

# How the Obama Administration Used Retroactivity to Advance Its Sentencing Priorities

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A curious thing happened ten minutes into the habeas petitioner's oral argument in *United States v. Welch*.<sup>1</sup> He was told to sit down so that the United States government could argue its case—only its case was the same as the prisoner's. It was an unusual sight. The United States was joining arms with a criminal defendant to argue that a Supreme Court decision striking down part of a sentencing statute should operate retroactively, potentially releasing thousands of federal prisoners serving mandatory minimum terms.

The Obama administration had long criticized many criminal sentences as overly harsh and had taken creative legal paths to fight mass incarceration. Much has been said about these efforts. From overhauling drug sentencing policy to prison reforms to clemency, plenty of ink—whether reporting, praising, or condemning—has been spilled on these very public pronouncements.<sup>2</sup>

But one Executive Branch action that has gone largely overlooked is precisely what the administration did in *Welch*: exploit the executive's privileged role in Supreme Court litigation to achieve an outcome consistent with its criminal justice policy objectives. While prosecutorial discretion is generally viewed as an *ex ante* enterprise, taking pro-defendant positions in retroactivity cases allows the executive to continue exercising its discretion long after convictions have become final. By arguing that new sentencing rules should apply retroactively, the executive can open the door to early release for thousands of federal prisoners. *Welch* was a (successful) example of post-conviction prosecutorial discretion.

But *Welch* was not the whole story. Two other retroactivity cases—*Montgomery v. Louisiana*<sup>3</sup> and *Beckles v. United States*<sup>4</sup>—presented the same opportunity for the Obama administration to advance its criminal jus-

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<sup>1</sup> 136 S. Ct. 1257 (2016).

<sup>2</sup> E.g., Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017); Jeff Sessions, Opinion, *Being Soft on Sentencing Means More Violent Crime. It's Time to Get Tough Again*, WASH. POST (June 16, 2017), [https://www.washingtonpost.com/amhtml/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b\\_story.html](https://www.washingtonpost.com/amhtml/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b_story.html) [https://perma.cc/V6Y2-D923].

<sup>3</sup> 136 S. Ct. 718 (2016).

<sup>4</sup> 137 S. Ct. 886 (2017).

tice agenda. In *Montgomery*, as in *Welch*, the government sided with the habeas petitioner arguing for retroactivity, seeking a ruling that would potentially mandate some two thousand resentencings.<sup>5</sup> But in *Beckles*, the government fought retroactivity, even as it argued that the underlying sentencing regime was unconstitutionally vague.<sup>6</sup> The government's argument in *Beckles* toed a thin line: the (nonbinding) Sentencing Guidelines were important enough to judges' sentencing decisions that they could be void for vagueness, but not so important that a new rule voiding part of the Guidelines would apply retroactively.

Were the administration's positions in the three cases motivated by policy preferences—that is, did the Solicitor General side with the criminal defendants in order to further the administration's preference for shorter (and in its view, fairer) sentences? Or, on the other hand, were the Solicitor General's positions the only correct positions, as a matter of retroactivity doctrine as it stood at the time? We see a middle ground: the government's positions were informed by the administration's sentencing priorities, but the government did not pursue those goals at the expense of doctrinal consistency or without considering the practical consequences of its positions. In other words, the executive did not subordinate its constitutional judgment to its political preference for lighter sentencing.

This Note explains how the government charted this retroactivity path. It proceeds in three parts. Part I traces the divergent sentencing policies of the past four presidential administrations, concluding with a focus on the Obama administration's "smart on crime" agenda and fairer sentencing objectives. Part II then analyzes how the government's approach in two recent retroactivity cases (*Welch* and *Montgomery*) led to "smart on crime" policy outcomes—that is, shorter sentences. Finally, Part III argues that a *third* retroactivity case (*Beckles*) shows that the government's position balanced its sentencing objectives against its constitutional judgment on retroactivity doctrine.

## I. DEPARTMENT OF JUSTICE SENTENCING POLICY FROM 1989 THROUGH THE OBAMA ADMINISTRATION

Attorney General Robert Jackson famously recognized that prosecutors have unparalleled "control over life, liberty, and reputation."<sup>7</sup> He called for prosecutors to temper their "tremendous" discretion with "sportsmanship,"

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<sup>5</sup> Adam Liptak, *Justices Expand Parole Rights for Juveniles Sentenced to Life for Murder*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/us/politics/justices-expand-parole-rights-for-juveniles-sentenced-to-life-for-murder.html> [https://perma.cc/KV9C-3VQE].

<sup>6</sup> Nora Demleitner, *Argument Analysis: Court Wrestles with Vagueness and Retroactivity in Sentencing Context*, SCOTUSBLOG (Nov. 29, 2016), <http://www.scotusblog.com/2016/11/argument-analysis-court-wrestles-with-vagueness-and-retroactivity-in-sentencing-context/> [https://perma.cc/AHY5-QASQ].

<sup>7</sup> Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

“human kindness,” and “humility.”<sup>8</sup> Easier said than done. Each of the past four presidential administrations has translated Jackson’s words into very different policy actions. Since 1989, federal policy on charging and sentencing has yo-yoed—from harsh to lenient and back again.

A. *Sentencing Policy from the Late 1980s to the Early Obama Years*

Our story starts during the tenure of Attorney General Dick Thornburgh under President George H. W. Bush. Thornburgh thought that federal prosecutors were not using the newly enacted Sentencing Guidelines<sup>9</sup> to their full potential. So he set out to give the first definitive guidance on the Guidelines. Writing to his department in 1989, he warned that criminals were receiving “inadequate” sentences.<sup>10</sup> Prosecutors, it seemed, either did not understand the guidelines or ignored them, recreating “the very problems that the guidelines are expected to solve.”<sup>11</sup> Only a straightforward use of the guidelines, Thornburgh averred, would lead to appropriate sentences. The upshot: prosecutors had to charge “the most serious, readily provable offense or offenses consistent with the defendant’s conduct.”<sup>12</sup>

If the ’80s marked a zig, the ’90s were the first zag. Under Attorney General Janet Reno, appointed by President Bill Clinton, federal prosecutors were told to paint with a finer brush. Reno instructed her department to make every charging and sentencing decision based on an “individualized” assessment of the specifics of each case.<sup>13</sup> This focus on the “fit” between the individual criminal defendant and the appropriate criminal charge, Reno promised, was consistent with “a faithful and honest application of the Sentencing Guidelines.”<sup>14</sup>

Not so, countered Attorney General John Ashcroft during the George W. Bush administration. In two Department of Justice (“DOJ”) memos, Ashcroft criticized the pre-Guidelines world in which “seemingly severe sentences” were softened by parole.<sup>15</sup> The Guidelines fixed the problem of lenient sentences—but only to a point. Simply put, too many prosecutors were acquiescing in sentencing judges’ downward departures from the

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<sup>8</sup> *Id.* at 3, 5–6.

<sup>9</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.); *see also* 28 U.S.C. § 991(a) (2012) (creating the U.S. Sentencing Commission); *id.* § 994(b)(1) (instructing the Commission to develop the Guidelines).

<sup>10</sup> Memorandum from Richard Thornburgh, Attorney Gen., to Fed. Prosecutors, 347 (Mar. 13, 1989).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Bluesheet Memorandum from Janet Reno, Attorney Gen., to Holders of U.S. Attorneys’ Manual (Oct. 12, 1993).

<sup>14</sup> *Id.*

<sup>15</sup> Memorandum from John Ashcroft, Attorney Gen., to All Fed. Prosecutors, 1 (Sept. 22, 2003) [hereinafter Ashcroft Charging Memo]; Memorandum from John Ashcroft, Attorney Gen., to All Fed. Prosecutors, 3 (July 28, 2003).

Guidelines. Ashcroft told prosecutors to oppose any downward departures “not supported by the facts and the law.”<sup>16</sup> What’s more, he urged them to deploy all the statutory enhancements in the federal arsenal.<sup>17</sup> The takeaway was Thornburgh on steroids: prosecutors were to charge “the most serious, readily provable offense or offenses that are supported by the facts of the case”—especially those that led to mandatory minimum sentences.<sup>18</sup>

The pendulum swung back once more during the early Obama years. Attorney General Eric Holder, in a 2010 DOJ policy memo, called for a more “even-handed” approach to charging and sentencing.<sup>19</sup> This meant a return to Reno-era individualized assessments of crimes and criminals. “[E]qual justice depends on individualized justice,” he wrote.<sup>20</sup> Thus, prosecutors were to consider each defendant’s unique circumstances.<sup>21</sup> And in every case, prosecutors were to remember the community’s needs.<sup>22</sup> After all, individualized justice was the “smart” thing to do.<sup>23</sup>

Soon, Holder would stake out a position far more radical than Reno-style “individualized assessments.” By 2010, America’s prison population, largely composed of black men, was so staggering that Michelle Alexander dubbed the criminal justice system the nation’s “New Jim Crow.”<sup>24</sup> This view soon took hold in the Obama administration; one commentator, praising a 2015 speech by the President, would write that “[i]t was almost as if Michelle Alexander . . . had hacked [Obama’s] computer and collaborated on his speech.”<sup>25</sup>

### B. Holder Declares War on “The New Jim Crow”

In a 2013 address to the American Bar Association, Holder joined the chorus: the criminal justice system, he declared, was “broken.”<sup>26</sup> The human

<sup>16</sup> *Id.*

<sup>17</sup> Ashcroft Charging Memo, *supra* note 15, at 3.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> Memorandum from Eric H. Holder, Jr., Attorney Gen., to All Fed. Prosecutors, 1 (May 19, 2010) [hereinafter Holder 2010 Memo].

<sup>20</sup> *Id.*

<sup>21</sup> Obama, *supra* note 2, at 825.

<sup>22</sup> Holder 2010 Memo, *supra* note 19, at 1.

<sup>23</sup> *Id.*

<sup>24</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

<sup>25</sup> Michael Eric Dyson, *President Obama’s Racial Renaissance*, N.Y. TIMES (Aug. 1, 2015), [http://www.nytimes.com/2015/08/02/opinion/sunday/president-obamas-racial-renaissance.html?\\_r=0](http://www.nytimes.com/2015/08/02/opinion/sunday/president-obamas-racial-renaissance.html?_r=0) [https://perma.cc/Z85Z-TJU4]; see also Ta-Nehisi Coates, *My President Was Black*, THE ATLANTIC (Dec. 13, 2016), <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/#back> [https://perma.cc/7A9X-CWHY] (“In 2014, the Obama administration committed itself to reversing the War on Drugs through the power of presidential commutation.”).

<sup>26</sup> Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013) [hereinafter Holder Speech], <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [https://perma.cc/Y942-GGTE].

costs of the harsh criminal sentences of the previous decades were incalculable.<sup>27</sup> The state of criminal justice in America, according to the Attorney General, was “shameful.”<sup>28</sup> He called for a solution to the problem of “too many Americans” going to “too many prisons” for “far too long.”<sup>29</sup>

Holder went on to articulate one “common sense change”: reduce sentences. He promised that his department would rethink mandatory minimums, which “generate unfairly long sentences.”<sup>30</sup> The same day that Holder outwardly announced the new policies to the ABA, he laid them out in an internal memo to the Department’s career prosecutors. Like the speech, the memo took aim at mandatory minimums: the Attorney General explained his view that mandatory minimums had resulted in unjust sentences.<sup>31</sup> Going forward, prosecutors were to reserve mandatory minimums for only “serious, high-level, or violent drug traffickers.”<sup>32</sup> For certain drug defendants, Holder told prosecutors not to charge the drug quantity needed for a mandatory minimum sentence.<sup>33</sup> Further, Assistant United States Attorneys (“AUSAs”) were not to seek recidivist enhancements except in extreme cases.<sup>34</sup>

For the most part, Holder’s dim view of mandatory minimums took hold within the DOJ. Two years later, mandatory minimum charges were down by 25%.<sup>35</sup> Perhaps this is because Holder’s mantle was picked up by Obama himself. Obama had been clear that the administration’s “smart on crime” agenda was thanks to “the strong, principled leadership of Eric Holder.”<sup>36</sup> The President clearly liked what he saw, blasting mandatory minimums in a 2015 speech. Echoing Holder, Obama lamented the “broken” criminal justice system “that has locked up too many Americans for too long, especially a whole generation of young black and Hispanic men.”<sup>37</sup> And like Holder, Obama called for Congress to reduce mandatory minimum sentences or abandon them altogether.<sup>38</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Memorandum from Eric H. Holder, Jr., Attorney Gen., to Heads of Dep’t of Justice Components and U.S. Attorneys, 1 (Aug. 12, 2013) [hereinafter Holder 2013 Memo].

<sup>32</sup> *Id.*; see also Obama, *supra* note 2, at 825 (“Holder revised the Department’s charging policies to avoid triggering excessive mandatory minimums for low-level, nonviolent drug offenders.”).

<sup>33</sup> Holder 2013 Memo, *supra* note 31, at 2.

<sup>34</sup> *Id.* at 3; see also Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to Dep’t of Justice Attorneys (Sept. 24, 2014).

<sup>35</sup> Matt Apuzzo, *After Obama Push for Clemency, Hints of Reversal Likely to Come*, N.Y. TIMES (Nov. 22, 2016), [http://www.nytimes.com/2016/11/22/us/politics/obama-commutations-criminal-justice-trump.html?\\_r=0](http://www.nytimes.com/2016/11/22/us/politics/obama-commutations-criminal-justice-trump.html?_r=0) [https://perma.cc/NEB6-D3SA].

<sup>36</sup> Obama, *supra* note 2, at 824 n.53.

<sup>37</sup> Peter Baker, *Obama Calls for Effort to Fix a ‘Broken System’ of Criminal Justice*, N.Y. TIMES (July 14, 2015), <http://www.nytimes.com/2015/07/15/us/politics/obama-calls-for-effort-to-fix-a-broken-system-of-criminal-justice.html> [https://perma.cc/4M3B-RA7T].

<sup>38</sup> *Id.*

A year and a half later, in early 2017, Obama was still deploring the “human toll” of our “failing” criminal justice system.<sup>39</sup> He cheered the DOJ’s more sparing use of charges that triggered mandatory minimum sentences, stressing the prosecutor’s role in escalating and easing sentences.<sup>40</sup> He welcomed the simultaneous decline of both violent crime and the federal prison population.<sup>41</sup> Even so, at the twilight of his presidency, he acknowledged that sentences were still too long and that racial disparities persisted.<sup>42</sup> “How we treat those who have made mistakes,” he concluded, “speaks to who we are as a society and is a statement about our values—about our dedication to fairness, equality, and justice.”<sup>43</sup>

The Obama administration’s policy on mandatory minimums was not without its detractors—even from within the DOJ itself. Soon after Holder’s 2013 “smart on crime” speech, the National Association of Assistant United States Attorneys fired back. In a letter to the Attorney General, the federal government’s line prosecutors defended the mandatory minimum sentence framework as “well-constructed and well worth preserving.”<sup>44</sup> The letter noted that the threat of mandatory minimum sentences helps AUSAs flip conspirators.<sup>45</sup> Mandatory minimums ensure that sentences are uniform and consistent across society.<sup>46</sup> And they hold crime at bay: before mandatory minimums, the nation faced a “crime epidemic,” and violence would soon follow Holder’s sought-after rollback.<sup>47</sup> In sum, the system “strikes the right balance between the need for guided sentencing discretion and the imperative for preserving the huge gains we have made against crime.”<sup>48</sup>

Most of these fears haven’t come to pass. In early 2017, Obama could write that federal prosecutors were using mandatory minimums “more carefully, and the result has been a focus on more serious cases and more signifi-

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<sup>39</sup> Obama, *supra* note 2, at 822.

<sup>40</sup> *Id.* at 824–25 n.53.

<sup>41</sup> *Id.* at 824.

<sup>42</sup> *Id.* at 812–16.

<sup>43</sup> *Id.* at 865–66. The Obama Administration had an economic argument, too. Reducing mass incarceration would save money. See Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, Deputy Attorney General Sally Q. Yates Delivers McNamara Memorial Lecture at Fordham University (Nov. 14, 2016), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-mcnamara-memorial-lecture-fordham> [<https://perma.cc/9K9U-3LXQ>] (“The Justice Department’s prison and detention costs have increased by almost three billion dollars in the past decade alone and now account for roughly one third of the department’s budget.”); see also Timothy Head & Grover Norquist, *The High Costs of Over-Incarceration*, NAT’L REV. (Aug. 13, 2015), <http://www.nationalreview.com/article/422476/high-costs-over-incarceration-timothy-head-grover-norquist> [<https://perma.cc/CN7F-L857>].

<sup>44</sup> Letter from Robert Gay Guthrie, President, Nat’l Ass’n of Assistant U.S. Attorneys, to the Honorable Eric H. Holder, Jr., Attorney Gen. (Jan. 27, 2014), <https://www.naausa.org/site/index.php/resources/letters/41-jan-2014-letter-to-ag-on-mandatory-minimums/file> [<https://perma.cc/3T7V-597K>].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

cant offenders.”<sup>49</sup> Violent crime fell in 2014.<sup>50</sup> Though it increased again in 2015 and 2016, the violent crime rates for those years were the third- and fourth-lowest rates in two decades.<sup>51</sup> In general, the system was working much as before: defendants were pleading guilty and cooperating at the same rates as before “smart on crime.”<sup>52</sup>

### C. “Smart on Crime” and the Already-Incarcerated

Democratic Party veterans got on board with the Obama administration’s reform efforts. Janet Reno, for instance, penned a Foreword to the Brennan Center’s 2014 policy paper, *Federal Prosecution for the 21st Century*. Though she lamented that “many are behind bars for sentences that are too long,” she was hopeful for reform.<sup>53</sup> After all, she wrote, the government could fight crime without increasing the incarceration rate, and Republicans and Democrats were working together toward that goal.<sup>54</sup> But what about those *already* serving mandatory minimum sentences? There were reforms already in the works—focused on reentry, clemency, and retroactivity.

#### 1. Decreasing Mandatory Minimums by Reducing Recidivism.

Often, a mandatory minimum sentence is triggered when an ex-offender recidivates.<sup>55</sup> One way to avoid harsh mandatory minimums, then, is to fight recidivism. The Obama administration did just that. It took steps to eliminate private prisons, where poor conditions led to lower rates of rehabilitation.<sup>56</sup> Similarly, it directed the Bureau of Prisons to put fewer prisoners in solitary confinement, which was “exacerbating mental illness and undermining the goals of rehabilitation.”<sup>57</sup> Because access to education in prison reduces an inmate’s odds of reoffending, the DOJ started a school district

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<sup>49</sup> Obama, *supra* note 2, at 826.

<sup>50</sup> *Crime in the United States 2014*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014> [<https://perma.cc/89L3-JYXL>].

<sup>51</sup> *Crime in the United States 2016*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016> [<https://perma.cc/WVK7-FD6X>]; *Crime in the United States 2015*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home> [<https://perma.cc/8R8U-JC3G>].

<sup>52</sup> Obama, *supra* note 2, at 826. Since the Obama years, the pendulum has swung back again. Attorney General Jeff Sessions has instructed the DOJ to “charge and pursue the most serious, readily provable offense.” Memorandum from the Office of the Attorney Gen., to All Fed. Prosecutors (May 10, 2017) [hereinafter Sessions 2017 Memo]. Of course, this Note’s focus is the strategy pursued during the Obama years.

<sup>53</sup> BRENNAN CENTER FOR JUSTICE, FEDERAL PROSECUTION FOR THE 21ST CENTURY 1 (2014), [https://www.brennancenter.org/sites/default/files/publications/Federal\\_Prosecution\\_For\\_21st\\_Century.pdf](https://www.brennancenter.org/sites/default/files/publications/Federal_Prosecution_For_21st_Century.pdf) [<https://perma.cc/QR83-5MXK>].

<sup>54</sup> *Id.*

<sup>55</sup> *See, e.g.*, 18 U.S.C. § 924(e)(1) (2012).

<sup>56</sup> Obama, *supra* note 2, at 831.

<sup>57</sup> *Id.* at 830.

within the federal prison system.<sup>58</sup> It began to hold halfway houses to higher standards.<sup>59</sup> Finally, because ex-offenders struggle to find jobs after they leave prison—and unemployment leads to recidivism—the Office of Personnel Management “banned the box” for most federal hiring, meaning that job applicants would not be asked about their criminal history.<sup>60</sup>

## 2. Clemency.

While banning the box meant less recidivism and therefore fewer mandatory minimum sentences imposed in the first place, presidential clemency targeted mandatory minimum sentences already imposed. In April 2014, the Obama administration announced the President’s new Clemency Initiative. As Deputy Attorney General James Cole explained, the “older stringent punishments” under mandatory-minimum regimes “are out of line with sentences imposed under today’s laws.”<sup>61</sup> To fix the disparity, the DOJ announced, the President would aggressively use his constitutional power to grant clemency to federal inmates.<sup>62</sup> In his own words, he would “look more systematically” at using clemency “to correct injustices in the system.”<sup>63</sup> The beneficiaries of Obama’s initiative were “bad dudes,” warned President-elect Donald Trump. “They’re walking the streets. Sleep tight, folks.”<sup>64</sup> But that wasn’t strictly true, because Obama was merely reducing sentences—leaving many inmates in prison for years more.<sup>65</sup> In effect, Obama was *retroactively* applying his administration’s more lenient sentencing regime to prisoners sentenced long ago.<sup>66</sup>

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<sup>58</sup> Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Justice Department Announces Reforms at Bureau of Prisons to Reduce Recidivism and Promote Inmate Rehabilitation (Nov. 30, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-reforms-bureau-prisons-reduce-recidivism-and-promote-inmate> [<https://perma.cc/C87R-QPFF>].

<sup>59</sup> Obama, *supra* note 2, at 832; *see also* Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, to Thomas R. Kane, Acting Dir., Fed. Bureau of Prisons (Nov. 30, 2016).

<sup>60</sup> Beth Colbert, “Banning the Box” in Federal Hiring, OFFICE OF PERS. MGMT.: DIR.’S BLOG (Apr. 29, 2016), <https://www.opm.gov/blogs/Director/2016/4/29/Banning-the-Box-in-Federal-Hiring> [<https://perma.cc/G4EK-92PA>].

<sup>61</sup> *Clemency Initiative*, U.S. DEP’T OF JUSTICE (Apr. 23, 2014), <https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/V2S9-LRYM>].

<sup>62</sup> *See id.*; *see also* U.S. CONST. Art. II, § 2.

<sup>63</sup> Obama, *supra* note 2, at 836–38.

<sup>64</sup> Sari Horwitz, *Obama Grants 79 More Commutations to Federal Inmates, Pushing the Total Past 1,000*, WASH. POST (Nov. 22, 2016), [https://www.washingtonpost.com/world/national-security/obama-grants-79-more-commutations-to-federal-inmates-pushing-the-total-past-1000/2016/11/22/1c7b5710-b0db-11e6-840f-e3ebab6bcd3\\_story.html](https://www.washingtonpost.com/world/national-security/obama-grants-79-more-commutations-to-federal-inmates-pushing-the-total-past-1000/2016/11/22/1c7b5710-b0db-11e6-840f-e3ebab6bcd3_story.html) [<https://perma.cc/CP5Y-VBSU>] [hereinafter Horwitz, *Obama Grants 79 More Commutations*].

<sup>65</sup> *Id.*

<sup>66</sup> Gregory Korte, *Obama Grants 98 More Commutations, Setting Single-year Clemency Record*, USA TODAY, (Oct. 27, 2016), <http://www.usatoday.com/story/news/politics/2016/10/27/obama-grants-98-more-commutations/92844186/> [<https://perma.cc/9VRN-YXWL>]; *see also* Kevin Liptak, *Obama Reducing 102 Inmates’ Sentences*, CNN (Oct. 7, 2016), <http://www.cnn.com/2016/10/06/politics/obama-reducing-prison-sentences-announcement/> [<https://perma.cc/EE98-FJQP>] (“Even as Congress has reduced mandatory sentences for certain drug



Obama's technique harkened back to Reno's advice in the nineties: focus on the individual.<sup>67</sup> "[A]t the core," wrote White House Counsel Neil Eggleston, "we must remember that there are personal stories behind these numbers."<sup>68</sup> As Deputy Attorney General Sally Yates put it, "You don't just try to hammer everybody for as long as you can because you can. . . . Your obligation as a prosecutor is to look at the individual's conduct."<sup>69</sup>

By 2016, the Clemency Initiative had borne considerable fruit. In August, Obama commuted the sentences of over 200 people, setting a single-day record.<sup>70</sup> The President eventually commuted over 1000 sentences—more than the previous eleven presidents combined<sup>71</sup>—including 342 life sentences.<sup>72</sup> All told, it was the highest number of commutations by a single President in nearly a century.<sup>73</sup> Obama would later boast of using his "clemency power to a degree unmatched in modern history to address unfairness in the federal system."<sup>74</sup>

Even so, opponents of mandatory minimums were clamoring for more. In the final months of Obama's presidency, a coalition of former judges, prosecutors and organizations such as the NAACP called on Obama to "grant sweeping commutations" to many inmates at once, "without the individual review of each petition."<sup>75</sup> The President did not accept that invitation; indeed, he acknowledged that clemency should not be used en masse as a substitute for legislation.<sup>76</sup> But his administration did take other, more "sweeping" steps to reduce sentences. The best tool for mass reduction of already-imposed sentences wasn't clemency—it was retroactivity.

### 3. *Retroactivity in the Sentencing Commission.*

The scope of Obama's resentencing-via-clemency paled in comparison to the Sentencing Commission's revisions of the Sentencing Guidelines in 2014. Cheered on by the Department of Justice, the Commission reduced sentences for drug offenses—and *applied that reduction retroactively*.<sup>77</sup> The

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crimes, thousands of Americans are still serving long sentences that current law no longer requires.").

<sup>67</sup> See Reno, *supra* note 13; Liptak, *supra* note 66.

<sup>68</sup> Korte, *supra* note 66.

<sup>69</sup> Apuzzo, *supra* note 35.

<sup>70</sup> Matt Ford, *Obama's Historic Day of Clemency*, THE ATLANTIC (Aug. 3, 2016), <http://www.theatlantic.com/news/archive/2016/08/obama-clemency-history/494378/> [https://perma.cc/J8HK-8VNF].

<sup>71</sup> Horwitz, *Obama Grants 79 More Commutations*, *supra* note 64.

<sup>72</sup> Sari Horwitz, *Coalition of Advocates Urges Obama to Expand Clemency Initiative*, WASH. POST (Nov. 29, 2016), [https://www.washingtonpost.com/world/national-security/coalition-of-advocates-urges-obama-to-expand-clemency-initiative/2016/11/29/d8f4b992-b66f-11e6-959c-172c82123976\\_story.html?tid=ss\\_tw&utm\\_term=.6b6e69729b85](https://www.washingtonpost.com/world/national-security/coalition-of-advocates-urges-obama-to-expand-clemency-initiative/2016/11/29/d8f4b992-b66f-11e6-959c-172c82123976_story.html?tid=ss_tw&utm_term=.6b6e69729b85) [https://perma.cc/PCR5-Q9F5] [hereinafter Horwitz, *Coalition of Advocates*].

<sup>73</sup> Coates, *supra* note 25.

<sup>74</sup> Obama, *supra* note 2, at 824.

<sup>75</sup> Horwitz, *Obama Grants 79 More Commutations*, *supra* note 64.

<sup>76</sup> Obama, *supra* note 2, at 835.

<sup>77</sup> Apuzzo, *supra* note 35.

upshot was that nearly 50,000 offenders could have a judge review and possibly reduce their sentences by resentencing them under the new (shorter) sentencing schedules.<sup>78</sup> As Judge Patti Saris, chair of the Sentencing Commission, explained, the amendment “received unanimous support from Commissioners because it is a measured approach . . . . It reduces prison costs and populations and responds to statutory and guidelines changes since the drug guidelines were initially developed, while safeguarding public safety.”<sup>79</sup>

#### 4. *Retroactivity via Congressional Legislation.*

In 2010, Congress passed the Fair Sentencing Act.<sup>80</sup> The law took direct aim at mandatory minimum sentences, lowering mandatory minimums for crack cocaine possession and distribution. This reduced the disparity between sentences for crack and powder cocaine, which had led to racial disparities in sentencing.<sup>81</sup> The White House cheered this legislation; as Obama himself put it, the law combated “excessive and unwarranted punishments.”<sup>82</sup>

After the “Smart on Crime” agenda was announced, the administration pushed for more legislative reforms. Bills supported by the White House were introduced in 2014 and 2015, but both ultimately floundered.<sup>83</sup> Both would have slashed mandatory minimum sentences for drug offenders.<sup>84</sup> And, importantly, both would have made the changes achieved by the Fair Sentencing Act—dramatically reduced mandatory minimums—*retroactive*.<sup>85</sup>

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<sup>78</sup> Press Release, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014), [http://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718\\_press\\_release.pdf](http://www.uscc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf) [<http://perma.cc/BG46-YEN8>] (“The United States Sentencing Commission voted unanimously today at a public meeting to apply a reduction in the sentencing guideline levels applicable to most federal drug trafficking offenders retroactively, meaning that many offenders currently in prison could be eligible for reduced sentences beginning November 2015.”). Sentencing ultimately rests with the judge, and the Sentencing Commission’s reforms depended on judges reducing sentences under the new guideline levels.

<sup>79</sup> *Id.*

<sup>80</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 129 Stat. 192 (codified as amended in scattered sections of 21 and 28 U.S.C.).

<sup>81</sup> See 21 U.S.C. § 844(a) (2012); Obama, *supra* note 2, at 815 (“Working with Congress, my Administration helped secure bipartisan sentencing reform legislation reducing the crack-to-powder-cocaine disparity.”).

<sup>82</sup> Obama, *supra* note 2, at 827.

<sup>83</sup> See Sentencing Reform and Corrections Act, S. 2123, 114th Cong. (2015); Smarter Sentencing Act, S. 1410, 113th Cong. (2014); see also Obama, *supra* note 2, at 827–28 (voicing support for both bills).

<sup>84</sup> See S. 2123 § 101; S. 1410 § 4.

<sup>85</sup> See S. 2123 § 106; S. 1410 § 3(b).

### 5. *Reducing Sentences in State Prisons.*

The administration didn't constrain itself to reducing sentences for already-incarcerated *federal* inmates; it started programs aimed at letting *state* prisoners out sooner, too. The Justice Reinvestment Initiative ("JRI"), launched in 2010, did just that.<sup>86</sup> Through a series of carrots and sticks, JRI pushed states to reduce prison time. As Obama explained, it worked: "Many [states] have found ways to expedite release from prison by expanding parole eligibility, streamlining administrative processes, and implementing or expanding earned time credits that allow individuals in prison to earn time off their sentences for good behavior."<sup>87</sup>

## II. AGGRESSIVE PRO-DEFENDANT RETROACTIVITY POSITIONS IN OCTOBER TERM 2015

Clemency, DOJ-supported retroactivity in the Sentencing Guidelines, and other reforms were not the only tools that the Executive Branch had to reduce sentences for thousands of currently incarcerated federal prisoners. The courts provided another way to retroactively reduce federal sentences. In the last year of Obama's presidency, the government took several unorthodox positions on the retroactive application of sentence-reducing constitutional rulings in three cases: *Montgomery v. Louisiana*,<sup>88</sup> *United States v. Welch*,<sup>89</sup> and *Beckles v. United States*.<sup>90</sup> The government's position in the first two cases—siding with the prisoner asking for a reduced sentence—though unusual, was entirely consistent with the Obama administration's view that thousands of prisoners were serving unduly harsh sentences. Yet the government's position in *Beckles*, where it argued against retroactivity, ran counter to that view. Regardless of whether the government's positions in *Montgomery* and *Welch* were directly influenced by the Obama administration's sentencing-reform objectives, *Beckles* illustrates that the government's position was never dominated by such concerns. Rather, *Beckles* shows that the government's retroactivity arguments were constrained by its own doctrinal interpretations and by the practical costs of resentencing.

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<sup>86</sup> See BUREAU OF JUSTICE ASSISTANCE, JUSTICE REINVESTMENT INITIATIVE, <https://www.bja.gov/programs/justicereinvestment/> [<https://perma.cc/G944-2LB5>]; COUNCIL OF STATE GOVERNORS, THE JUSTICE REINVESTMENT INITIATIVE (February 2016), [https://csgjusticecenter.org/wp-content/uploads/2014/08/JR\\_Fact\\_Sheet.pdf](https://csgjusticecenter.org/wp-content/uploads/2014/08/JR_Fact_Sheet.pdf) [<http://perma.cc/4VAK-SSGP>].

<sup>87</sup> Obama, *supra* note 2, at 846.

<sup>88</sup> 136 S. Ct. 718 (2016).

<sup>89</sup> 136 S. Ct. 1257 (2016).

<sup>90</sup> 137 S. Ct. 886 (2017).

A. *Montgomery v. Louisiana*

In *Montgomery v. Louisiana*, the Supreme Court held that its 2012 decision in *Miller v. Alabama*<sup>91</sup>—prohibiting mandatory life without the possibility of parole sentences for juveniles—announced a new substantive constitutional rule that applied retroactively.<sup>92</sup> That meant that any juvenile homicide offender sentenced to *mandatory* life without parole became eligible for resentencing to allow for consideration of mitigating evidence, including the offender's age at the time of the crime.

Henry Montgomery was exactly such an offender. When he was just seventeen, Montgomery was found “guilty without capital punishment” in 1970 for killing a deputy sheriff in East Baton Rouge, Louisiana.<sup>93</sup> Under Louisiana law, that verdict mandated a sentence of life without parole. The jury was not permitted to consider any mitigation evidence, including Montgomery's age at the time of the crime.<sup>94</sup>

But nearly fifty years later, Montgomery had new hope. The Supreme Court in *Miller v. Alabama* held that states may not impose mandatory life without parole for juvenile homicide offenders under the Eighth Amendment.<sup>95</sup> While *Miller* did not categorically foreclose imposition of a life without parole sentence, it did require that the sentencer consider the minor's “diminished culpability and heightened capacity for change” before doing so.<sup>96</sup> The Court further explained that only those children whose crimes reflect “irreparable corruption” should be subject to a life sentence.<sup>97</sup> Though *Miller* no doubt applied prospectively, the question in *Montgomery* was whether someone like Henry Montgomery—whose sentence had long become final—could take advantage of *Miller*'s new rule.

The *Montgomery* majority held that they could. The Court reached this answer after applying its retroactivity doctrine, as embodied in *Teague v. Lane*<sup>98</sup> and its progeny. *Teague* established a presumption *against* the retroactivity of new constitutional rules of criminal procedure.<sup>99</sup> But that presumption is subject to two important exceptions: one for rules that qualify as new *substantive* rules of constitutional law and another for rules that qualify as “watershed rules of criminal procedure.”<sup>100</sup>

For the purposes of *Montgomery* and this Note, only the first exception matters. *Miller* could apply retroactively only if the Court found that it an-

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<sup>91</sup> 567 U.S. 460 (2012).

<sup>92</sup> *Montgomery*, 136 S. Ct. at 737.

<sup>93</sup> *Id.* at 725 (quoting *State v. Montgomery*, 242 So. 2d 818 (La. 1970)).

<sup>94</sup> *Id.* at 726.

<sup>95</sup> *See* 567 U.S. 460.

<sup>96</sup> *Id.* at 479.

<sup>97</sup> *Id.* at 479–80.

<sup>98</sup> 489 U.S. 288 (1989).

<sup>99</sup> *Montgomery*, 136 S. Ct. at 728.

<sup>100</sup> *Teague*, 489 U.S. at 311.

nounced a new substantive constitutional rule.<sup>101</sup> New substantive rules include decisions that prohibit criminal sanctions for certain primary conduct *as well as* decisions that prohibit a certain punishment for a class of defendants. In sum, substantive rules “set forth constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose.”<sup>102</sup> (By contrast, a rule is merely procedural if it “regulate[s] only the *manner of determining* the defendant’s culpability.”<sup>103</sup>)

The Court held that *Miller* announced a new substantive constitutional rule because it prohibited a certain punishment (life imprisonment without parole) for a class of defendants—hazily defined as “all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.”<sup>104</sup> Thus, even though *Miller* did not *per se* prohibit the imposition of life-without-parole sentences on juvenile offenders, *Miller* still announced a substantive rule because it proscribed that punishment for *most* juveniles. The Court explained: “The fact that life without parole could be a proportionate sentence” for an “irreparabl[y] corrupt[ ]” juvenile “does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.”<sup>105</sup>

Justice Scalia, joined by Justices Thomas and Alito, dissented.<sup>106</sup> Justice Scalia argued that *Miller* could not be substantive because *Miller* itself

<sup>101</sup> Before getting to that question on the merits, however, the Court first had to address whether *Teague*—which interpreted a federal habeas *statute* and not the Constitution—nevertheless announced a constitutional rule that was binding on state courts. (*Montgomery* arose from a state collateral review proceeding.) Only then would a federal question arise, giving the Court jurisdiction to decide the case. The Court held that *Teague* did announce a constitutional rule and therefore required *state* (in addition to federal) courts to apply its rules retroactively when a federal constitutional question was at issue. *Teague*, the Court concluded, is “best understood as resting upon constitutional premises,” and that, with respect to substantive rules in particular, *Teague* announced a “constitutional command . . . binding on state courts.” *Montgomery*, 136 S. Ct. at 729.

Why was the Court so sure that *Teague* announced a constitutional doctrine? Its reasoning was somewhat opaque, but the Court’s conclusion seemed to flow from the Supremacy Clause. “If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.” *Montgomery*, 136 S. Ct. at 731–32 (internal quotation marks and citations omitted). The Court expressly left unanswered whether the “watershed procedural rules” exception is a similar constitutional command.

<sup>102</sup> *Montgomery*, 136 S. Ct. at 729.

<sup>103</sup> *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004).

<sup>104</sup> *Montgomery*, 136 S. Ct. at 734.

<sup>105</sup> *Id.*

<sup>106</sup> The dissent spent much of its time attacking the majority’s jurisdictional analysis. Justice Scalia was characteristically scathing, charging that the majority “created jurisdiction by ripping *Teague*’s first exception from its mooring, converting an equitable rule governing federal habeas relief to a constitutional command.” *Id.* at 742–43 (Scalia, J., dissenting).

stated, quite clearly, precisely the opposite: ‘Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer *follow a certain process*—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.’<sup>107</sup>

That single line—the Court insisting in *Miller* that its decision does not “categorically bar a penalty for a class of offenders”—resolved this case for the dissent.

Justice Scalia was not at all persuaded by the majority’s contrary contention that *Miller*, by rendering life without parole sentences disproportionate for *most* juveniles, nevertheless qualified as a substantive rule: “[T]o say that a punishment might be inappropriate and disproportionate for certain juvenile offenders is not to say that it is unconstitutionally void. All of the statements relied on by the majority do nothing more than express the *reason* why the new, youth-protective *procedure* prescribed by *Miller* is desirable: to deter life sentences for certain juvenile offenders.”<sup>108</sup> The dissent saw no principled reading of *Miller* that could render it substantive. “It is plain as day that the majority is not applying *Miller*, but rewriting it.”<sup>109</sup>

The federal government, though not a party in *Montgomery*, joined in the argument as *amicus curiae*. The Solicitor General’s brief urged that *Miller* was substantive and therefore retroactive, but on a slightly different ground than the Court’s ultimate decision. The government argued that *Miller*’s “primary effect is substantive: it forecloses mandatory life-without-parole sentences for juvenile homicide offenders, *thereby expanding the range of possible sentencing outcomes*. That makes the *Miller* rule substantive under *Teague*.”<sup>110</sup> For the government, the key was not only that *Miller* outlawed mandatory life without parole for juveniles, but also that such a ruling had the effect of *expanding* possible sentencing outcomes.

Justice Sotomayor picked up on the fact that the government took a slightly different tack on the retroactivity question, though Deputy Solicitor General Michael Dreeben downplayed the distinction at oral argument.<sup>111</sup> But the difference was real. The government’s brief even admitted it was making a somewhat unusual argument, noting that the Court had never before found a rule substantive because it expanded sentencing outcomes rather than limiting them.<sup>112</sup> But the government pressed forward because

<sup>107</sup> *Id.* at 743 (quoting *Miller v. Alabama*, 567 U.S. 460, 483 (2012)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280) [hereinafter *Montgomery* Government Brief] (emphasis added).

<sup>111</sup> See Transcript of Oral Argument at 33–34, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (No. 14-280).

<sup>112</sup> *Montgomery* Government Brief at 16.

“the Court’s descriptions of substantive and procedural rules support categorizing an outcome-expanding rule as substantive.”<sup>113</sup> Pushed on this point at oral argument, Dreeben opined:

I think that if you trace back the origins of the substantive category, to Justice Harlan’s opinion in *Mackey*, this is still faithful to what Justice Harlan had in mind. Justice Harlan said the clearest case of an injustice in not applying a rule retroactively is when it puts off-limits altogether criminal punishment. He did not say that it was the only case.<sup>114</sup>

One possible explanation for the government’s emphasis on the *expansion of outcomes* argument (though not given in the briefing or at oral argument) is that the Solicitor General foresaw and perhaps wished to avoid vulnerability to the sharp critiques that would later comprise Justice Scalia’s dissent. Recognizing, as the dissent emphasized, that *Miller* did not *categorically* bar the imposition of life without parole, the Solicitor General found a creative way around this problem. The government conceded that *Miller* did not categorically *bar* a specific punishment for juvenile offenders, but argued that *Miller* did categorically mandate that the sentencer consider the viability (and superiority) of alternative punishments. In this way, *Miller* fits nicely with the Obama administration’s pronouncements that sentences should be more “individualized,” given that *Miller* expanded the range of possible “fits” for each defendant. In any case, though the Court arrived at the government’s preferred result, it did not embrace the government’s reasoning.

The government’s argument was novel in part because, prior to *Montgomery*, the Court had only twice classified a rule as substantive under the *Teague* framework<sup>115</sup>—once when it barred the death penalty for those with intellectual disabilities,<sup>116</sup> and again when it narrowed a criminal statute’s scope by reinterpreting its terms.<sup>117</sup> *Miller* did not involve a statutory interpretation question, so the second case offered no analytical help to the question in *Montgomery*. Nor did *Miller* categorically bar the imposition of life without parole sentences for juveniles in the same way that *Atkins v. Virginia*, the first case, categorically barred the death penalty for those with

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<sup>113</sup> *Id.*

<sup>114</sup> Transcript of Oral Argument at 34, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

<sup>115</sup> This is not necessarily to suggest *Teague*’s test for substantive rules is unduly prohibitive, since some of the Court’s landmark cases have announced obviously substantive rules—rules that simply haven’t been put to the *Teague* test. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (forbidding the death penalty for minors under the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state sodomy laws under the Fourteenth Amendment).

<sup>116</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989) (making clear that the rule later announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), would be substantive and therefore apply retroactively).

<sup>117</sup> *Bousley v. United States*, 523 U.S. 614 (1998).

intellectual disabilities. Scanning this pre-*Montgomery* landscape, it is clear that the Court's substantive rules jurisprudence in no way compelled the holding that *Miller* ought to apply retroactively.<sup>118</sup>

But the government made that argument anyway. And it did so based on reasoning that, had the Court accepted it, could have radically expanded the range of rules that qualified as substantive under *Teague*. The archetypal substantive rule is one that either “forbid[s] criminal punishment of certain primary conduct” or that “prohibits a certain category of punishment for a class of defendants because of their status or offense.”<sup>119</sup> The government wanted to add a third category (or perhaps an off-shoot of the second): rules that mandate the expansion of possible punishments, even if they do not categorically bar the imposition of any single punishment.

It is worth pausing to consider the implications of the government's argument. If new Supreme Court rules requiring a sentencer to consider other punishments were retroactive, theoretically *any* decision invalidating mandatory minimums could be substantive and therefore retroactive. Such rules do not cut off the possibility that the very same sentence will be imposed, but they do require the sentencer to consider other punishments beforehand. The Court in *Montgomery*, however, found a far more conventional path to making *Miller* retroactive, quoting from its earlier retroactivity cases to emphasize that substantive rules are those that take punishments *off* the menu, not ones that add to it.<sup>120</sup>

But apart from the content of the government's retroactivity argument, the fact that the United States was urging retroactivity was noteworthy. As Obama wrote, “state and local justice systems tend to have a far broader and more pervasive impact on the lives of most Americans,” so any attempt to fight mass incarceration had to include the states.<sup>121</sup> *Montgomery* offered one way to do so: the Solicitor General's intervention represented an aggressive deployment of the federal executive's appellate power in a manner consistent with the Obama administration's desired sentencing policy outcomes—at the *state* level.<sup>122</sup> The federal government was not a party to the case, yet it submitted extensive briefing on both the jurisdiction and merits questions and participated in oral arguments.<sup>123</sup> And with its foot in the door, the gov-

<sup>118</sup> *The Supreme Court, 2015 Term—Leading Cases*, 130 HARV. L. REV. 307, 377–86 (2016).

<sup>119</sup> *Penry*, 492 U.S. at 330.

<sup>120</sup> *See Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (quoting *Penry*, 492 U.S. at 330).

<sup>121</sup> Obama, *supra* note 2, at 815–16.

<sup>122</sup> Was the Solicitor General's conduct in *Montgomery* consistent with federalism principles? After all, determining prison sentences is a core state police power. Unfortunately, the federalism question is beyond the scope of this Note, but it should be a source of further scholarship. *See infra* pp. 34–35.

<sup>123</sup> In its prefatory “interest of amicus” statement, the government justified its participation on the ground that it had “identified at least 27 federal prisoners serving mandatory life sentences” for juvenile homicide offenses and claimed a “substantial interest in whether *Miller* applies retroactively to these defendants.” *Montgomery* Government Brief at 1.



ernment indulged in a creative interpretation of *Miller* and advanced a theory of substantive rules that was totally foreign to the Court's jurisprudence.

The government's desired outcome in *Montgomery*, of course, was fully consistent with the Obama administration's sentencing priorities. If the Obama administration believed that "widespread incarceration at the federal, state, and local levels" imposes "unsustainable" economic burdens and "human and moral costs that are impossible to calculate," then urging *Miller*'s retroactivity was one small step toward reversing that damage.<sup>124</sup> The result in *Montgomery* meant that more than 2000 inmates across the country became eligible for resentencing.<sup>125</sup> Some of those inmates, in the Obama administration's view, may well have counted among the "too many Americans [who] go to too many prisons for far too long."<sup>126</sup> Indeed, the government's effort in *Montgomery* was in keeping with what the Obama administration had done through clemency, where 342 inmates serving life sentences had their sentences commuted.<sup>127</sup> On this view, *Montgomery* stands as the first example of the Obama administration's use of post-conviction prosecutorial discretion. By bringing to bear the Solicitor General's appellate advocacy power, the administration helped to capture a symbolic victory in accord with its publicly-stated sentencing objectives. *Montgomery* was followed, almost immediately, by *United States v. Welch*.

### B. United States v. Welch

The seeds of the retroactivity debate in *United States v. Welch* were sown in the Armed Career Criminal Act ("ACCA"). ACCA subjects a felon who possesses a firearm to up to ten years in prison.<sup>128</sup> But if the felon has three prior convictions for "violent felonies" or serious drug offenses, the sentence shoots up to a mandatory minimum of fifteen years.<sup>129</sup> At least five years of freedom hinge, then, on whether a prior conviction is for a "violent felony." Some violent felonies, such as burglary and arson, are listed in the statute.<sup>130</sup> But ACCA also defines violent felony as any crime that "involves conduct that presents a serious potential risk of physical injury to another."<sup>131</sup> This catch-all is known as the "residual clause."<sup>132</sup>

Over the last ten years, the Supreme Court has struggled to articulate which crimes "involve[ ] conduct that presents a serious potential risk of

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<sup>124</sup> Holder Speech, *supra* note 26, at 4.

<sup>125</sup> Matt Ford, *A Retroactive Break for Juvenile Offenders*, THE ATLANTIC (Jan. 26, 2016), <http://www.theatlantic.com/politics/archive/2016/01/montgomery-alabama-supreme-court/426897/> [https://perma.cc/Z73C-CFWE].

<sup>126</sup> Holder Speech, *supra* note 26.

<sup>127</sup> Horwitz, *Coalition of Advocates*, *supra* note 72.

<sup>128</sup> 18 U.S.C. § 922(g) (2016); *id.* § 924(a)(2).

<sup>129</sup> *Id.* § 924(e)(1).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2552 (2015).

physical injury to another.” Attempted burglary counts.<sup>133</sup> So does vehicular flight from a police officer.<sup>134</sup> But drunk driving does not,<sup>135</sup> and neither does failing to report to a penal institution.<sup>136</sup>

This unpredictability did not sit well with Justice Scalia. “We try to include an ACCA residual-clause case in about every second or third volume of the United States Reports,” he lamented.<sup>137</sup> Each “ad hoc judgment” was bound to simply “sow further confusion.”<sup>138</sup> Instead, in dissent after dissent, Justice Scalia called for the Court to hold that the residual clause was void for vagueness.<sup>139</sup>

Undeterred, the Court in 2014 granted certiorari to decide whether possession of a short-barreled shotgun was a violent felony under the residual clause.<sup>140</sup> That was the rather conventional question originally briefed by the parties in *Johnson v. United States* in the summer of 2014 and argued that November.<sup>141</sup>

But then the Court added a twist. In early 2015, it asked for another round of briefing and argument—this time, on the question of whether the residual clause was unconstitutionally vague.<sup>142</sup> The Court seemed poised—at the urging of Justice Scalia, no doubt—to find a criminal statute void for vagueness for the first time in over a decade.<sup>143</sup>

In June 2015, the Court did just that. In an opinion by Justice Scalia, the Court held that the residual clause was “so vague that it fails to give ordinary people fair notice of the conduct it punishes,” violating the Due Process Clause.<sup>144</sup>

According to the Court, two flaws doomed the residual clause. First, the clause gave courts the impossible task of imagining the “ordinary case” of a given crime. To decide whether a prior conviction satisfied the residual clause, a sentencing court had to analyze the statute under which the defendant was convicted and ask whether the abstract, “ordinary case” of violating that statute—not the defendant’s actual conduct—would satisfy the

<sup>133</sup> *James v. United States*, 550 U.S. 192, 209 (2007).

<sup>134</sup> *Sykes v. United States*, 564 U.S. 1, 8–9 (2011).

<sup>135</sup> *Begay v. United States*, 553 U.S. 137, 148 (2008).

<sup>136</sup> *Chambers v. United States*, 555 U.S. 122, 130 (2009).

<sup>137</sup> *Sykes*, 564 U.S. at 28 (Scalia, J., dissenting).

<sup>138</sup> *Id.*

<sup>139</sup> *E.g., id.; James*, 550 U.S. at 229–31 (Scalia, J., dissenting).

<sup>140</sup> *Johnson v. United States*, 134 S. Ct. 1871 (2014) (mem.) (granting certiorari).

<sup>141</sup> *See, e.g.*, Brief of Petitioner Samuel James Johnson, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120).

<sup>142</sup> Rory Little, (*Re-Argument Preview: Is Possession of a Sawed-Off Shotgun a “Violent Felony”?* *The Government is Not Going Down Without a Fight*, SCOTUSBLOG (Apr. 17, 2015, 11:00 AM), <http://www.scotusblog.com/2015/04/re-argument-preview-is-possession-of-a-sawed-off-shotgun-a-violent-felony-the-government-is-not-going-down-without-a-fight/> [<https://perma.cc/F43P-GYPB>].

<sup>143</sup> *The Supreme Court, 2014 Term—Leading Cases*, 129 HARV. L. REV. 181, 307 n.65 (2015).

<sup>144</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

residual clause's requirement of a serious risk of physical injury.<sup>145</sup> But how was a court to decide what kind of conduct is "ordinary" for a certain crime—with a survey, gut instinct, or Google?<sup>146</sup> "The residual clause offer[ed] no reliable way to choose between these competing accounts" of what counts as an "ordinary" crime.<sup>147</sup>

Second, the residual clause required courts to estimate the *risk* of the imagined, ordinary crime. But it never told them how much risk is a "serious potential" risk.<sup>148</sup> "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."<sup>149</sup>

With the residual clause void for vagueness, *future* offenders would not be subject to the fifteen-year mandatory minimum it imposed. But the question quickly became: did the ruling apply retroactively, to prisoners sentenced under the residual clause before *Johnson*? As in *Montgomery*, the answer turned on the application of *Teague* retroactivity. And as in *Montgomery*, the DOJ took the side of the prisoner.

The stakes were incredibly high. Over 6000 federal prisoners were serving time under ACCA.<sup>150</sup> All stood to have their mandatory minimum sentences reviewed to see whether their sentences could still be imposed under an ACCA provision *other than* the (now void) residual clause and, if not, to have their sentences reduced—a core Obama administration policy goal. And hundreds had already served the ten-year *maximum* that could be imposed after *Johnson*.<sup>151</sup> If their prior convictions did not fit under any ACCA provision other than the residual clause, then applying *Johnson* retroactively would let those prisoners out immediately.<sup>152</sup>

Gregory Welch was one of many ACCA prisoners who sought to take advantage of *Johnson*. In 1996, Welch punched a man in the mouth and

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<sup>145</sup> *Id.* at 2557. Compare this task (finding the statute of the prior conviction, picturing the "ordinary case" of violating that statute, and deciding whether that ordinary case involves a serious risk of physical injury) with the side-by-side comparison of statutes in the deportation context. Under immigration law's "categorical approach," courts "examine the statute under which an alien was convicted and ask whether the *minimum* conduct the statute reaches"—*not* the *ordinary* case—"is also covered by a federal statute mandating deportation. If so, the two statutes are a categorical match, and the alien qualifies for deportation." *The Supreme Court, 2015 Term—Leading Cases*, 130 HARV. L. REV. 307, 477 (2016).

<sup>146</sup> *Johnson*, 135 S. Ct. at 2557 (citing *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

<sup>147</sup> *Id.* at 2558.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson's Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 56 (2015).

<sup>151</sup> Lyle Denniston, *Court to Decide Johnson Retroactivity*, SCOTUSBLOG (Jan. 8, 2016, 3:00 PM), <http://www.scotusblog.com/2016/01/court-to-decide-johnson-retroactivity/> [<https://perma.cc/A863-NM8P>].

<sup>152</sup> *Id.*

grabbed a gold bracelet from his wrist.<sup>153</sup> He was convicted in a Florida court of strong-arm robbery, which punished taking property with “the use of force, violence, assault, or putting in fear.”<sup>154</sup>

Fast forward fourteen years. In 2010, police searched Welch’s apartment while investigating the robbery of a convenience store.<sup>155</sup> They found Welch on his bed, talking on a cell phone, smoking a joint, and holding a baby.<sup>156</sup> They discovered his gun in the attic and charged him as a felon in possession of a firearm under ACCA.<sup>157</sup> Both the district and circuit courts agreed that his prior strong-arm robbery conviction was a violent felony under the residual clause.<sup>158</sup> Welch got fifteen years—the mandatory minimum.<sup>159</sup>

After *Johnson*, many ACCA prisoners, including Welch, challenged their sentences. The United States government didn’t put up a fight, agreeing that *Johnson* should be retroactive and that prisoners sentenced under the residual clause were entitled to resentencing.<sup>160</sup> So when Welch’s case finally made it to the Supreme Court, the Court had to appoint an amicus to argue that *Johnson* was not retroactive.<sup>161</sup>

The government sided with Welch because, in its view, *Johnson* announced a “substantive, penalty-restricting constitutional rule” and therefore had to be retroactive.<sup>162</sup> Retroactivity, the government argued, depended on whether the rule had a substantive or procedural *effect*—not whether the rule derived from a substantive or procedural constitutional guarantee (such as the Due Process Clause).<sup>163</sup> The effect of the *Johnson* rule was substantive: “Because the holding of *Johnson* alters the statutory boundaries of permissible sentences that a court may impose under the ACCA, it falls within this Court’s established framework for identifying substantive rules.”<sup>164</sup> In other words, *Johnson* disallowed a type of punishment (fifteen years to life in prison) for a class of prisoners (those qualifying as armed career criminals thanks to the residual clause).<sup>165</sup>

To check its work, the government showed that *Johnson* wasn’t procedural. Procedural rules “merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted other-

<sup>153</sup> Welch v. United States, 136 S. Ct. 1257, 1262 (2016).

<sup>154</sup> FLA. STAT. § 812.13(1) (1994).

<sup>155</sup> United States v. Welch, 683 F.3d 1304, 1306 (11th Cir. 2012).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1306–07.

<sup>158</sup> *Id.* at 1307, 1313–14.

<sup>159</sup> *Id.* at 1306–07.

<sup>160</sup> See Price v. United States, 795 F.3d 731, 732 (7th Cir. 2015) (“We invited the government to respond, and it has done so. We now conclude, consistently with the government’s position, that *Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions.”); *In re Rivero*, 797 F.3d 986, 993 n.1 (11th Cir. 2015) (Pryor, J., dissenting) (noting the government’s position in *Price*).

<sup>161</sup> Welch v. United States, 136 S. Ct. 1257, 1263 (2016).

<sup>162</sup> Brief of Respondent United States at 25, Welch, 136 S. Ct. 1257 (No. 15-6418).

<sup>163</sup> Reply Brief of Respondent United States at 2, Welch, 136 S. Ct. 1257 (No. 15-6418).

<sup>164</sup> *Id.* at 12.

<sup>165</sup> Brief of Respondent United States at 25–26, Welch, 136 S. Ct. 1257 (No. 15-6418).

wise.”<sup>166</sup> But after *Johnson*, there is no way that Gregory Welch’s sentence “may still be accurate” despite an error in his sentencing procedure; *Johnson* “eliminate[d] the possibility” of imposing Welch’s fifteen-year sentence to the next Gregory Welch because the *maximum* lawful sentence without the violent felony enhancement is 10 years.<sup>167</sup> (Recall that the residual clause or any other mandatory minimum-triggering provision of ACCA means the difference between a ten-year *maximum* and a fifteen-year *minimum*.) “The effect of *Johnson* is not to impose a higher burden of proof, alter the admissible evidence, or change the factfinder—classic procedural rules. Rather, *Johnson*’s effect is to strike the residual clause entirely as void for vagueness.”<sup>168</sup>

By way of illustration, the government pointed to the exact same residual clause language in the Sentencing Guidelines—the provision that would eventually drive the litigation in *Beckles*. A rule that invalidated the clause in the Guidelines, the government contended, would be procedural.<sup>169</sup> That’s because a finding that a defendant satisfied the Guidelines’ residual clause never bound a court to any sentencing range. Instead, the Guidelines are only “part of the *process* for imposing sentence, rather than a set of substantive rules that alter the statutory boundaries of sentencing.”<sup>170</sup> (This would become the government’s central anti-retroactivity argument in *Beckles*.)

The *Welch* Court accepted the government’s arguments. *Johnson* was substantive: before *Johnson*, the fifteen-year mandatory minimum “applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause.”<sup>171</sup> But after *Johnson*, the same exact person “faces at most 10 years in prison.”<sup>172</sup> *Johnson* thus affected the “reach” of ACCA, not the “judicial procedures” or “methods” by which ACCA is applied.<sup>173</sup>

Gregory Welch, the United States, and seven Justices were all in agreement. But the case was not so clear-cut, as Justice Thomas’s dissent demonstrates. After all, for a rule to apply retroactively, it must “place particular conduct or persons covered by the statute *beyond the State’s power to punish*.”<sup>174</sup> For instance, *Schriro v. Summerlin* classified as procedural a rule that the jury must find every fact necessary to impose the death penalty.<sup>175</sup> That

<sup>166</sup> Reply Brief of Respondent United States at 6, *Welch*, 136 S. Ct. 1257 (No. 15-6418) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)).

<sup>167</sup> Brief of Respondent United States at 27–28, *Welch v. United States*, 136 S. Ct. 1257 (No. 15-6418).

<sup>168</sup> *Id.* at 28.

<sup>169</sup> *See id.* at 38 n.9.

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> *Welch*, 136 S. Ct. at 1265.

<sup>172</sup> *See id.*

<sup>173</sup> *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

<sup>174</sup> *Id.* at 1271 (Thomas, J., dissenting) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)) (emphasis added).

<sup>175</sup> *Id.* at 1272 (quoting *Schriro*, 542 U.S. at 353–54).

was because the prove-it-to-a-jury holding didn't change the "range of conduct a State may criminalize."<sup>176</sup> As Justice Thomas pointed out, *Johnson* did not "preclude the Government from prohibiting particular conduct or deem any conduct constitutionally protected."<sup>177</sup> Yes, Congress must clarify precisely what conduct amounts to a violent felony.<sup>178</sup> But assuming it speaks with more precision, *Johnson* doesn't put any conduct beyond Congress's ability to punish.

In sum, *Welch* was much like *Montgomery*—a close constitutional issue in which the government took an unorthodox position by siding with a prisoner. As in *Montgomery*, the government eschewed colorable arguments against retroactivity. And as in *Montgomery*, thousands stood to have their sentences reduced once the government's post-conviction prosecutorial discretion won in court.

### C. Why the Solicitor General's Pro-Defendant Positions Matter

Why is the Solicitor General's support of the criminal defendants in these cases so significant? For several reasons. First, and most importantly, the Solicitor General usually wins—whether arguing as a direct party or as an amicus curiae. Second, the Solicitor General's choice in *Montgomery* and *Welch* to side with criminal defendants is exceedingly rare. And third, the Solicitor General's office aligning itself with criminal defendants is particularly important because those defendants usually lack expert counsel before the Court. Thus, they have the most to gain from the support of some of the most experienced Supreme Court advocates in the country. In sum, when the government throws its appellate litigation might behind criminal defendants, it dramatically alters the playing field: an almost-always losing case suddenly becomes winnable.

To begin, the Solicitor General usually gets what it wants. One systematic examination of the Rehnquist Court era revealed that the Solicitor General won over 62% of all cases in which the United States was a party and more than 66% of those where the Solicitor General acted as amicus curiae.<sup>179</sup> Another survey spanning multiple decades found that as petitioner or as an amicus supporting petitioners, the Solicitor General won 75% of cases, while ordinary petitioners won just 61% of the time.<sup>180</sup> And as respondents, the Solicitor General won 52% of the time, compared to a success rate of

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<sup>176</sup> *Id.* (quoting *Schriro*, 542 U.S. at 353–54).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* (4th ed. 2007).

<sup>180</sup> Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1494 (2008) (citing Corey A. Ditslear, Office of the Solicitor General Participation Before the U.S. Supreme Court: Influences on the Decisionmaking Process 32 (2003) (unpublished Ph.D. dissertation, The Ohio State University) (on file with author)).

just 35% for respondents without Solicitor General support.<sup>181</sup> The Solicitor General's influence as an amicus is particularly pronounced: A "petitioner's chances of winning increase by an average of 17% if supported by an amicus brief filed by the Solicitor General and decrease by an average of approximately 26% if the Solicitor General instead files an amicus brief in support of respondent."<sup>182</sup> Data like this lead scholars like Professor Andrew Crespo to conclude that "[t]he influence that the Solicitor General wields before the Court cannot be overstated."<sup>183</sup>

What might explain that influence? Beyond the fact that its "client—the United States of America—is inherently *sui generis*," other factors abound, including the Solicitor General's repeat player status.<sup>184</sup> The Solicitor General has a "wholly unique, decades-long history with the Court as an institution" and therefore enjoys a trust that few, if any, other advocates could claim.<sup>185</sup> That familiarity, Crespo argues, is critical: "Because the S.G. so reliably provides the bench with information about the state of the law, the S.G. is easily able to secure the support of the justices."<sup>186</sup> Crespo highlights another important explanation for the Solicitor General's Supreme Court success: subject-matter expertise. Indeed, Deputy Solicitor General Michael Dreeben is "known informally as the 'criminal deputy'" and handles almost exclusively criminal law cases, including *Montgomery*, *Welch*, and *Beckles*.<sup>187</sup> In Dreeben's 27 years with the Solicitor General's office, he has become the second most experienced Supreme Court lawyer in the country,<sup>188</sup> establishing himself as one of the very best in the process.<sup>189</sup>

But what makes the Solicitor General's choice in *Montgomery* and *Welch* so remarkable is that the Solicitor General's startling advantage in the Supreme Court is rarely put to use in service of criminal defendants. Crespo reports that the Solicitor General participates as a party (in federal prosecutions) or an amicus (in state prosecutions) in 72% of the criminal cases before the Supreme Court.<sup>190</sup> And whether a party or an amicus, the Solicitor General "virtually always argues in opposition to the criminal defendant;"

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1494–95 (citing Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 803–04 (2000)).

<sup>183</sup> Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 2014 (2016).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 73 (2005).

<sup>187</sup> Crespo, *supra* note 183, at 2014–15.

<sup>188</sup> *Id.* at 2015.

<sup>189</sup> Tony Mauro, *Justices Praise DOJ's Dreeben After Contentious 100th Argument*, NAT'L L. J. (Apr. 28, 2016), <http://www.nationallawjournal.com/id=1202756193138/Justices-Praise-DOJs-Dreeben-After-Contentious-100th-Argument?slreturn=20161128134253> [https://perma.cc/QS5U-Q7V7].

<sup>190</sup> Crespo, *supra* note 183, at 2013.

Crespo pegs the rate at around 96%.<sup>191</sup> Not only do criminal defendants normally *not* reap the benefits of the Solicitor General's expert advocacy and Supreme Court influence, they are often pitted directly against it.

Finally, criminal defendants, more so than any other party before the Supreme Court, stand to gain the most from Solicitor General support. That is because they are consistently represented before the Court by inexperienced, and indeed sometimes totally novice, Supreme Court advocates.<sup>192</sup> The Justices themselves have been vocal about the problem. Justice Kagan lamented in a 2014 speech to the Justice Department that “[c]ase in and case out, the category of litigant who is not getting great representation at the Supreme Court are criminal defendants.” Justice Sotomayor put things a bit more colorfully: “There are times when I want to jump off the bench at one of these lawyers and just strangle them.”<sup>193</sup> Sotomayor stressed that the effects reach beyond just the individual case. “More often than not they do real damage to the long-term development of the law. Not just losing the case for their client, but for setting up approaches that can really be harmful, generally.”<sup>194</sup>

Crespo provides extensive empirical support to back up these more informal evaluations. The data is clear: criminal defendants routinely are represented by relatively inexperienced Supreme Court advocates.<sup>195</sup> That inexperience shows most starkly when defendants are forced to fight the Solicitor General, either as a direct party or an amicus. Including those cases in which the Solicitor General participates as amicus curiae, according to Crespo's methodology, the Solicitor General finds itself arguing against non-expert Supreme Court advocates in 74% of criminal cases and against first-time advocates in an astounding 65% of such cases.<sup>196</sup>

So when the Solicitor General instead decides to cast its lot with criminal defendants, it immediately inverts that advocacy deficit into a powerful advantage. That is why the government's choice in *Montgomery* and *Welch* mattered so much—and why criminal defendants should hope that the Trump administration's Solicitor General continues to make such unorthodox choices.<sup>197</sup> As Professor Leah Litman, who has analyzed *Johnson* and its

<sup>191</sup> *Id.*; see also Adam Liptak, *Criminal Defendants Sometimes 'Left Behind' at Supreme Court, Study Shows*, N.Y. TIMES (Aug. 8, 2016), <http://www.nytimes.com/2016/08/09/us/politics/criminal-defendants-sometimes-left-behind-at-supreme-court-study-shows.html> [https://perma.cc/72KD-YDHT].

<sup>192</sup> See generally Crespo, *supra* note 183, at 2008–17.

<sup>193</sup> Ed Beeson, *Justice Sotomayor On Working A Room And The Post-Scalia Void*, LAW360 (June 20, 2017), <https://www.law360.com/appellate/articles/936106/justice-sotomayor-on-working-a-room-and-the-post-scalia-void> [https://perma.cc/8ZEX-NZ3W].

<sup>194</sup> *Id.*

<sup>195</sup> Crespo, *supra* note 183, at 2008–10.

<sup>196</sup> Crespo, *supra* note 183, at 2016–17.

<sup>197</sup> If the Solicitor General's litigation positions are indeed informed by administration policy, then we won't see the government take as many pro-defendant stances in the near future. See Sessions 2017 Memo, *supra* note 52 (returning DOJ sentencing policy to the Ashcroft standard); Jeff Sessions, Opinion, *Being Soft on Sentencing Means More Violent Crime*.



offspring more closely than any other scholar, noted: “It will be a huge loss to criminal justice if the next administration does not have its Supreme Court practitioners in the S.G.’s office take pro-defendant positions.”<sup>198</sup>

### III. *BECKLES v. UNITED STATES*: THE GOVERNMENT GETS GUN-SHY ON RETROACTIVITY

Together, *Welch* and *Montgomery*—coupled with Executive Branch pronouncements that mandatory minimum sentences had “broken” the criminal justice system—point to one possible conclusion: the Obama administration was willing to shun legislative sentencing schemes and use constitutional litigation as an end run to reduce mandatory minimum sentences. And it was the Solicitor General’s privileged position in the Supreme Court that allowed it to do so.

But that’s not the whole story, as *Beckles v. United States* demonstrates. *Beckles* presented the government with yet another opportunity to apply retroactivity doctrine to achieve fairer sentencing outcomes. The case considered whether the vagueness ruling in *Johnson* applied to the identically worded residual clause in the United States Sentencing Guidelines’ career offender guideline—and, if it did, whether that rule would apply retroactively.

The stakes of this decision were in some ways higher than in *Montgomery* or *Welch*. Each year, thousands of defendants are designated career offenders, often dramatically increasing the sentencing range recommended by the Guidelines.<sup>199</sup> In 2015, 2119 defendants were labeled career offenders, with an average sentence of 145 months.<sup>200</sup> In 2014, 2269 received the label, with an average sentence of 147 months.<sup>201</sup> And while it is unclear just how many of those defendants were designated career offenders pursuant to the residual clause, a conservative estimate is that thousands of current prisoners received longer sentences under the clause.<sup>202</sup>

If the residual clause was unconstitutionally vague, and if such a holding applied retroactively, then many of those prisoners could receive dramat-

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*It’s Time to Get Tough Again*, WASH. POST (June 16, 2017), [https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b\\_story.html](https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b_story.html) [https://perma.cc/V96H-66Y6] (“Drug trafficking is an inherently violent business. If you want to collect a drug debt, you can’t, and don’t, file a lawsuit in court. You collect it by the barrel of a gun.”).

<sup>198</sup> *Do We Even Really Know the Name?*, FIRST MONDAYS PODCAST (Dec. 5, 2016).

<sup>199</sup> U.S. SENTENCING COMM’N, QUICK FACTS: CAREER OFFENDERS (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY15.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY15.pdf) [https://perma.cc/3CBD-CD3A].

<sup>200</sup> *Id.*

<sup>201</sup> U.S. SENTENCING COMM’N, QUICK FACTS: CAREER OFFENDERS (2014), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Career\\_Offender\\_FY14.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf) [https://perma.cc/P5CT-KUUM].

<sup>202</sup> See Leah M. Litman & Luke C. Beasley, *How the Sentencing Commission Does and Does Not Matter in Beckles v. United States*, 165 U. PA. L. REV. ONLINE 33, 45 (2016).

ically reduced sentences.<sup>203</sup> While courts are not required to sentence within the guidelines range, they often do;<sup>204</sup> and even when they depart downward, the guidelines still have an anchoring effect.<sup>205</sup> In one fell swoop, the Court could give relief to thousands of the “too many Americans” in prison “for far too long.”<sup>206</sup>

And yet, here, the government argued *against* the retroactivity of a hypothetical invalidation of the Guidelines’ residual clause.<sup>207</sup> The government’s position in *Beckles* ran counter to the Obama administration’s sentencing objectives, and starkly so. Nevertheless, the Executive’s position in *Beckles* should not have been surprising to observers of *Johnson* and subsequent retroactivity fights; the government had long indicated that it did not believe any guideline invalidation should apply retroactively. In fact, U.S. Attorneys across the country had consistently argued against the retroactivity of the Guidelines in collateral review cases, and the Solicitor General had already made its case against Guidelines retroactivity to the Court in its *Welch* briefing. In *Welch*, the government argued that “because the Guidelines are part of the *process* for imposing sentences, rather than a set of *substantive* rules that alter the statutory boundaries of sentencing,” a rule invalidating the Guidelines would not be a substantive one and cannot apply retroactively.<sup>208</sup> The Executive simply renewed, and fleshed out, this argument in *Beckles*.

Ultimately, the Court rejected the government’s argument that the Guidelines’ residual clause was unconstitutionally vague, holding instead that the advisory Guidelines were not subject to constitutional vagueness challenges. In a unanimous opinion, the Court reasoned: “Unlike the ACCA . . . the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court’s discretion in choosing an appropriate sentence within the statutory range.”<sup>209</sup> The Court’s decision on the vagueness question meant that it had no reason to reach the retroactivity question. But regardless of whether the guidelines are immune from vagueness challenges—as the Court held—or whether the residual

<sup>203</sup> See *id.* at 38–40. Professor Leah Litman and Luke Beasley mine data from eight circuits that have already conducted resentencings on the assumption that the residual clause was unconstitutionally vague. The data reveal that the difference in the recommended sentencing range is often massive. And when defendants were actually resentenced *without* the career offender designation, they received dramatically lower sentences. *But see* Brief Amicus Curiae by Invitation of the Court at 24, 34, *Beckles v. United States*, 137 S. Ct. 886, (2017) (No. 15-8544), 2016 WL 6276892 (casting Litman and Beasley as “armchair critics” relying on a “decidedly unscientific” data set but not pointing to any contrary data).

<sup>204</sup> LITMAN & BEASLEY, *supra* note 202, at 35.

<sup>205</sup> *Id.*, at 34.

<sup>206</sup> Holder Speech, *supra* note 26, at 2.

<sup>207</sup> Brief of Respondent United States at 15–33, *Beckles v. United States*, 137 S. Ct. 886, (2017) (No. 15-8544).

<sup>208</sup> Brief of Respondent United States at 38 n.9, *Welch v. United States*, 136 S. Ct. 1257 (2016) (No. 15-6418) (emphasis added).

<sup>209</sup> *Beckles v. United States*, 137 S. Ct. 886, 892 (2017).

clause is unconstitutionally vague but such a ruling would not have retroactive effect—as the government argued—the decision in *Beckles* dealt a serious blow to the thousands of prisoners who received longer sentences under the Guidelines’ residual clause. Those prisoners now had no hope for retroactive relief.

Though it didn’t win the day, the government’s argument in *Beckles* is as revealing as its implications are stark. Had the Court accepted the government’s argument, then even if the Court had found the Guidelines’ residual clause unconstitutionally vague, thousands of prisoners who received longer sentences under that now-invalid clause would still have had to languish in prison. Even more remarkably, the government *believed* the residual clause *was* unconstitutionally vague.<sup>210</sup> Its argument, then, was that while prisoners had received longer sentences under an *admittedly unconstitutional* guideline, they were out of luck if their convictions had already become final.

However harsh the government’s position in *Beckles* may have seemed, it served as a clear illustration that the Obama administration’s use of its appellate power in this retroactivity trilogy was informed by more than a naked desire to attack mass incarceration and achieve fairer sentencing. The government’s straddling in *Beckles*—arguing that the Guidelines were important enough in judges’ sentencing decisions that vagueness doctrine ought to apply to them, but that they were not so important that a rule invalidating them would be substantive and retroactive—not only ran counter to the administration’s sentencing objectives but also caused the government significant doctrinal difficulty.

An exchange between Justice Kennedy and Deputy Solicitor General Dreeben shows how plausible and even attractive a more consistent position would have been. After Dreeben finished explaining just how “influential” the Guidelines have been in federal sentencing, Justice Kennedy pointed out that, if true, “that explanation is in conflict and considerable tension with your argument that this is not—that this is procedural. . . . It appears that you’re taking two different positions on these points.”<sup>211</sup> Dreeben responded that the government had taken those different positions because there were “two different legal tests” in play—one for vagueness doctrine and one for retroactivity, the latter of which is “much stricter” and requires a change in law to have a “dispositive” (not just an “important”) effect.<sup>212</sup> To be retroactive, Dreeben stressed, a change in law must eliminate the possibility of punishment for an *entire class* of defendants, and an invalidation of the guidelines does not technically do that; a judge would be free to impose the same sentence even if the Guidelines range were lowered.<sup>213</sup> (In *Welch*, by contrast, a judge could not impose a sentence greater than ten years—assum-

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<sup>210</sup> Transcript of Oral Argument at 28, *Beckles*, 137 S. Ct. 886 (No. 15-8544), 2016 WL 6947672.

<sup>211</sup> *Id.* at 31.

<sup>212</sup> *Id.* at 31–32.

<sup>213</sup> *Id.* at 32.

ing no enhancement other than ACCA's residual clause applied—once the residual clause was void for vagueness.) Dreeben's careful response threaded the needle, but one could easily imagine Dreeben arguing just the opposite—that, while a judge *could hypothetically* impose the same sentence, judges almost always sentence relative to the new Guidelines range.<sup>214</sup> And as a result, a change in the Guidelines that would lower the recommended sentencing range has a substantive effect.

But the government didn't make that argument, which signals that the Obama administration's desire to achieve fairer sentencing, while it may have influenced the government positions in *Montgomery* and *Welch*, was not the only factor in its exercise of discretion at the appellate level. Other factors influenced the government's approach in these cases, including a strictly academic legal interpretation<sup>215</sup> and other policy considerations that may have run counter to its desire to reduce sentences. For instance, the Executive was clearly concerned that the retroactive application of a rule invalidating the guidelines' residual clause might unduly burden the federal court system by requiring thousands of resentencings.<sup>216</sup> Citing Justice Harlan in *Mackey v. United States*,<sup>217</sup> the government cautioned that “retrials and resentencings require expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final.”<sup>218</sup>

The government also noted that the residual clause language at issue in *Beckles* “applies to many other provisions of the Guidelines”—provisions under which “substantial numbers of prisoners” were sentenced—further compounding the resentencing burden on courts.<sup>219</sup> The administration may also have feared that later challenges to the Guidelines, in tandem with a rule

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<sup>214</sup> To be sure, a pro-retroactivity argument in *Beckles* presents some additional difficulties. In *Montgomery*, the Court created a special sub-class of defendants and argued that *Miller* categorically barred the imposition of life without parole on those individuals. 136 S. Ct. 718, 736 (2016). But that same footwork wasn't available to the government, or the Court, in *Beckles*. See generally *The Supreme Court, 2015 Term—Leading Cases*, 130 HARV. L. REV. 307, 377–86 (2016).

<sup>215</sup> The government's nuanced argument that the advisory guidelines could be unconstitutionally vague despite their advisory nature, but that their advisory nature precluded retroactive effect of a rule invalidating them, strikes us as correct. If the substantive exception to *Teague*'s bar on retroactivity requires eliminating a punishment for a class of offenders, the residual clause's invalidation simply would not do that. But see Brief for the United States as Amicus Curiae Supporting Petitioner at 8–25, *Montgomery*, 136 S. Ct. 718 (No. 14-280), 2015 WL 4607689 (characterizing *Miller* as substantive not because it eliminated a punishment for a class of offenders but because it required the consideration of other punishments).

<sup>216</sup> This concern seems rather speculative, if not altogether unfounded, given that the Sentencing Commission did not even investigate the impact of guidelines resentencings, see Litman & Beasley, *supra* note 202 at 46, and the federal system previously handled resentencings for drug retroactivity in 2014, see Press Release, *supra* note 78.

<sup>217</sup> 401 U.S. 667, 675 (1971) (Harlan, J., concurring).

<sup>218</sup> Brief of Respondent United States at 33–34, *Beckles v. United States*, 137 S. Ct. 886 (2017) (No. 15-8544), 2016 WL 5116851.

<sup>219</sup> *Id.* at 34.

that Guidelines invalidations have retroactive effect, would throw the current sentencing regime into chaos.<sup>220</sup>

More cynical explanations abound for why the Executive decided not to support the prisoner's retroactivity fight in *Beckles*—despite the availability of reasonable arguments—while at the same time making a highly creative retroactivity argument in favor of the prisoner in *Montgomery*. For one, arguing for retroactivity in *Montgomery* came at little cost to the federal system, instead imposing costs on state judicial systems. *Beckles* would put a major burden on the federal courts and prisons. Even as compared to *Welch*, the government argued that *Beckles* threatened a still greater shock to the system: the “crime of violence” definition challenged in *Beckles* appeared not just in the career offender guideline at issue but in many other Guidelines provisions under which thousands more prisoners were sentenced.<sup>221</sup> *Montgomery* was also more symbolically significant—life without parole will always stir political passions, especially when that sentence is imposed on children—than practically powerful. That decision promised relief to far fewer prisoners than a finding of retroactivity in *Beckles* would have.

But whatever the considerations that compelled the Obama administration to fight retroactivity in *Beckles*, it is significant that the government chose to pick that fight. Its choice illustrates that, though the Obama administration was willing to use appellate litigation to retroactively reduce sentences and attack mass incarceration from the back end, it did not do so in an unrestrained or unprincipled fashion. The administration's sentencing prerogatives may well have influenced the Solicitor General's strategy in these cases, but *Beckles* shows they by no means dictated it.<sup>222</sup>

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<sup>220</sup> In *Johnson*, for instance, the government argued that the Court should not find the residual clause unconstitutionally vague because such a ruling would jeopardize the constitutionality of over 200 state and federal criminal laws that used similar language. See Supplemental Brief of Respondent United States at 22, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120). That concern was not enough to sway the Court in *Johnson*, but the government's fears have come to pass. Not only did *Johnson* spawn a constitutional challenge to the Guidelines' residual clause, it has also led to a vagueness challenge of the similarly worded definition of crime of violence in 18 U.S.C. § 16 (2016), as incorporated in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F) (2016), in *Sessions v. Dimaya*, a case currently before the Court. See 137 S. Ct. 31 (2016) (Mem.) (No. 15-1498) (granting certiorari).

<sup>221</sup> Brief of Respondent United States at 4–5, *Beckles*, 137 S. Ct. 886 (No. 15-8544), 2016 WL 5116851.

<sup>222</sup> The Supreme Court ultimately held that the advisory Guidelines could not be void for vagueness, so it never reached the question of whether a vagueness ruling would apply retroactively. See *Beckles*, 137 S. Ct. at 890. For this Note, of course, the outcome of the case matters less than the Solicitor General's positions in the litigation. For an in-depth treatment of the decision itself, see *The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 221, 293–302 (2017).

## CONCLUSION

The state of criminal justice during the late Obama years presented a confluence of powerful forces. The administration joined the growing political consensus that mass incarceration must be reversed. But for the most part, its hands were tied: over the past thirty years, prosecutors and courts had deployed the incredibly harsh sentencing regimes from the war on drugs—with many sentencing schemes, such as ACCA, still on the books.<sup>223</sup>

While the Obama administration advocated for prospective reforms, it also used its executive power to attack this problem from the back end, through creative arguments for the retroactive effect of Supreme Court rules invalidating sentences. Though we cannot say with certainty that the Solicitor General's positions in these cases were *motivated by* the administration's "smart on crime" policy, we know two things. First, the positions were *consistent with* "smart on crime" (subject to the pragmatic concern in *Beckles* that they not drown the federal district courts with resentencing petitions). Second, the Solicitor General's office is not "in an office off by itself . . . separate from anybody else's influence."<sup>224</sup> In fact, "as a matter of institutional reality the Solicitor General's boss is the Attorney General . . . and no Solicitor General ever forgets that."<sup>225</sup> As a survey of the government's positions in the cases examined in this Note shows, the government achieved fairer sentencing in a doctrinally consistent way (at least with respect to *Welch* and *Beckles*), while balancing that objective against other policy considerations.

The Obama administration's approach to retroactivity—treating the doctrine as a possible tool of post-conviction prosecutorial discretion—is a model that future administrations interested in sentencing reform can follow. The government's position on retroactivity was ultimately validated in each of *Montgomery*, *Welch*, and *Beckles*—even as the Court chose not to rely on the government's outcome-expanding conception of substantive rules in the first two cases. That track record should not go unnoticed. One must wonder whether the prisoner-petitioner in *Beckles* would have fared better with Michael Dreeben standing in his stead.

This Note has limited itself to retroactivity. But that isn't the only constitutional doctrine implicated by the government's stances in these cases. Other doctrines, on which the Note hopes to inspire scholarship, are federalism and the separation of powers. As to federalism: given that the President has no constitutional power over state sentences, should the government have inserted itself in *Montgomery* to reduce sentences for state prisoners?

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<sup>223</sup> *E.g.*, 21 U.S.C. § 841 (2016) (detailing mandatory minimum sentences for various drug quantities).

<sup>224</sup> Michael R. Dreeben, Deputy U.S. Solicitor General, Presentation at Duke Law School: Challenges and Rewards of Representing the Government in the Supreme Court (Nov. 1, 2010), <https://www.youtube.com/watch?v=EmeHI4TryIw>.

<sup>225</sup> *Id.*

As to separation of powers: are pro-defendant retroactivity positions an end-run around the President's (politically costlier) pardon and clemency powers? The ink is hardly dry on *Montgomery*, *Welch*, and *Beckles*. But this much is clear: the retroactivity trilogy will spark debate about constitutional law and criminal justice reform for years to come.

