Testimony Before the United States Sentencing Commission

Concerning Policy Statement §1B1.13

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My name is Kate Stith. I am a professor at Yale Law School, where I teach courses on criminal law and procedure and on constitutional separation of powers. In addition to publishing numerous law review articles, I've co-authored two books, one on federal criminal law entitled *Defining Federal Crimes*, and one on the federal sentencing guidelines entitled *Fear of Judging: Sentencing Guidelines in the Federal Courts*. In addition, I served by appointment of Chief Justice Rehnquist on the Advisory Committee for the Federal Rules of Criminal Procedure. I have been an advisor to the American Law Institute's MODEL PENAL CODE: SENTENCING project since its inception almost 15 years ago. Before joining the Yale Law School faculty, I was a federal prosecutor in the Southern District of New York.

Background – Sentence Modification in a Determinate Scheme

While I have long advocated determinate sentencing as a general proposition, my work as an advisor to the ALI's project on determinate sentencing has led to a growing appreciation of the need to provide reliable ways to consider when an individual's original term of incarceration should be reduced on the basis of extraordinary and compelling changed circumstances. I thank you for allowing me to discuss with you the role of the Commission in setting forth policies to guide courts as to when sentence reduction is warranted for these reasons.

It has been a decade since the Commission first promulgated its policy on the authority of federal courts to reduce sentences on government motion for "extraordinary and compelling reasons." It has been almost that long since the Commission's last hearing on what is colloquially known as "compassionate release." In that time there has been a growing appreciation among those who have championed determinate sentencing over the years of the need to provide mechanisms for reconsidering the length of an individual's prison sentence when that sentence no longer is just or appropriate. Reconsideration may be in order because an individual prisoner's circumstances have changed significantly since his or her original sentencing; among such circumstances may be advanced age and infirmity. And apart from changed individual circumstances, reconsideration may be in order because the passage of time

has made a sentence imposed years before to be now judged harsher than necessary to justly punish and ensure public safety.[1]

I congratulate the Commission on its on-going commitment to reassess, and where appropriate to modify or urge Congress to modify, sentencing laws and policies. Sometimes such changes have been made retroactive. Some significant changes, however, have been given only prospective effect. It is obviously not possible to make every ameliorative change in sentencing law retroactive. But where there have been substantial, significant ameliorative changes, authorities may judge it unfair not to consider the appropriateness of applying those changes to those previously sentenced, a premise evidently underlying the clemency initiative launched by the Obama Administration two years ago.[2]

In particular, there is growing recognition that lengthy prison terms may undermine the very premise of determinate sentencing theory and practice, which is that an appropriate and just punishment can and should be imposed at an individual's initial sentencing proceeding. While I most certainly do not support reversion to widespread sentence reduction and early release, we must face the truth that some exceptionally long prison sentences, especially those mandated by statute no matter what the circumstances of the crime or the offender, may in hindsight be judged excessive and unnecessary by reasonable and knowledgeable observers. This is one of the considerations that has propelled the development by the ALI of revised sentencing articles in the Model Penal Code.

In the remainder of my testimony, I will describe those provisions of the ALI's proposed MPC sentencing modifications that recognize a place for sentence reduction in a determinate

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[1] *See* ABA Commission on Effective Criminal Sanctions, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED SENT'G REP. 217 (2009) (M. C. Love, Reporter) (quoting Professor Douglas Berman) ("The reason why second look mechanisms are so important is because we can expect, we should expect, first looks to be dysfunctionally harsh. That's why a parole system was included in modern imprisonment systems, and why the Framers included a pardon power in our founding document.").

[2] Historically, clemency was the federal justice system's fail-safe release mechanism, replaced at the dawn of the twentieth century by parole. When parole was abolished in the federal system, some expected a resurgence of clemency, but in fact the opposite occurred, for several reasons – including an understandable reluctance to rely on the unstructured, unexplained discretion of a president. As was pointed out 15 years ago by the late Daniel Freed, my colleague at Yale Law School for many years, clemency was never intended to address systemic shortcomings in the legal system or substitute for law reform. *See* Daniel J. Freed and Stevenson L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT'G REP. 119, 124 (2001).

scheme. Most relevant here, the MPC gives the jurisdiction's sentencing commission a central role in determining the types of circumstances in which a sentence may be reduced based on changed circumstances. I believe Congress envisioned the same broad policy-making role for this Commission. In light of the concerns that have recently been raised about the Bureau of Prison's role in implementing federal sentence reduction authority, I urge the Commission to move forward vigorously to develop specific guidance to ensure that federal courts are able to exercise such authority in all appropriate cases.

Sentence Reduction Authorities in the Model Penal Code: Sentencing

Eight years ago, when the American Law Institute was already well along in its project to revise the sentencing articles of the Model Penal Code using a determinate model, it became apparent to the project's Advisers that we would have to tackle the issue of early release if our sentencing system was to operate with the necessary legitimacy and efficiency. That is, we would have to devise processes to modify the court-imposed sentence while preserving the basic principles of determinacy. Key questions involved what circumstances would warrant sentence modification, and what process would be most likely to preserve the institutional arrangements on which determinacy depends, notably the central role of the court in determining the quantum of punishment.

The MPC deliberations produced three mechanisms for reducing a sentence after it has become final, addressing three separate concerns.[3] While only one of these mechanisms is directly relevant to the questions before this Commission today, I will describe all three briefly, in the interest of presenting a full picture of how early release fits into the MPC's determinate structure.

The first of the MPC's sentence reduction authorities is fairly conventional, and would apply routinely and equally to all prisoners. Under § 305.1, prison officials would be authorized to reduce a sentence up to an aggregate total of 30% through the application of good time and

[3] The sentence reduction provisions described in this testimony were approved by the Institute's Annual Meeting in May 2011. See Model Penal Code: Sentencing, Tentative Draft No. 2 (March 25, 2011) (hereafter MPC Draft). They will be considered by the Institute's membership again in 2017 when the entire sentencing project will be brought before the Annual Meeting for final approval. These provisions are discussed in Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOLEDO L. REV. 859 (2011).

earned time credits, "to further the goals of prison discipline and offender rehabilitation."[4] This broadly applicable good time provision seeks to enhance the rehabilitative and management functions of sentencing, though the MPC commentary does not claim empirical proof of such enhancement.[5] The commentary rejects good time as an appropriate means of controlling prison population.[6]

The other two MPC sentence authorities envision more dramatic but targeted modifications. Unlike the good time provision, these authorities have no analogue in the 1962 Code. Section 305.6 proposes a new model for sentence modification in cases involving very long prison terms; this so-called "Second Look" provision authorizes a de novo judicial resentencing after an individual has spent 15 years in prison.[7] And § 305.7 authorizes a court to respond at any time to "compelling" changes in a particular prisoner's circumstances, such as advanced age and infirmity, which make it inappropriate or inhumane to execute the entire original sentence.[8] Both of these judicial early release mechanisms are conceived as statutory

[4] MPC Draft, § 305.1, cmt. a. Most determinate sentencing systems allow for only a small reduction for institutional compliance, and early drafts of the MPC also restricted good time to the 15% allowed under federal law. After sentencing scholars criticized the 15% figure as too low to serve either rehabilitative or management functions, it was raised. *See* Richard F. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 195-96 (2009) (concluding, based on experience under Minnesota's 33% good time allowance, that "the 15% figure does not do much to curtail very long sentences, and it may not provide sufficient incentives for in-prison program participation").

[5] MPC Draft, § 305.1, cmt. a.

[6] *Id.*

[7] *Id.* § 305.6 ("Modification of Long-Term Prison Sentences"). This section contemplates that a "judicial panel or other judicial decision-maker" will hear and rule on applications under this section, and that sentence modification under this provision "should be viewed as analogous to a resentencing in light of present circumstances." § 305.6(4). Taking into account the potential for a 30% administrative reduction through good time, the "Second Look" provision would apply only where an individual was sentenced to at least 23 years in prison. This provision, the most radical of the MPC early release authorities, is discussed in Love & Klingele, *supra* note 3 at 873-876.

[8] *Id.* § 305.7 ("Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons"), cmt. b ("The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to a prisoner who reaches an advanced age while incarcerated, or a prisoner whose physical or mental condition renders it unnecessary, counterproductive, or inhumane to continue a term of confinement.")

substitutes for clemency: one allowing the sentencing court to respond to changed circumstances at any time, and the other providing a more predictable opportunity for reassessment of a sentence after the passage of a significant number of years.[9]

Each of the three authorities in the MPC package of early release mechanisms performs a distinct function, and they complement one another in the design of a determinate system that is also a just and efficient one. However, § 305.7—on judicial authority to respond to changed circumstances—is most relevant to the issues before this Commission today, and I will therefore confine the remainder of my comments to it.[10]

Sentence Modification in Changed Circumstances under the MPC: Sentencing

Section 305.7 was modeled on the federal sentence reduction statute[11] that is the subject of today's hearing. Like its federal model, the MPC provision provides authority for courts to reduce a sentence in compelling circumstances. The precise language used in the new MPC provisions authorizes sentence reduction if the court finds that "the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons, justify a modified sentence in light of the [general purposes of sentencing]."[12] Along with a number of procedural provisions governing judicial proceedings, the new MPC regime specifically provides that the jurisdiction's sentencing commission "shall promulgate and periodically amend sentencing guidelines . . . to be used by courts when considering the modification of prison sentences under this provision."[13] This is the counterpart to 28 U.S.C. § 994(t), which requires the Commission to promulgate policy regarding judicial sentence modification authority, including "what should be considered extraordinary and compelling reasons for sentence reduction . . . ."

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[9] It is noteworthy that the recent report of the Charles Colson Task Force on Federal Corrections specifically endorsed the "Second Look" proposal in § 305.6. It's not clear why the Task Force did not recommend greater use of the "compassionate release" statute, the model for § 305.7 that is the subject of this hearing.

[10] A copy of § 305.7, with its commentary and the Reporter's Notes, is included as an Appendix to this testimony.

[11] 18 U.S.C. § 358(c)(1)(A)(i).

[12] MPC Draft § 305.7(7)

[13] MPC Draft § 305.7(10).

There is one significant way in which § 305.7 differs from its federal model. During the course of its progress through the Institute's approval process, the revised MPC removed the corrections agency as a gatekeeper for this exercise of judicial authority. Instead, prisoners are authorized to go directly to the court that sentenced them to make the case that compelling circumstances warrant their release, without the mediation of prison authorities.[14] The gatekeeper provisions in early drafts of § 305.7 had been the subject of scholarly criticism,[15] and were deleted in response to concerns expressed by members of the Institute at the 2010 Annual Meeting that the federal Bureau of Prisons had filed so few motions that courts were significantly limited in their ability to consider whether sentence reduction was warranted.[16]

The MPC thus places the sentence modification decision in the hands of trial courts rather than prison officials or executive branch agencies such as pardon or parole boards. The commentary to § 305.7 recognizes that this is currently a minority practice among the states. The commentary concludes, however, that allowing sentencing courts to decide prisoner petitions directly, unconstrained by prison officials—who may have potential institutional conflicts and in any event whose primary obligations relate to corrections—"reflects the Code's policy preference for 'front-end' decisionmakers over 'back-end' agencies in the sentencing chronology, and conforms to the Code's general philosophy that sentencing is primarily a

[14] The corrections agency would have a role under § 305.7 in notifying prisoners of their potential eligibility, and providing prisoners with assistance in preparing applications, but the prosecuting authority that brought the charges against the prisoner would be authorized to represent the state's interests in court. Section 305.7(2) and (6).

[15] Early drafts of § 305.7 contained a "gatekeeper" provision similar to the one in 18 U.S.C. § 3582(c)(1)(A)(i). *See* Frase, *supra* note 5 at 196, 201 n. 8, 202 n. 15. In his 2009 article reviewing the sentence reduction authorities in an earlier draft of the Model Penal Code, Professor Frase was critical of the gatekeeper provision, opining that "corrections officials are not professional sentencers, and in some cases staff animosities or favoritism might distort the corrections position as to sentence reduction." Noting on the other hand that corrections officials have more information than anyone else about the prisoner's current circumstances, Frase recommends that they should "state their views [but] not act as a true gatekeeper." *Id*. at 199.

[16] *See* MPC Draft, § 305.7, cmt. c (". . . the Federal Bureau of Prisons has filed so few motions for reduction of sentence as to render the federal compassionate release provision a virtual nullity").

judicial function."[17] In other words, giving prisoners direct access to courts "recognizes that the early release decision is more closely related to sentencing than to corrections."[18]

Section 305.7 also recognizes, based largely on concerns about the federal experience, that allowing corrections officials to control prisoner access to courts may be tantamount to allowing them to control the sentence reduction decision itself. As I understand matters, this concern has been raised repeatedly, including by the Justice Department's own Inspector General, with respect to the way the federal Bureau of Prisons has administered its role under the federal "compassionate release" statute, 18 U.S.C. § 3582(c)(1)(A)(i).

The MPC and Federal "Compassionate Release"

What can be learned from the Model Penal Code experience about the issues now before the Commission on whether to amend its policy implementing the federal "compassionate release" statute? As discussed, both § 305.7 and this federal sentence reduction authority are part of a determinate sentencing scheme that seeks to balance a policy preference for front-end sentencing authority, on the one hand, with a recognition, on the other hand, that a just and comprehensive system must be able to address the "unusual case" in which circumstances are "so changed . . . that it would be inequitable to continue the prisoner's confinement."[19] The legislative history of the 1984 Sentencing Reform Act notably describes the sentence reduction authority in § 3582(c)(1)(A)(i) as a "safety valve" that "keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[20] Like § 305.7, the federal scheme also contemplates that the sentencing commission will make policy for the courts considering sentence reduction motions.

Where the federal scheme diverges from § 305.7 most tellingly is in allowing prison officials to effectively control access to the courts that have power to reduce sentences. Because a BOP motion under § 3582(c)(1)(A)(i) is jurisdictional, this gives BOP the practical ability to deny sentence reduction even in situations where a court may have indicated it would be willing

[17] *Id.*

[18] Love & Klingele, *supra* note 3 at 872.

[19] *See* S. Rep. Sen. Rep. 98-225 at 121 (98th Cong., 1st Sess) (1984).

[20] *Id.*

to grant it.[21] This feature of the federal scheme seems a throw-back to a time when back-end administrative authorities were in a position to control the quantum of punishment, something that determinate sentencing was supposed to replace.[22] It has also evidently severely limited the usefulness of this federal "safety valve" to address situations where continued imprisonment would be "inequitable." Until quite recently, there were never more than a few dozen motions filed each year, despite an escalating and aging federal prison population. Even after a 2013 report from the Justice Department's Inspector General criticized BOP's parsimonious exercise of its gatekeeping authority,[23] and a revision of BOP's policy later that year expanded eligibility criteria, statutory sentencing reduction authority continues to be underutilized. For example, a second Inspector General report last spring noted that only two prisoners had been released under the general non-medical category of advanced age, despite the fact that more than 500 prisoners met the criteria in BOP's policy.[24]

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[21] *See, e.g.*, Mary Price, *A Case for Compassion*, 21 FED. SENT'G REP. 170 (2009) (describing a case in which the sentencing judge wrote to BOP asking that it file a motion so that he could reduce the sentence of a man who was terminally ill, to no avail).

[22] That the sentence reduction authority in § 3582(c)(1)(A)(i) provides a gate-keeping role for BOP may be an artifact stemming from the provision's progenitor in the "compassionate release" provision that was enacted during the indeterminate sentencing regime that existed prior to 1984. The authority in § 3582(c)(1)(A)(i) was originally enacted in 1976 as part of the Parole Reorganization Act, *see* 18 U.S.C. § 4205(g), and was intended to enable the Justice Department to expedite early parole consideration in cases it would otherwise have recommended for executive clemency. *See United States v. Diaco*, 457 F. Supp. 371, 372 (D.N.J. 1978) (motion filed to reduce sentence in light of unwarranted disparity among co-defendants; statement of Director of BOP explaining that the new procedure offered an alternative to submitting an application for clemency to the President through the Office of the Pardon Attorney); *United States v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (sentence reduced because of exceptional adjustment in prison; same statement by BOP Director). The sentence reduction authority was carried forward with slight modifications as part of the Sentencing Reform Act of 1984 Act, with apparently no consideration given to how retaining BOP gatekeeping authority over which cases come before the sentencing court for modification was inconsistent with the larger purposes of the 1984 sentencing reform legislation, including abolishing the authority of back-end administrators to control actual sentence length.

[23] Office of the Inspector General, U.S. Department of Justice, *The Federal Bureau of Prisons Compassionate Release Program* 1 (April 2013) ("We found that, on average, only 24 inmates are released each year through BOP's compassionate release program."); *see also id*. at ii ("[A]lthough the BOP's regulations and Program Statement permit non-medical circumstances to be considered as a basis for compassionate release, the BOP routinely rejects such requests and did not approve a single nonmedical request during the 6-year period of our review.").

[24] Office of the Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* 44 (May 2015) (reporting that BOP filed only two sentence reduction motions for prisoners eligible by virtue of having reached age 65 and having served the longer of 10 years or 75% of their sentence, despite the fact that 529 prisoners fell into this category).

You may well wonder how amendments to the Commission's sentencing reduction policy, which is addressed to courts, would result in BOP more expansively exercising its authority to trigger judicial consideration of resentencing. In the past, the Justice Department has taken the position that BOP is under no obligation to comply with Commission sentence reduction policy.[25] In effect, this position implies that policies for sentence reduction should be set by BOP, not by this Commission. This position seems to me to be inconsistent with both the overall scheme of the 1984 Act, in which Congress made the Commission responsible for developing judicial sentencing policies, and with 28 U.S.C. § 994(t), which specifically directs the Commission to develop a set of "extraordinary and compelling reasons" governing sentence reduction, the only limitation being that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[26]

If the Commission were to develop a narrow but comprehensive and detailed menu of "extraordinary and compelling reasons" warranting judicial consideration of sentence reduction, this full exercise of Commission authority would, in and of itself, discourage BOP from adopting inconsistent policies for the exercise of its gatekeeping function. I would also urge the Commission to consider following the approach of the new Model Penal Code sentence reduction provisions by authorizing the court, upon submission of a BOP motion, to invite the federal prosecutorial office responsible for the prisoner's conviction to represent the Government's interest.[27]

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[25] A letter submitted to the Commission by the Department of Justice dated July 12, 2006, commenting on the Commission's proposed policy implementing § 3582(c)(1)(A)(i), stated that any policy the Commission adopted that was inconsistent with what the letter described as BOP's sentence reduction policy would be treated as a "dead letter." The DOJ letter minced no words in explaining that, because Congress gave BOP the power to control which particular cases will be brought to a court's attention, "it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them."

[26] The inclusion of the word "alone" indicates that rehabilitation is an appropriate consideration in reducing a sentence, along with other changes in a prisoner's circumstances. But this consideration appears nowhere in BOP's policy for administering § 3582(c)(1)(A).

[27] The Commission's issue paper asks (p. 3) whether the Commission should provide that BOP "should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as 'extraordinary and compelling reasons' in § 1B1.13." While it is not clear to me that the Commission has the authority to direct BOP to file motions in particular cases, the law gives the Commission responsibility for devising generally applicable standards that BOP can be held accountable for administering. As former Commissioner John Steer wrote in a 2001 article, "Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section." *See* John R. Steer & Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT'G REP. 154, 157 (2001). In the absence of

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In sum, I believe that principles of determinate sentencing, if not the mandate of § 994(t) itself, requires the Commission to take an active role in developing grounds for sentence reduction due to extraordinary and compelling circumstances. The Commission is certainly not bound by whatever policy BOP has independently developed, and is far better positioned than is BOP to consider what circumstances warrant a reduction in sentence. Indeed, the Commission may well decide—at the conclusion of its usual careful and deliberative process—that the permissible grounds for sentence reduction should not be limited to those set forth in BOP's program statement (illness, disability and advanced age, and family circumstances). It may decide that there are other compelling changes in a prisoner's circumstances that may also make continued incarceration inequitable, such as those proposed by the Practitioners' Advisory Group.[28]

I therefore urge the Commission to taken a broad view of its authority under § 994(t) to describe what constitutes "extraordinary and compelling reasons" for sentence reduction in changed circumstances. Thank you for your consideration.

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specific enforceable guidance from the Commission, BOP frequently decides cases based on considerations relating to the underlying criminal case that are more appropriate for the court than for a corrections agency. *See, e.g.*, Nat Hentoff, *A Slow, Lonely Death in Prison*, January 21, 2016, http://www.cato.org/publications/commentary/slow-lonely-death-prison.

[28] The present Administration has recognized through its clemency initiative the need to have a sentence-reduction procedure in certain cases where a prisoner would receive a lower sentence under current law and policy.