

Under the statute, the sentencing court has no jurisdiction to grant compassionate discharge without a motion from the Director of BOP.[209] Thus, under the statute, there is no allowed judicial review of BOP's denial of an inmate's request for compassionate discharge, and BOP's final decision cannot be successfully appealed to the sentencing court. The statute is considered a mechanism to reduce a sentence, not a mechanism to challenge the validity of the conviction, the validity of the sentence, or the sentence's execution. The statute states that the court "may not modify" a sentence except in the circumstances specified.[210] Because of this, BOP's denial of a compassionate discharge

[205] *See* 28 CFR 542.15 for an outline of the proper appeal procedure.
[206] 28 C.F.R. 571.63(d)
[207] *Id.*

[208] The ABA comment letter on criteria for sentence reduction under USSG 1B1.13 (March 12 2007) states that "as far as we are aware, no motion has been denied during this time period." *Supra* note 9, at 3.
[209] *See* e.g. *United States v. Clark*, 8 F.Supp. 2d 560 (W.D. Va. 1998) (holding court has no jurisdiction to modify a sentence under 18 USC § 3582(c).
[210] 18 U.S.C. § 3582(c).

request cannot be challenged under 28 U.S.C. § 2255 or 28 U.S.C. § 2241.[211]

Proposed Sentencing Commission Guidelines

If the Director of BOP moves the sentencing court for a reduction in sentence under the statute, the court will grant the request if it finds "extraordinary and compelling" reasons under the statute. Judges, however, are not bound by BOP policy statements and proposed regulations in making this determination. Interestingly, at the same time BOP has proposed new rules to greatly restrict the application of the statute, the United States Sentencing Commission proposed new guidelines with much broader criteria for what constitutes "extraordinary and compelling reasons" for granting compassionate release under the statute.[212]

The Sentencing Commission, an independent judicial branch agency, provides guidelines and policy statements for judges to consider and use. On April 18, 2007, the Commission voted unanimously to approve new guidelines for judges to use to help them to determine what circumstances are "extraordinary and compelling reasons" in granting compassionate discharge under the statute.[213] The proposed guidelines outline four circumstances that would be considered "extraordinary and compelling reasons" justifying compassionate discharge under the statute.[214]

"Extraordinary and compelling" circumstances exist under the proposed guidelines if (1) the defendant is suffering from a terminal illness; (2) the defendant is suffering from a permanent medical condition or deterioration due to aging that substantially diminishes the ability of the defendant to provide self care; (3) the defendant's only family member capable of caring for the defendant's minor child or children has died or become incapacitated; or (4) there exists in the defendant's case another extraordinary circumstance as determined by the Director of BOP.[215]

Unless acted on by Congress, these guidelines will become effective on November 1, 2007.[216] The proposed guidelines do not change the fact that only BOP can initiate a compassionate

---

[211] *See United States v. Smartt,* 129 F.3d 539 (10th Cir. 1997). The district court's denial of the defendant's 18 U.S.C. § 3582(c) motion for compassionate discharge was upheld. The court held that there is no statutory authority for the court to grant such a motion unless the motion is brought by the Director of BOP. *Id.* at 541. The court explained that although it did not have the authority to reduce a sentence under § 3582(c), it could consider a challenge to the sentence itself under 28 U.S.C. § 2255. See *Id.* at 543.

[212] *See* Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558 (May 21, 2007).

[213] Families Against Mandatory Minimums, "Compassionate release" guideline amendment proposed by U.S. Sentencing Commission, available at http://www.famm.org/ExploreSentencing/FederalSentencing/SentencingGuidelineUpdates/Compassionaterelease.aspx.

[214] 72 Fed. Reg. 28558

[215] *Id.*

[216] *Id.*

discharge. However, they do indicate the widening gulf between the judiciary and the executive branches on what circumstances warrant compassionate discharge, and bring up the question of which branch's proposed rules and guidelines are closest to the legislative intent of the statute.[217]

Indeed, a first round salvo in a possible coming battle has already been fired. In a letter to the Chair of the Sentencing Commission, the Department of Justice warned the Commission that any policy it adopts that is inconsistent with BOP's policy would be a "dead letter."[218] In the present circumstances, DOJ is correct; the statute has given BOP all the cards.

Conclusion

The compassionate discharge statute, 18 U.S.C. § 3582(c)(1)(A), provides a mechanism for the release of an inmate before the end of his or her sentence under "extraordinary" circumstances. Because only the Director of the Bureau of Prisons can submit a motion to the court for compassionate discharge, it is rarely granted except in the case of terminally ill inmates. Recently proposed BOP rules and Sentencing Commission guidelines highlight significant disagreement as to how broadly the statute's "extraordinary and compelling" criteria should be applied.

[217] For a complete discussion of the history of the proposed rules and guidelines, legislative intent, and constitutional issues involved, see the ABA comment letter on the proposed rule, *Reduction in Sentence for Medical Reasons* (February 20, 2007), *Supra* note 15, and the ABA comment letter on criteria for sentence reduction under USSG 1B1.13 (March 12, 2007), *supra* note 9.

[218] ABA comment letter on criteria for sentence reduction under USSG 1B1.13 (March 12, 2007), *supra* note 9, at.8.

CORRECTIONS

In our last issue, in an article on the SAFE NOW Act (page 12), we described Safe Now Project as a lobbying organization. That was not correct. Safe Now is a nonprofit involved in "educating lawmakers and others on the needs and gaps in sex offender management." For a full description of their mission, go to www.safenowproject.org.

ACKNOWLEDGMENTS

We extend our appreciation and gratitude to Keith Heidmann a recent 2007 graduate of University of Marquette Law School for all his work on this publication. We also extend our gratitude to Quarles & Brady of Milwaukee. Keith worked in our office this summer as part of a *pro bono* externship sponsored by Quarles & Brady. All the best to Keith as he begins his career with Quarles.

CONTACT US

If you wish to submit in an article or suggestions for future newsletter, please write to us at:

FEDERAL DEFENDER SERVICES
OF WISCONSIN, INC.
ATTENTION: *Doing Time Times*
517 E. Wisconsin Avenue #182
Milwaukee, Wisconsin 53202