Ketanji Brown Jackson's Record on Sex Offenses

Senate Judiciary Questionnaire

In her Harvard Law Review note entitled "Prevention versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders" (May 1996) (page 77 SJQ attachment).

Key Excerpts:

- "constitutionality of sex offender statues depends upon their characterization as essentially "preventative" rather than "punitive" (page 79 of SJQ attachments (SJQA))
- "Because the Constitution stands as a bulwark against government encroachment on individual liberty, courts should employ a classification standard that 'safeguards the humane interests for the protection of which the [Constitution] was written.'" (page 92 SJQ attachment)
- "This note argues that '[i]n a democracy, where safeguards are built in to protect human dignity, the effect of the sanction rather than the reason for imposing it must necessarily be [that] criterion.'" (pages 92-93 of SJQ attachment)
- "if a sex offender statute deprives an offender of an otherwise-established legal right and primarily operates to affect retribution or general deterrence, it should be deemed "punitive" for constitutional purposes." (page 93 of SJQ attachment)
- "…because individuals need constitutional protection far more when state actions achieve retribution or general deterrence than when its acts accomplish individual reformation or rehabilitation, an analysis that classifies sex offender statutes accordingly is a principled means of evaluating these laws" (page 94 of SJQ attachment)
- "…this Note suggests that such a principled approach involves assessing the impact of sex offender statutes and deeming the laws 'punitive' to the extent that they operate to deprive sex criminals of a legal right…" (page 95 of SJQ attachment)

> Notably, KBJ stated in her Note that "If…a community notification statute deprives the [sex] offender of his right to mobility or bodily integrity and if it makes him the "target of widespread community rejection, antipathy, and scorn" in a manner that is more retributive

than rehabilitative, then it should be considered 'punishment'." (page 94 of SJQ attachment)
    - *Commentary*: The statute would therefore be unconstitutional.

KBJ Early Career

Judge Saris (the district court judge KBJ clerked for right out of law school (1996-1997) stated at KBJ's investiture ceremony that KBJ "**had cases involving constitutional challenges to the sex offender registry**" (page 1038 of SJQ supplemental)

- That case was Doe v. Weld, 954 F.Supp.425 (1996), which was a constitutional challenge to Massachusetts's Megan's Law.
- In her opinion, the judge noted that "Virtually every court that has considered the issue of whether registration is punishment for purposes of the Ex Post Facto Clause has held that it is not." *Doe* at 434.
- Her judge also said, "the public disclosure scheme that currently is applicable to Level One juveniles under Massachusetts's "Megan's Law" is not so punitive in form and effect that it cannot legitimately be considered remedial." *Id*. At 434-435.
- *Commentary: This is essentially a rejection of KBJ's Harvard Law Review Note argument*.

KBJ Tenure at U.S. Sentencing Commission

KBJ served as an Assistant Special Counsel at the US Sentencing Commission (2003-2005) and as Vice Chair & Commissioner from 2010-2014. (page 2 of SJQ)

- She spent twice as much time working at the Commission than anywhere else in her career before coming a judge.

KBJ Statements about Commission work on child porn:

- "The Commission also noted, as a prelude to our Child Porn report, that the mandatory minimums related to certain non-contact sex offenses may be excessively severe and might be applied inconsistently." (Page 1016 SJQA)
- "Child pornography offenses, some of which have lengthy mandatory minimum penalties, are of great interest to the criminal justice community right now."(page 1058 SJQA)
- "The Commission also suggested…more specific reforms to improve the current system of mandatory minimums, including…[c]ertain non-

contact sex offenses may be excessively severe and might be applied inconsistently." (Pages 1092-1093. SJQA)
    - *She's talking about child pornography cases here.*
- "The Commission believes this report will assist in the formulation of possible guideline and other penalty revisions that will bring these guidelines into the 21st century." (page 1214 SJQA)

Background:

- In 2003, Congress passed the PROTECT Act, which established new mandatory minimums for child pornography crimes. Under the PROTECT Act, Congress established new mandatory minimums for penalties for existing offenses, most notably by requiring at least a 5 year sentence for receipt and distribution of child pornography.[1]
- In 2006, Congress again increased existing mandatory minimums for child exploitation crimes in the Adam Walsh Child Protection and Safety Act of 2006.
    - *Commentary: These guidelines already were in "the 21st century" – she just didn't like them.*

"Collision" between Congress and Judiciary over child porn sentences

- At a 2011 event, she commented on the issue of child pornography sentencing: "[I]s this an area in which Congress and the Judiciary are headed for a collision? What, if anything, can the Commission do to bridge the gap between the branches on the question of the appropriate sentences for child pornography offenders?" (page 1270 SJQA)
- *Commentary: This "collision" appears to be one of the Commission and (KBJ's) own making.*
- Reports from the U.S. Courts website show that for 2006-2010, the total number of defendants charged with sex offenses and those charged with sexually explicit material was a very small percentage of the total number of federal crimes charged.

Defendants charged with	2006	2007	2008	2009	2010
Sexually Explicit Material	1184 (1.3%)	1422 (1.6%)	1649 (1.8%)	1842 (1.9%)	1695 (1.7%)
Sex offenses (total)	1925 (2.1%)	2360 (2.7%)	2714 (2.9%)	2913 (3%)	2825 (2.8%)

Drug crime (total)	31356	29935	29035	29961	29660
Immigration crimes (total)	18132	17107	21592	25883	29242
Total crimes	89375	87476	91262	96273	99606

2011 Commission Priorities

- In 2011, while Judge Jackson was Vice Chair, the Commission announced looking at the sentences for child pornography and whether they were too harsh as one of its priority areas.
- The Commission published these priority areas for public comment in January 2011.
- In August 2011, the Commission posted the public comment it received.
- All the "sample citizen letters" the Commission selected and posted on its website support reducing the sentences for child pornography.
- **The only entity that submitted a letter that admonished some sobriety from the Commission was the Justice Department.** In DOJ's letter, the agency wrote that the Commission's "recommendations should ensure that the sentences for child exploitation offenses adequately reflect the seriousness of the crimes and the offenders."
- **She notes that priorities reflect the "Commissioner's own interests"** (page 1273 SJQA)
- Elsewhere she notes that "[p]riorities are identified each cycle (e.g., problem guidelines) and staff members work on "policy development teams" to research and develop alternative proposals." (page1445 of SJQA)

Child pornography sentencing appears to have been a special interest for KBJ

- The other work the Commission engaged in was at the direction of Congress or at the request of the Executive Branch.
- In a speech in November 2010, she highlights that the Commission is working on "responding to six public laws with specific directives to the Commission". (Page 1340 of SJQA).
- The six laws **did not include a directive** to look at child pornography sentencing. They were:
- "The directive to issue a comprehensive report regarding mandatory minimums after Booker in the Matthew Shepard and Jaines Byrd Jr.

Hate Crimes Prevention Act[2] (an enormous undertaking, given the process I described);
- The directive to review and report to Congress on feasibility of new mandatory minimums in the Comprehensive Iran Sanctions, Accountability, and Divestment Act;
- The directive to increase certain specific offense characteristic levels for loss caused by health care fraud in the Patient Protection and Affordable Health Care Act;
- The directive to increase specific offense characteristic levels for securities and bank fraud in the Dodd-Frank Wall Street Reform and Consumer Protection Act;
- The directive that increases and decreases specific offense characteristic levels for activity related to drug-trafficking in the Fair Sentencing Act, as previously described; and
- The directive related to abuse of a position of trust in the Secure and Responsible Drug Disposal Act." (pages 1340-41 of SJQA)

- She noted elsewhere that the Commission was looking at firearms offenses at the request of the Administration and Ambassador to Mexico and the Commission increased penalties for trafficking guns across the US/Mexico border (page 1284 of SJQA)
- *Commentary: the other work of the Commission was done at the request of Congress or the Executive Branch. The child pornography work appears to have been done because the Commission wanted to.*

USSC poll of the federal judiciary on child pornography

- As reported in her SJQ, between January and March 2010, the Commission sent a survey to every federal district court judge[3] regarding their views on sentencing guidelines.[4]
- This poll was done as part of the USSC's work: "To mark the 25th anniversary of the SRA, the Commission sought information from a wide range of persons and groups with a role in the federal criminal justice system about sentencing practices in general and the federal sentencing guidelines in particular." (page 2 of report)
- Note:
    - This survey was not required by law (as opposed to other work of the USSC)
    - The Commission designed the survey and chose what to ask federal judges about

- The Commission was specifically looking to gather data to establish child pornography crimes had too high a mandatory minimum and that the guideline ranges were too high for these crimes.

USSC Sourcebook changed to specifically look at child porn cases

- In her SJQ, she states, "in its fiscal year 2010 sourcebook, the Commission (for the first time) broke out child pornography from other sex offenses in its data analysis."
- 2010 was KBJ's first year on the Commission.

US Sentencing Commission hearing on child pornography sentences

- During a February 2012 hearing in which the Commission was gathering information as part of "a thorough examination of" child-pornography offenses "and the offenders who commit them, including the technological and psychological issues associated with child pornography offenses."
- During this hearing, Jackson suggested to a witness that perhaps some child-pornography offenders were "less serious offenders" because they engaged in child pornography just to see if they could do so as to be part of a group:

> "I guess my thought is . . . that there are people who get involved with this kind of activity who may not be pedophiles who may not be necessarily interested really in the child pornography but have other motivations with respect to the use of the technology and the being in the group and, you know, there are lots of reasons why people might engage in this. And so I'm wondering whether you could say that there is a -- that there could be a less-serious child pornography offender who is engaging in the type of conduct in the group experience level because their motivation is the challenge, or to use the technology? They're very sophisticated technologically, but they aren't necessarily that interested in the child pornography piece of it?"

- The witness (a career DOJ prosecutor) rejected her suggestion and said, “it’s difficult to say that the singular-experience are not dangerous…” (page 427 of transcript)
- She then doubled down on her suggestion saying “[c]ould there be someone who has a lot of experience with Napster and peer-to-peer… and they come into the whole child pornography world at the group experience level?” (page 69 of transcript)
    - The witness (the same career DOJ prosecutor) responded that he had never seen this. (Page 70)
- Another commissioner suggested that “Jackson’s question underscores something we have to struggle with, which is victimization at both ends,” (Page 72 of transcript) as if persons convicted of consuming child pornography were also victims.
- Jackson later said, along the same lines: “I had mistakenly assumed that child pornography offenders are pedophiles.” (Page 130 of transcript)
- The witness (Dr. Gene Abel) replies that she thinks Jackson “ought to keep [her] previous definition” (that child pornography offenders were pedophiles) (page 129-30 of transcript)
- The witness states that “There are individuals who collect. And sometimes they'll collect ten gigs of images, and they won't look at them. They are collectors. **But that's kind of rare**.” (Page 130 of transcript)
- Even though the expert witness says this is rare, the Commission put out its 2012 report and lists as a key finding “The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to **offenders’ collecting behavior** as well as its failure to account fully for some offenders’ involvement in child pornography communities and sexually dangerous behavior.”

Role of the USCC

- In one of her speeches, she notes that the Commission “has been a tireless advocate of change…” (page 1277 SJQA)
- In another speech, she makes clear she knows what Congress laid out as the USSC’s mandate (does not include advocacy). (page 1310 of SJQA)
- In a speech in August of 2010, she characterizes herself as “**a policymaker in the area of criminal sentencing**”
- *Commentary: It is clear KBJ viewed the Commission as an advocacy organization and that the Commission under her leadership became “a tireless advocate of change” for those charged with child pornography offenses.*

Issues with the PROTECT Act and limitations on judicial discretion

- The PROTECT Act was passed in April 2003. KBJ was an Assistant Special Counsel at the USCC from 2003-2005. (Page 2 of SJQ).
- In a March 2011 lecture, she noted, "by the end of the 1990s, there was an increasing perception on Capitol Hill and within D.O.J. that liberal judges were to blame for the downward pressure on federal sentences and that legislation was necessary to reign them in." (page 1323 SJQA).
- She further noted "[s]taffers of Republican members of the House Judiciary Committee drafted a bill that targeted judicial discretion to depart from the sentencing guidelines, and a freshman Republican Representative named Tom Feeney attached the departure-stifling bombshell as a rider to the House version of the Amber Alert bill right before the vote." (pages 1323-24 of SJQA).
- "The Sentencing Commission (l) was prohibited from providing new grounds for downward departures for two years; (2) had to review all authorized downward departures in the guidelines and amend the guidelines to "ensure that the incidence of downward departures are substantially reduced"; and (3) had its fundamental statutory charter amended to provide that "no more than 3 judges could serve on the Commission" at any given time." (Page 1326 SJQA)
- "PROTECT Act story is also about the relationship between Congress and the Commission…Congress undercuts the USSC for the first time!" (page 1328 SJQA)
- "…Congress changed the composition of the Commission itself (limiting judicial involvement)➔ a clear signal that its distrust of the judiciary has spilled over into a distrust of the Commission as the judicial branch agency designed to cabin judicial discretion at sentencing!" (Page 1329 SJQA)

[1] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf
[2] Sec. 4713 of the National Defense Authorization Act for Fiscal Year 2010. The report can be found here.
[3] Abt (their survey contractor) sent the survey to 942 judges and 639 responded to Abt (67.8% response rate)
[4] "In our January 2010 survey of federal judges, about 70 percent of judges responding felt that the guideline range for possession of child

pornography was too high. Similarly, 69 percent thought the guideline range for receipt of child pornography was too high." (Page 1059 of SJQA)