

# THE "WAR ON DRUGS" AND OTHER FOLLIES



CYNTHIA EVA HUJAR ORR

## PRESIDENT'S MESSAGE

### Downing of "Drug Planes" Interrupted

The U.S. Program aimed at felling planes which ferry drugs was stalled for a few days this year in order for the government to issue what it called a "stern message" to the Colombian military. Apparently, without U.S. approval, it downed and destroyed a civilian plane not shown to contain drugs. You may recall the American Missionaries, a woman and her infant child, were killed in Peru in 2001 after their plane was mistaken as a drug flight and forced down under fire. The program and its problems quietly resumed two years after these deaths under the auspices of an outside contractor, managing the program for the State Department after the CIA refused to continue. The stern warning issued to the Colombians most recently? "The Colombians received a very stern message," said Bobby Charles, assistant secretary of state for international narcotics and law enforcement affairs. "A very clear message was sent by us to them." The Colombians were told that "they had to get serious, or the program would hang in the balance," said Mr. Charles. "That was a pivotal moment." "Hardly a stern warning in my book.

At one time the air interdiction program seemed to be effective, discouraging cocaine shipments by aircraft. Now Peruvian raw drug shipments to Colombia appear to be transported by boat to avoid the high fees demanded by pilots risking the loss of their aircraft. Despite the sparse air traffic, the State Department has resumed the program offering faint praise: "They need to be really thoughtful, this has to be done right," he said. "There can't be any slip-ups." After receiving the American message following the September [Colombian] incident, he said "they did get serious."

The characterization of innocent deaths and property loss as "slip-ups" is not encouraging. It displays the callousness that comes with any "war:" "all is fair." When what we are dealing with is American demand for illicit drugs, any "war" on the impoverished farmers growing crops and foreign drug traffickers is doomed to fail. They will find an alternate way to meet the demand and net American dollars. Persons who call the loss of innocent lives a "slip-up" are not taking matters seriously enough.

### Let's Get Serious About Drug Interdiction

#### Texas Drug Courts and Federal Drug Court Discretionary Grant Program - A Serious Approach

So how does one effectively stem the flow of illicit drugs to the United States? By making it less profitable to bring the illicit product here. What is not in demand, does not command a high price. The price for items in oversupply falls and the suppliers lose money. Therefore, any measures aimed at decreasing the demand for illicit drugs will be most effective.

Texas legislators realized that the State was engaged in a losing proposition by imprison-

ing drug users. It paid each time an illegal drug consumer relapsed and re-entered the prison system. The cost was not only budgetary. In addition to pouring state tax dollars down the drain, Texas was losing entire generations of young African American and Hispanic men. In San Antonio, 39% of this group between the ages of 20 and 29 were under correctional supervision in 2000. Ten percent of black children under 18 live in homes without either parent. "The lost income to African American households from those African American males being imprisoned or jailed is estimated to be nearly \$11 billion annually."<sup>2</sup> Moreover, schools and healthcare systems for the poor are crumbling while we spend billions of dollars on building new prisons.<sup>3</sup>

"We were wasting dollars and lives by sending people to the penitentiary, where they oftentimes become better criminals." Sen. John Whitmire, D. Houston.<sup>4</sup>

So the Texas government created drug courts and lower penalties for first time and small time possession.

The Success Through Addiction Recovery (STAR) program was extended to Harris County last legislative session. HB1287 expanded the number of Drug Courts to include Harris County and they were previously established in Dallas, El Paso, Fort Bend, Jefferson, Montgomery, Tarrant, and Travis Counties.<sup>5</sup> These drug courts use the "stick" of a criminal record and jail time to sweeten the "carrot" of drug treatment programs. Some counties divert the prosecution entirely, some use a deferred adjudication approach, to encourage successful completion of drug rehabilitation.

This legislature also enacted HB2668, providing treatment for first time drug possession and also established mandatory State Jail Felony Probation for first time (5 abuse unit/1 lb mj) drug offenders.

*Continued on page 14*

## **President's Retreat to**

# **A L A S K A !**

Turnagain Arm winds along Cook Inlet passing each glacier in turn, seven in all. The sun rises at five a.m. and does not set until midnight when Alaskans retire for dinner and a very little shut-eye before returning to work.

*I had expected blackout curtains to keep the extended daylight at bay and allow sensible hours of sleep. But with bald eagles, grey and beluga whales, candle fish, mountain goats, moose and Texans as their companions, who can sleep? Folks leave work and frolic until the sun sets. If you wet a hook, the fish jump on. And the skiing is some of the best available with long daylight hours and exhilarating runs, at a comfortable sea level. Walking, hiking, spa visits and shopping are also abundant.*

*There is always winter or your plane ride home to recover from the sleep deprived spring. My friend, Bill Bryson, invited me to Mt. Alyeska and to the company of his friends; spirited, fun, independent, salt of the earth, and gracious people like himself. Two-fisted lawyers like us.*

I look forward to seeing them again in March during my President's Retreat and invite all of you to join me March 25-28 in Anchorage. A quick forty miles away is Mt. Alyeska. The Alaska Academy of Trial Lawyers will join us. Tickets from San Antonio are about \$490 and the room rate at the Prince Alyeska resort, featured on "The Bachelor" in a "fantasy date" segment, is \$109 for our group. Contact Rose in the TCDLA home office (512 478-2514) for information and to join our group. - *Cynthia Eva Hujar Orr*

Continued from page 7

Seeing the wisdom of this approach, the federal government provides a Drug Court Discretionary Grant Program for seed money to start up drug courts in states and local governments.<sup>6</sup> The drug courts have been effective:

“A January study by Tony Fabelo of the Texas Criminal Justice Policy Council found that, within three years after completing drug court, graduates were less likely to be rearrested than similar offenders who did not participate in such programs. ... ‘The effectiveness of drug courts in reducing recidivism merits considering strategies to expand drug courts in Texas,’ the study said.”<sup>7</sup>

The good news is that in counties where the drug courts do not currently exist, judges have the discretion to create their own drug courts. After all, this is how drug courts got started. Individual judges saw the wisdom in rehabilitating drug offenders instead of repeatedly sending them to prison where they just got worse and decreased their chances at leading productive lives because of the baggage caused by a felony conviction.<sup>8</sup>

“People are starting to realize you can’t incarcerate away the problem. ...When you take care of drug addiction, you help take away criminal activity.” Susan Weinstein, chief counsel for the National Drug Court Institute.<sup>9</sup>

At the same time it is providing seed money for state and local drug courts, the federal government is exacerbating the problem with, among other things, mandatory minimum sentencing laws.

### **Mandatory Minimum Federal Sentences and Feeney Amendment Roundly Criticized**

People ranging from the left, including Democratic Presidential Candidate Howard Dean,<sup>10</sup> and right, including Chief Justice William Rehnquist have criticized sentencing guideline provisions that limit judicial discretion in federal sentencing decisions. While the state court judges can fashion a drug court where it does not exist, by exercising their substantial sentencing discretion, Congress and the Attorney General are tying federal judges’ and prosecutors’ hands.

“[The Feeney Amendment] will seriously impair the ability of the courts to impose just and responsible sentences.” Chief Justice William Rehnquist calling for repeal of the Feeney Amendment with his colleagues on the Judicial Conference.<sup>11</sup>

The mandatory minimum sentences, Feeney Amendment’s limits on judicial discretion and the Attorney General’s directive for prosecutors to pursue the most serious “readily provable” offenses are causing the lengthy imprisonment of people who should not even be caught up in the criminal justice system. Together, these measures eliminate judicial and prosecutorial discretion to divert people from prosecution when appropriate.

“Consider Brenda Valencia, who in 1991 was a 19-year-old former high school athlete in Miami who’d never been in trouble until she gave a ride to her roommate’s

stepmother, whom she knew was a drug dealer on her way to pick up money from a cocaine dealer. She ended up with a 12-year-seven-month prison term. Joe Bogan, a former federal prison warden, says the case isn’t unusual: ‘You could go in here and you could find hundreds of cases that would make the same point... It’s not fair. It’s not just....if you look back here in this prison, there are maybe 1,400 inmates, and there are probably 700-800 of them could be out. And their sentences would still be just. It would still hold them accountable for their criminal conduct.’”<sup>12</sup>

The federal system takes the approach of the “war on drugs”: eliminate the people, eliminate the problem. However, this approach is proven ineffective. Dr. Felton Earls at the Harvard School of Public Health has conducted a study on criminal behavior which has been touted as important enough to “shape policy for the next generation.”<sup>13</sup> In his \$51 million study, Dr. Earls concludes that fostering community efforts to care for high crime neighborhoods was the most effective in stemming crime. An example is the Ten-Point Coalition program in Boston which substantially reduced crime due to after school programs developed by a group of black ministers.<sup>14</sup> The San Antonio Spurs, likewise, participate in an after school basketball program for kids aimed at the same goal, reducing juvenile crime.

“...[C]ities that sow community gardens ... may reap a harvest of not only kale and tomatoes, but safer neighborhoods and healthier children.”<sup>15</sup>

However, the federal system is spurred on by the same cheap political rhetoric. It is a “war on drugs,” a “war on crime” and damn the casualties.<sup>16</sup> The National Drug Policy Council spent \$684 million dollars on a Super Bowl anti-drug ad campaign that was ridiculed for equating drug use with terrorism. And it turns out the government was allegedly defrauded by the advertising agency who continues to produce the anti drug spots.

Even though the Department of Justice knows that drug courts are effective and provides seed money to start them, it continues to throw good money after bad.

### **Federal Sentencing Is Supposed to Be Particularized**

The First Circuit Court of Appeals held that a defendant does not admit that a statutory mandatory minimum sentence applies to him when he admits that the conspiracy in which he participated dealt with sufficient drug quantities to trigger the mandatory minimum sentence.<sup>17</sup> The sentencing court must find, based upon evidence, the particular drug quantities attributable to or foreseeable by the defendant before finding that a minimum mandatory penalty applies to that defendant.

In another context, the Fifth Circuit would impose harsh sentencing increases on a strict liability basis. As if sentencing laws had not limited judges’ prosecutors’ and defendants’ options enough. In *U.S. v. Carbajal*, 290 F.3d 277, 284 (5<sup>th</sup> Cir. 2002) the Court held that a criminal defendant is “strictly liable” for a death resulting from the consumption of drugs he sells, whether or not the death is foreseeable to him. The guidelines designate a level 38 (235-293 months with no criminal history) when a death results from drug use. One can only imag-

ine what would have happened to 19-year-old Brenda Valencia in the Fifth Circuit if somebody had died while ingesting cocaine her roommate's stepmother was involved with selling.

But terror suspects are getting a median prison sentence of 14 days.<sup>18</sup>


The point is, no accounting system can dispense justice. The sentencing grid that Congress wants federal judges to stick to, without exception, has resulted in young men who cannot even afford lawyers being given lengthy prison sentences intended for drug king pins.<sup>19</sup> The little guy has no testimony to offer federal prosecutors in order to obtain sentence reductions.

John Forte,<sup>20</sup> a Grammy-winning talented musician and principled social activist, is serving 14 years for a non-violent first offense while the real drug dealer was given a five year sentence. John's latest release, i john, received top reviews from *Rolling Stone Magazine* and he was featured on Good Morning America by Charlie Gibson as a promising talent that excelled despite an academically challenging environment. A poor kid from a rough neighborhood who carried a borrowed violin to and from school each day, John was recognized by his teachers as talented and he was admitted to one of the country's premier boarding schools, Philips Exeter Academy in New Hampshire. John produced popularly acclaimed anti-drug, anti-violence and anti-ignorance recordings for the hip hop community. We are wasting our youth, our talent, our leaders in the "war on drugs." Until we allow federal judges to exercise their discretion, we will continue to waste monetary, and more importantly, human capital.

Federal judges are appointed for life so that they can make the right decisions, insulated from political and popular pressures.

"What is fundamentally horrible about the guidelines is that we appoint these highly educated judges, give them a lifetime appointment so they can be insulated from the political process and make the right decisions, and then we handcuff them and keep them from doing just that," says Justin Brooks of the Institute for Criminal Defense Advocacy at the California Western School of Law in San Diego.<sup>21</sup>

Brenda Valencia, John Forte and countless other casualties in the "war on drugs" should be released from federal custody so they can lead productive lives instead of sitting in warehouses to justify the political careers of individuals who find a "tough on crime" approach keeps them in office.

Let us send a strong message to our law makers – spend money on schools and healthcare, not warehouses. We want healthy children and safe neighborhoods, not these casualties from the "war on drugs." 

#### ENDNOTES

- 1 Interruption of Effort to Down Drug Planes Is Disclosed, James Risen, *New York Times*, January 8, 2004.
- 2 The African American Community; Social, Economic, Political, Health, and Education Factors, Strategic Interventions, Inc., pages 6 and 8 (2003). The Race, Penn or the Pen, *Crisis Magazine*, Michael Eric Dyson.
- 3 For more staggering statistics concerning the waste caused by the "war on drugs" see the law student article on page 28: The Endless Drug War: No Winners, Only Casualties; Understanding the Real Costs of

U.S. Drug Policy. Written by Donald H. Flanary, III, a third year law student at St. Mary's School of Law.

- 4 Drug Court to begin session: County program set for Sept. 1 offers alternative to jail, Robert Crowe, *Houston Chronicle*, August 11, 2003.
- 5 Bexar and Hidalgo Counties were slated to establish drug courts in 2002, but have yet to do so. Id.
- 6 Office of Justice Programs and Bureau of Justice Assistance, U.S. Department of Justice, Adult Drug Court Implementation Grant Program, FY 2004. <http://www.ojp.usdoj.gov/BJA/grant/DrugCtAdult/page3.html>.
- 7 Drug Court to begin session: County program set for Sept. 1 offers alternative to jail, Robert Crowe, *Houston Chronicle*, August 11, 2003.
- 8 Id.
- 9 Id.
- 10 "I am deeply concerned about unjustified racial disparities in the criminal justice system. For example, federal statistics show that minorities are disproportionately arrested and imprisoned for drug crimes. I favor strong efforts to combat racial profiling, including use of the President's existing authority under Title VI of the Civil Rights Act of 1964 to ensure that police departments do not engage in this discredited practice. I oppose mandatory sentencing laws, which contribute to racial disparity and deprive judges of needed discretion. A growing number of states have reformed their sentencing laws because governors), and state legislators, Democrats and Republicans, recognize that mandatory sentences are too costly and do not work. We need similar reforms at the federal level; the federal prison budget increased by \$900 million between 2000 and 2004 to warehouse thousands of non-violent offenders serving lengthy mandatory sentences. I also favor reform of the disparity between crack and powder cocaine sentences in federal law." <http://www.deanforamerica.com/>
- 11 Federal Judges Attack Sentencing Restrictions, Judicial Conference calls for repeal of Feeney Amendment, Mark Hamblett, *New York Law Journal*, January 5, 2004.
- 12 Tough Drug Sentencing's Impact Questioned, 60 Minutes, January 6, 2004. <http://www.cbsnews.com/stories/2003/12/31/60minutes/main590900.shtml>.
- 13 Jeremy Travis, director of the National Institute of Justice from 1994 to 2000. On Crime as Science (a Neighbor at a Time), Dan Hurley, Scientist At Work, January 6, 2004.
- 14 Id.
- 15 Id.
- 16 Student article on page 28: The Endless Drug War: No Winners, Only Casualties; Understanding the Real Costs of U.S. Drug Policy.
- 17 *U.S. v. Colon-Solis*, No. 01-1773 (1<sup>st</sup> Cir. Jan. 6, 2004). "When a defendant admits that the conspiracy to which he belonged handled drug quantities sufficient to trigger a statutory mandatory minimum sentence, does he automatically become subject to that mandatory minimum without a further finding that the triggering amounts were attributable to , or foreseeable by him? We join several of our sister circuits in answering this question in the negative."
- 18 Terror Suspects Getting Light Penalties So Far, *Los Angeles Times*, December 8, 2003.
- 19 Good News for Bad Guys, Debra J. Saunders, *San Francisco Chronicle*, January 6, 2004.
- 20 *U.S. v. Forte*, 2003 WL 22345827 (5<sup>th</sup> Cir. 2003).
- 21 Revolt on Fed Sentence Rules May Fall on Deaf Ears, *Baltimore Sun*, January 12, 2004.