

# Powerless on the Bench

**KEVIN SHARP** took the bench as a federal judge in 2011 in the United States District Court for the Middle District of Tennessee—a coveted lifetime appointment. But just six years later, he decided to resign. He explained why at Cato’s October conference, *Criminal Justice at a Crossroads*.

Being a federal judge is not a bad gig. I took the bench in my forties—and throughout my tenure I was always the youngest, and the funniest, guy in the room. Then I resigned my commission, and suddenly I wasn’t *nearly* as funny. Maybe it was because I wasn’t in my forties anymore. Before I explain why I stepped down from the bench, I think it is important to share my background because it affected the prism through which I viewed my responsibilities as a judge.

I’m originally from Memphis. Like most river cities, Memphis was at times a little tough and economically depressed. My father was a Memphis firefighter. My mother sold encyclopedias door-to-door. I was not a particularly good student, and I did not think earning a college degree was in my future. When I was young, I thought my future would be picking up a shovel and working at an oil refinery.

Some of you may remember the days when you had full-service gas stations, but before self-service gas stations where you could pay at the pump, people followed the honor system and paid after pumping their gas. I was hired to carry a baseball bat on the gas station’s grounds, walking up to pumps and saying, “You’re going to pay for that, right?”

Another job I had was at a car wash. For those of you who were around in the ’70s and saw *Car Wash*, you know that car washes are not that fun. In some ways *Car Wash* was very realistic. A bunch of adults worked

minimum-wage jobs. They were going nowhere, the work was hard, the work was tiring, and they spent their days all wet, hoping that somebody would give them a tip. It was one thing for me at 18 to be doing that, it was another thing for a 35-year-old guy who was doing it to support his family. These were the people that I knew; these were the people that I grew up with.

At the time, I drove down a street and saw a Navy recruiting station in a little shopping center. I pulled in and asked the re-

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cruiter to “send me somewhere, anywhere, just get me out of here.” I ended up at a boot camp stationed with a P-3 squadron. Soon after at age 19 without a college education, I was part of a 15-person crew hunting Soviet submarines off the coast of Vietnam on a multi-million-dollar aircraft. I was the crypto guy, which means I had the codes. My job was an important job, and so all of a sudden I started to see myself and other people differently. Because I was stationed with various kinds of people with different backgrounds and cultures and we were all experiencing different cultures and countries together, I realized that although we did not speak the same language and we had

all grown up differently, we were all still really similar.

Once I left the Navy, I decided that I wanted to become a lawyer. I completed my undergraduate degree and then attended Vanderbilt Law School. I practiced law for the next 17 years. Then I received a call from the Justice Department, asking me to interview at the White House for a position as a district court judge in the Middle District of Tennessee.

Ultimately, President Obama nominated me, and the U.S. Senate unanimously confirmed me. When I took the bench in 2011, I was a former military, God-and-country, middle-of-the-road guy. I took my job very seriously. I understood the importance of the judiciary.

Like a lot of judges who take the bench, I had limited experience in criminal law. Criminal law is fairly simple—much simpler than the tax code or some of the other things that I had done. But it soon became the hardest thing I did on the bench. In civil cases, my rulings generally concerned money. But in criminal cases, when I said the “sentence is imposed as stated,” somebody was placed in handcuffs and led away by a U.S. marshal.

Early on, I sentenced a young man, Antonio, who was 27. He was charged as a felon in possession of a firearm. He had been convicted of two armed robberies at 17 years old. At 27, Antonio is doing what we all hope a criminal defendant does after being convicted: he gets a job. He is in contact with his family. He does not do drugs. He does not drink. But Antonio had been doing one thing that he should not have been.

Antonio was driving down the street and, without being too graphic, he and his girlfriend were engaged in an activity that caused him to cross slightly over the double-yellow line. The police saw it and pulled him over. The police suspected his girlfriend was

a prostitute, so they split Antonio and his girlfriend up and asked them questions. The police realized based on her answers that she in fact was Antonio's girlfriend. Then, the police said, "OK, we are going to let you go. Oh, by the way, do you mind if we search your car?" Antonio, forgetting that he had an unloaded pistol under the front seat of his car, responded, "No, go ahead."

Antonio was charged with being a felon in possession of a firearm. Because he was convicted as an adult in his prior crimes, his *mandatory* minimum sentence was 15 years. I read his case and thought this could not be right. Fifteen years? What are "mandatory minimums"? I did not fully understand what they were at the time. I spent the next several days trying to figure out how to get around the minimum sentence—it cannot be done.

Regrettably, I did what I had to do. I sentenced Antonio to 15 years. I thought to myself, "What in the world are we doing? Why would the government take away my ability to fashion a fair sentence? I know what a judge is supposed to consider in determining how to fashion a sufficient sentence. What I have done is in no way, shape, or form an appropriate sentence."

Several years later, I had the same conversation with myself. This time, the case involved a 22-year-old kid, Chris Young. He was caught up with a group of members of the Vice Lords, a gang known for running cocaine and crack through middle Tennessee. Chris was not a member of this gang. He was an aspiring rapper who would hang out with members of the Vice Lords because one of the gang members had a studio. He was occasionally asked to make crack, but he did not know how.

Chris was arrested as part of a 30-person indictment for drug conspiracy. Chris was such a minor player in the drug conspiracy—he did not even know how to make crack. I think the only reason the DEA arrested him was because he happened to be at a gas station when they took down the Vice Lords'

leader. He was at the wrong place with the wrong group at the wrong time. The only evidence showing Chris's connection to the gang were tapes from their wiretaps where Chris is talking to the gang's leader about how he cannot figure out why the crack he has cooked did not turn out right. The



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leader gets frustrated and finally says, "I'll just come over and do it myself." That was basically the extent of it.

The prosecutor told Chris, "You can plead guilty, and we will give you twelve years." Chris is 22 and thinks, "12 years, no! I'm so minor in all of this, I will go to and win at trial." His lawyer convinces him that he should not go to trial, given his two prior drug convictions (one for less than half a gram of crack, which is about a sugar packet of crack) and the penalty he could face if convicted again—a mandatory life sentence. At this point, the prosecutor changes his mind and says, "12 years was last week's price—this week's price is 22 years, and if you turn this down, next week's price may be

higher." A 22-year-old, Chris thought, "22 years is life! I'll take my chances at trial."

Only three people of this 30-person group arrested, by the way, went to trial. Everybody else pled guilty. At trial, these three people, who happened to also be the *lowest* members of this conspiracy, all got life in prison. Every single one of them. Yes, the Vice Lords were selling a lot of drugs, but not *Chris*, and not the other two defendants who also decided to go to trial. They all are behind bars for life.

Chris Young grew up in the projects, did not know his father, and saw his mother in and out of jail for her drug addiction. When his mother had been sent to jail, Chris and his brother would stay in the house without electricity, water, or money for food. They would eat out of garbage cans or ask neighbors to give them food. When they were tired of the way that they smelled, they asked neighbors if they could take a shower. This is how Chris grew up. His brother eventually died. It is unclear as to whether he committed suicide or was murdered. I could not consider *any* of his hardships. I could only look at how he was charged, and his charges led to his mandatory life sentence.

Before being sentenced, Chris was asked, "Do you have anything to say?" He responded, "Yes, I do." Chris gave a speech that he clearly had worked on for a long time. It was very articulate. He showed his understanding of economics, philosophy, and history. Here was a kid who had *such* great potential. I told you about my background because I recognized some parts of Chris in me. Chris was self-taught. He had taught himself Greek philosophy—and Greek names are not pronounced the way they are often spelled, so he is pronouncing these names phonetically, "SO-craits?" "YOU-rope-ides?" I struggled to understand who he was talking about. Then I realized, I *know* who Chris is talking about because I did the same thing when I started reading in the military. I would go to the li-

brary and pick up books and pronounce these names the way kids are taught in elementary school. I listened to Chris make the same mistakes I had made—the difference being I had opportunities that Chris Young did not have. I convinced myself then and there that “I cannot do this, I am not going to do it anymore.”

Members of Congress, in their desire to be elected and reelected, often show how tough on crime they can be, and they say, “Look, mandatory minimums are necessary so that we can take discretion away from the

judges.” But these legislators have not taken away discretion, they have just *moved* it to the prosecutor, who has a dog in the hunt. If somebody said, “Well wait a minute, let’s not allow the prosecutor to do it but the defense counsel,” they would say “You’re insane! Why would you do that?” My position, then, is why would you give discretion to the prosecutor?

Because of the way that I grew up, as I saw criminal defendants come through my court, I would think about how I may have gone to high school or have worked at an oil refinery with these people. These were real

people who faced real consequences. And, despite my position, I was told what to say. I was just a messenger. And I thought to myself, “Somebody else can be a messenger. If real change is going to be made, then I need to do that on the other side of the bench. Sure, I am giving up a lifetime appointment, but am I going to walk in here every day and do things that I do not think are just? The government can pay me for life to do that, but that is not enough for me. The government does not pay me enough for this—I *cannot* be paid enough to do this.” ■

## The Future of Criminal Justice Reform

**W**ith the election of President Trump and his tough-on-crime rhetoric, are the days of criminal justice reform over? How should state and local officials tackle difficult issues such as the opioid crisis, overcriminalization and overincarceration, and police misconduct? At a Cato conference, Criminal Justice at a Crossroads, experts gathered to discuss these questions. The day opened with a discussion on law enforcement, in which Ron Davis, formerly a police chief in California, criticized Americans’ tendency to treat police work like a “vocation” instead of a profession with strict rules and systems. As some of the most powerful government employees in the country, he argued, police must have clear goals and evidence-based practices. Steven S. Alm, a retired judge from Hawaii, discussed his widely praised Hawaii’s Opportunity Probation with Enforcement program, which operates under the principle that probation punishments should be proportionate, swift, consistent, and not overly harsh. In a moving closing address, Kevin Sharp told the story of why he resigned from his lifetime appointment as a federal judge (see page 9). Other speakers included Alyssa Rosenberg of the *Washington Post*, William R. Kelly of the University of Texas at Austin, former acting commissioner of U.S. Customs and Border Protection Jay Ahern, and many others.



Top, LAURA DONOHUE of Georgetown University Law Center speaks on a panel about criminal justice at the border, and bottom, Chief J. THOMAS MANGER of Montgomery County, Maryland, and retired Chief RON DAVIS of East Palo Alto, California, discuss policies to improve law enforcement accountability.