PENALTIES

HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2014

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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FRIDAY, MAY 30, 2014

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2014

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Task Force met, pursuant to call, at 9:01 a.m., in room 2237, Rayburn House Office Building, the Honorable Louie Gohmert (Vice-Chairman of the Subcommittee) presiding.

Present: Representatives Gohmert, Goodlatte, Bachus, Holding, Scott, Conyers, Cohen, and Jeffries.

Staff Present: (Majority) Robert Parmiter, Counsel; Alicia Church, Clerk; and (Minority) Ron LeGrand, Counsel.

Mr. GOHMERT. The Over-Criminalization Task Force hearing will come to order. Without objection, the Chair is authorized to declare recesses of the Task Force at any time.

We will welcome our witnesses today.

Mr. William G. "Bill" Otis an adjunct professor at Georgetown Law. He has held a number of positions in the Federal Government: Chief of the Appellate Division, U.S. Attorney's Office for the Eastern District of Virginia, Counselor to the Administrator, Drug Enforcement Administration, and Special Counsel to President George H.W. Bush. He has written several op-ed pieces on criminal law for USA Today, Forbes, The Washington Post, and U.S. News & World Report; has been interviewed and quoted by The New York Times and The Wall Street Journal; has testified as an expert witness before Congress; has appeared on various network programs and as a contributor to the blogs Crime and Consequences and Power Line. Mr. Otis obtained his undergraduate degree at the University of North Carolina and his juris doctorate at Stanford Law School.

The Chair will now recognize the gentleman from North Carolina, Mr. Holding, to introduce our second witness.

Mr. HOLDING. Mr. Chairman, it is my pleasure today to introduce a leader in this battle fighting against drug crimes, former Assistant United States Eric Evenson, who is here today. Mr. Evenson retired December of last year after more than two decades as a Federal prosecutor and after significant experience as a prosecutor in the State courts of North Carolina. He served as an assistant district attorney for a number of years in both Greensboro and Durham. His perspective as a frontline Federal prosecutor I

think will be invaluable, Mr. Chairman, to the Task Force consideration of Federal penalties.

I came to know Eric when I served as First Assistant United States Attorney in the Eastern District of North Carolina. When I joined the office in 2002, Eric was already leading our Organized Crime Drug Enforcement Task Force, as you know, OCDETF, Mr. Chairman, task force, coordinating Federal investigations and prosecutions of high-level interstate and international drug trafficking.

Throughout his tenure, Eric believed strongly and demonstrated clearly that tough, cooperative, and sustained pressure on drug-trafficking organizations could reduce the flow of drugs, could remove the worst offenders, and could drive down the crime rate and make our communities safer. Under Eric's leadership, our OCDETF unit pursued large numbers of serious drug traffickers and gained the cooperation of defendants whose information was critical to our ability to infiltrate, disrupt, and dismantle these organizations.

During his tenure, Eric received two Director's Awards from the United States Department of Justice for outstanding prosecutions and one from Attorney General Janet Reno and one from Attorney General Eric Holder before retiring from the Department of Justice in November of 2013.

Mr. Chairman, I think Eric's expertise and his deep knowledge of what works and what doesn't work will aid this Committee as it considers issues currently facing our country in the area of drug control and sentencing policy. So I am pleased to welcome my friend and colleague here today. And I hope that all the Members of the Task Force will benefit from his perspective. Thank you.

Mr. GOHMERT. Thank you very much.

Our next witness, Mr. Marc Levin. Marc A. Levin is director of the Center for Effective Justice at the Texas Public Policy Foundation and policy director of its Right on Crime Initiative, which he led the effort to develop in 2010.

Mr. Levin helped develop the Right on Crime Initiative, which was launched by the Texas Public Policy Foundation at the end of the 2010. Right on Crime has become the national clearinghouse for conservative criminal justice reforms, receiving coverage in outlets such as The Wall Street Journal, National Review, New York Times, Fox Business News, and The Washington Post. Mr. Levin has testified on sentencing reform and solitary confinement at separate hearings before the Senate Judiciary Committee, and has testified before State legislatures. Mr. Levin served as a law clerk to Judge Will Garwood on the U.S. Court of Appeals for the Fifth Circuit, and staff attorney at the Texas Supreme Court.

Our next witness, Mr. Bryan Stevenson. Mr. Stevenson represents the Equal Justice Initiative. He is also clinical faculty at New York University School of Law. Mr. Stevenson has represented capital defendants and death row prisoners since 1985, when he was a staff attorney with the Southern Center for Human Rights in Atlanta, Georgia. Since 1989, he has been executive director of the Equal Justice Initiative, a private, nonprofit law organization he founded.

The focus is on social justice and human rights in the context of criminal justice reform in the United States. EJI litigates on behalf of condemned prisoners, juvenile offenders, people wrongly con-

victed or charged, poor people denied effective representation, and others whose trials are marked by racial bias or prosecutorial misconduct.

Mr. Stevenson has served as a visiting professor of law at the University of Michigan School of Law. He has also published several widely disseminated manuals on capital litigation and written extensively on criminal justice, capital punishment, and civil rights issues. Mr. Stevenson is a graduate of Harvard, with both a master's in public policy from the Kennedy School of Government and a JD from the School of Law.

So the witnesses' written statements will be entered into the record in their entirety. I will ask the witnesses to summarize each testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you there. The light will switch from green to yellow, indicating you have 1 minute to conclude your testimony; when the light turns red, it indicates the witness' 5 minutes have expired.

At this time, unless there is objection, I want to offer the statement of our Chairman, James Sensenbrenner, Jr., for the Over-Criminalization Task Force. Know that our thoughts and prayers are for Chairman Sensenbrenner and his wife with the health issues that she has had for a week or so. And so hearts and prayers go out for both of them. And I have a statement here that I would enter into the record. If there is no objection, hearing no objection, that will be so order.

[The prepared statement of Mr. Sensenbrenner follows:]

Prepared Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Over-Criminalization Task Force of 2014

Good morning and welcome to the seventh hearing of the Judiciary Committee's Over-Criminalization Task Force. Over its first six months of existence, the Task Force conducted an in-depth evaluation of the over-criminalization problem. This year, the Task Force has held two hearings, focusing on Criminal Code Reform and the Over-federalization of criminal law.

These hearings have followed a logical progression. The Task Force began its work by analyzing whether the *mens rea,* or intent requirements, in the federal criminal code are appropriate and sufficient to ensure that, except in very specific circumstances, nobody is convicted of a crime without the intent to do something that the law forbids. The Task Force next engaged in an examination of regulatory crimes, where the lack of an adequate intent requirement is often an issue. I firmly believe that, if the regulated conduct is important enough to carry a criminal penalty, it is something Congress should vote upon, rather than leaving it to a regulator to implement. For example, we heard testimony from a witness who unknowingly violated the Clean Water Act by re-routing sewage in an emergency, and found himself facing up to five years in federal prison. The Department of Justice informed us that the statute they used to prosecute this individual was the same one used to prosecute BP for dumping millions of gallons of oil into the Gulf of Mexico. Clearly there is a significant problem here.

The Task Force then held hearings on the need for reform of the federal Criminal Code, which we know contains over 4,500 criminal statutes, and the related issue of the over-federalization of the criminal law. Our work continues today, as the Task Force will take the next logical step by analyzing the penalties associated with the over-criminalization of federal law.

As our previous hearings have illustrated, one of the most important issues facing this Task Force is whether certain conduct—even conduct which we all agree should be regulated by the federal government—should subject violators to criminal penalties, including incarceration. I think we can all agree, for example, that American citizens should be strongly discouraged from polluting our lakes, rivers and oceans. But should doing so—particularly unknowingly—rise to the level of a federal criminal conviction? Should Americans face prison time for mistakenly checking the

wrong box on a form? What about for violating the laws of a foreign country? Alarmingly, as we know from our previous hearings, these are not hypothetical situations.

The issue of federal criminal penalties has received significant attention on Capitol Hill over the past year, and not just from this Task Force. In particular, many Members have advocated for cutting mandatory minimum penalties, especially those that apply to drug trafficking crimes. Proponents of this approach have asserted that it would serve to reduce the federal budget, trim the prison population, and ensure that federal judges have greater discretion and flexibility when sentencing drug traffickers. However, as I have stated in previous hearings, I am a strong proponent of determinate sentencing—particularly that an individual who violates the law should receive the same sentence in Springfield, Virginia, as he would in Springfield, Illinois. Congress is the branch of government responsible for assigning culpability to criminal conduct, including culpability for offenses that we determine are so significant as to require mandatory incarceration.

Additionally, even Attorney General Holder has admitted that the nation currently faces a "serious public health crisis" with respect to heroin. This is a rare instance where I agree with the Attorney General. Given that we are facing a heroin epidemic in this country, I have significant concerns with any legislative proposal to cut penalties for those who are bringing significant quantities of this poison into our communities.

I look forward to hearing from our distinguished panel about these and other issues associated with federal over-criminalization penalties.

I want to thank the witnesses for appearing today, and look forward to hearing your perspectives on this important issue.

Mr. GOHMERT. With that, we will turn to the Ranking Member, Mr. Scott, for his statement.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, even though the United States represents only 5 percent of the world's population, we account for over 25 percent of the world's prisoners. Since 1980, our Federal prison population has increased 1,000 percent, the average Federal sentence has doubled, and drug sentences have actually tripled. Drug convictions alone make up two-thirds of the increase in the Federal prison population. The so-called war on drugs has been waged almost exclusively in poor communities of color, even though data shows that minorities are no more likely to use or sell illegal drugs or commit crime. These excessive and discriminatory sentences are driven up by mandatory minimums, enhancements, and consecutive counts. In fiscal year 2012, 60 percent of convicted Federal drug defendants were convicted of offenses carrying a mandatory minimum penalty.

These defendants are not the ones for whom the harsh penalties were intended. They are not the kingpins, they are not the leaders, and they are not organizers of criminal syndicates. Rather, data from the U.S. Sentencing Commission tells us that the vast majority are couriers, street-level dealers, and addicts. More than half of them have the lowest criminal history category and as a result 93 percent of Federal inmates are nonviolent offenders.

Mandatory minimums are the worst-of-the-worst sound bites masquerading as crime policy. They sentence people before they are even charged or convicted, based solely on the name or the code section of the crime. No consideration is given to the seriousness of the crime or how minor a role one may have played in the crime or whether one is a first offender, a young person, or an abused girlfriend under the control of a boyfriend. The same code section, for example, that prohibits sex between a 40-year-old and a 13-year-old also prohibits sex between a 19-year-old and 15-year-old

high school students. Obviously, they should not be given the same sentence, but mandatory minimums often require judges to impose sentences that violate common sense.

The United States already locks up a higher portion of its population than any country on Earth. The Pew Center on the States estimates that any ratio of over 350 per 100,000 in jail today, anything above that, the crime-reduction value of increased incarceration begins to diminish. They also tell us that any ratio above 500 becomes actually counterproductive, that you have got so many people locked up that you are actually adding to crime rather than diminishing crime because you have messed up so many families, you have wasted so much money, you have got so many felons wandering around that can't find jobs that you are actually adding to crime.

But the data shows that in the United States our ratio is not only above 500, but above 700, leading the world. Some minority communities have incarceration rates over 4,000 per 100,000, creating what the Children's Defense Fund calls the cradle-to-prison pipeline.

Since 1992, the annual prison costs have gone from $9 billion to over $65 billion a year, and the rate of increase for prison costs was six times greater than the increased spending for higher education. The rates of incarceration we have in this country, looking at crime and simply suggesting that the main problem is we are not locking up enough people, doesn't comport with science, data, or common sense.

All research shows that when compared to traditional proportional sentencing, mandatory minimums waste money, disrupt rational sentencing considerations, discriminate against minorities, and often require judges again to impose sentences that violate common sense. Even when a prosecutor, a judge, defense counsel, and probation officers, even the victim, all agree, after having heard all the evidence, that the mandatory minimum is too severe for a particular case, there is no choice. The judge's hands are tied and the judge must apply the mandatory minimum as a matter of law.

Despite all the problems with mandatory minimums, Congress is still trying to pass more, even though there are at least 195 mandatory minimums already on the books. I believe in what they call the first law of holes: When you find yourself in a hole, the first thing you ought to do is stop digging. So if we are going to get rid of mandatory minimums, we have to stop passing new ones. Unfortunately, we are violating that rule; in fact, we passed a new mandatory minimum just last week in the House.

Granting Federal judges more discretion in sentencing is the smart and right thing to do. They are the ones closest to the facts and the players in each case. But we also have to confront the fact that over the past 40 years, Congress has been playing politics rather than working to reduce crime in a smart way.

We have seen alternative strategies that could be used, like the Youth PROMISE Act that I have introduced, which takes a proactive approach. It puts evidence-based, cost-effective approaches in crime reduction into play at the community level with full community involvement. This strategy has not only been shown

to reduce crime, but also to save money. It will essentially dismantle the cradle-to-prison pipeline and create a cradle-to-college-and-career pipeline.

In terms of criminal justice reform, we need to focus our efforts on distinctly Federal interests and ensure that the sentences of a correct length are being legislated and imposed. We need to ensure that Federal collateral consequences of convictions do not serve as a continuing punishment and burden on individuals who have already served their time and paid their debt to society. But most of all, we have to oppose mandatory minimums, enhancements, and consecutive counts so that we can eliminate the overincarceration that violates common sense and increases rather than decreases crime.

Thank you, Mr. Chairman.

Mr. GOHMERT. Thank you, Mr. Scott.

The Chair would ask Mr. Conyers, do you wish to make an opening statement?

Mr. CONYERS. Yes, Mr. Chairman, I would, please, if it meets with your approval.

Mr. GOHMERT. The Gentleman is recognized for 5 minutes.

Mr. CONYERS. Thank you. This is so important. And I welcome the witnesses and look forward to their testimony.

But the Over-Criminalization Task Force finally focuses today on what is the most critical failing of our Nation's criminal justice system: The continuing prevalence of racism as evidenced by a Federal charging and sentencing regime that clearly discriminates against people of color.

Now, racism has permeated our Nation's history since the beginning. The Constitution of course referred to slaves as three-fifths of a man. The Civil War was fought to abolish slavery. And then Jim Crow raised its ugly head, and the segregation and tactics that followed are a matter of fact.

We are now approaching the 60th anniversary of Brown v. The Board of Education, which of struck down separate but equal as the law of the land. And just last year, we celebrated the 50th anniversary of the March on Washington and the passage of the Civil Rights Act.

As a Nation, we have come so far. We like now to think that our justice is color blind, that our system is race-neutral. But whether overt or subconscious, the vestiges of racism are still reflected in our Federal criminal justice system, and it is all the more insidious for it. That is because criminal justice is meted out by human beings with human failings, including bias. No longer does Jim Crow and overt racism rule the day, but rather coded phrases, such as policing high crime areas and stop-and-frisk policies, are the norm, and combined with mandatory minimums so expertly referred to by our colleague Mr. Scott, and stacking and enhancement penalties, and the so-called three-strikes statutes. It is these concepts that disproportionately affect communities of color, drawing more and more people into an antagonistic and unforgiving criminal justice system.

To provide some perspective regarding this problem, I just want to breeze through this. In the last 40 years the United States prison population has grown by 700 percent and now accounts for 25

percent of the world's prisoners. The number of Federal prisoners alone grew by nearly 50 percent from 2001 to 2010. While only 4 percent of the Federal crimes carry mandatory sentences, 34 percent of those in Federal prison are serving mandatory sentences.

Moreover, the racial impact of the Federal penalty system is wildly disproportionate. One in nine Black men between the ages of 20 and 34 are incarcerated. One in 3 Black men and 1 in 6 Latinos will spend some part of their lives in prison, compared to one 1 in 23 White men. Blacks represent 12 percent of total drug users in the country, but account for nearly 40 percent of drug-related arrests.

Now, these numbers are far worse in segregated and impoverished communities. In addition to the devastating societal costs of mass incarceration, it also results in a massive economic cost. The so-called war on drugs has cost $1 trillion since its beginning, and the cost to run our Federal prisons cost $6.9 billion in fiscal year 2014.

So before we identify solutions, we must recognize how we institutionalize and normalize racism today. That is what makes this discussion this morning so important. I want to focus on how racism, unconscious or not, has a disproportionate impact on criminal penalties on minority communities. Bias can begin with a decision of where and what offenses are investigated. With enough time and officers in a certain location, it is only a matter of time before they find reasonable suspicion to stop, detain, and arrest someone or many people.

At the prosecutorial phase, this bias can be magnified through decisions about what charges to bring, what plea deal to offer, and whether mandatory minimums and enhancements apply. People from poor communities of color are more likely to receive harsher charges and mandatory penalties.

The mandatory minimums and statutory enhancements so ingrained in the code that were intended to target so-called kingpins and violent criminals do no such thing. Their use is now propagated against low-level, nonviolent offenders who are disproportionately poor people of color. The threat of these staggering mandatory de facto life sentences coerces defendants into pleading guilty. They impose a trial penalty on those who use their constitutional right to a jury trial.

I am almost there, Mr. Chairman, and I thank you for your indulgence.

Finally, at sentencing people of color receive harsher sentences than would Whites for the same conduct through mandatory minimums and other sentencing enhancements.

Racism in America has for the most part ceased to be overt. But the prevalence of institutionalizing discrimination by writing it into law is just as present today as it was 100 years ago.

The question that stands is this: What can we as a Congress do about these pressing issues? Finding solutions to unconsciously institutionalized racism in the criminal justice system and writ large on our society is not an easy task, but there are steps we can take. We can begin by rolling back mandatory minimums and stacking and enhancement sentencing penalties that result in cruel and unusual punishment for what are too often low-level offenses. We can

revest the judiciary with discretion in sentencing. We can reinvest the judiciary with discretion in sentencing. Not all judges are immune to bias, but in doing so we allow the possibility of proportional sentencing and the ability to overturn unduly harsh sentences due to abuse of discretion.

I conclude on this point, Chairman.

Mr. GOHMERT. You are double your time. And if we do that, we're not going to get through because of votes that are coming.

Mr. CONYERS. All right. Then I will just submit the rest of my statement. Thank you, Chairman.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The Over-Criminalization Task Force finally focuses today on what is *the* most critical failing of our Nation's criminal justice system: the continuing prevalence of racism as evidenced by a federal charging and sentencing regime that clearly discriminates against people of color.

Racism has permeated our nation's history since the beginning. The Constitution referred to slaves as three-fifths of a man. The Civil War was fought to abolish slavery, and then Jim Crow raised his ugly head.

We are fast approaching the sixtieth anniversary of Brown v. Board of Education, which struck down "separate but equal" as the law of the land.

And just last year, we celebrated the fiftieth anniversary of the March on Washington, and the passage of the Civil Rights Act.

As a nation, we have come so far. We like to now think that justice is colorblind; that the system is race neutral. But, whether overt or subconscious, the vestiges of racism are still reflected in our federal criminal justice system, and it is all the more insidious for it. That is because criminal justice is meted out by human beings with real human failings, including bias.

No longer does Jim Crow and overt racism rule the day, but rather coded phrases such as "policing high crime areas" and "stop and frisk" policies are the norm. And combined with mandatory minimums, stacking and enhancement penalties, and so-called "three strikes" statutes, it is these concepts that disproportionately affect communities of color, drawing more and more people into an antagonistic and unforgiving criminal justice system.

- **To provide some perspective regarding this problem**, let's begin with a few facts:In the last 40 years, the U.S. prison population has grown by 700%, and now accounts for 25% of the world's prisoners. The number of federal prisoners alone grew by nearly 50% from 2001 to 2010.
- While only 4% of federal crimes carry mandatory minimum sentences, *34% of those in federal prison are serving mandatory sentences.*

Moreover, the racial impact of the federal penalty system is wildly disproportionate:

- 1-in-9 black men between ages 20 and 34 are incarcerated.
- 1-in-3 black men, and 1-in-6 Latinos will spend some part of their lives in prison, compared to 1-in-23 white men.
- Blacks represent 12% of total drug users in the country, but account for nearly 40% of drug related arrests.

These numbers are far worse in segregated and impoverished communities.

In addition to the devastating societal cost of mass incarceration, it also results in a massive economic cost. The so-called "war on drugs" has cost $1 trillion since its beginning, and the cost to run our federal prisons cost *$6.9 billion* in FY 2014.

Before we identify solutions, we must recognize how we institutionalize and normalize racism today.

First, I want to focus on how racism, unconscious or not, has a disproportionate impact on criminal penalties on minority communities. Bias can begin with the decision of where and what offenses are investigated. With enough time and officers in a certain location, it is only a matter of time before they find "reasonable suspicion" to stop, detain, and arrest someone.

At the prosecutorial phase, this bias can be magnified through decisions about what charges to bring, what plea deal to offer, and whether mandatory minimums and enhancements apply. People from poor communities of color are more likely to receive harsher charges and mandatory penalties.

The mandatory minimums and statutory enhancements so ingrained in the Code that were intended to target so-called "kingpins" and violent criminals do no such thing. Their use is now propagated against low-level, non-violent offenders who are disproportionately poor people of color.

The threat of these staggering mandatory de facto life sentences coerces defendants into pleading guilty. They impose a trial penalty on those who their constitutional right to a jury trial.

Finally, at sentencing, people of color receive harsher sentences than would whites for the same conduct through mandatory minimums and other sentencing enhancements.

Racism in American has, for the most part, ceased to be overt, but the prevalence of institutionalizing discrimination by writing it into law is just as present today as it was 100 years ago.

The question that stands is: What can we, as a Congress, do about these pressing issues?

Finding solutions to unconsciously institutionalized racism in the criminal justice system, and writ large on society, is not an easy task. But there are steps we can take.

We can begin by rolling back mandatory minimums and stacking and enhancement sentencing penalties that result in cruel and unusual punishment for what are too often low-level offenses.

We can revest the federal judiciary with discretion in sentencing. Not all judges are immune to bias, but in doing so we allow for the possibility of proportional sentencing, and the ability to overturn unduly harsh sentences due to abuse of discretion.

We can recognize that Congress can and should defer to States in matters that the States can—and already do—investigate, prosecute and sentence, rather than engage in wasteful duplicative federal prosecutions allowing United States Attorneys to focus on uniquely federal concerns.

Criminal justice is just one symptom of the underlying problem, and I hope to work with my colleagues in the future to hold a more in-depth forum to explore the issues of systemic racism and its impacts on society at large that will include a look at education, public services, voting rights, drug and mental health treatment, and employment.

For today, I am hopeful that our witnesses today can shed light on the issues of the disparate racial impact of the criminal justice system, the economic and societal impact of these policies, and propose potential solutions and I look forward to their testimony.

Mr. GOHMERT. I had waived giving my statement and offered Mr. Sensenbrenner's for the record. But with all the discussion about racism, let me just make this one point. I was a judge for 10 years. I tried three capital murder cases in Tyler, Texas. Two were of Anglos, one was an African American. The two Anglos got the death penalty, the African American got life. So I don't always have the appreciation for racism entering into every aspect.

Someone had raised an issue of, well, gee, since the judge appoints the grand jury foremen, who had the leadership role in the grand juries. So I was attacked before they checked my record. I never, ever considered race in appointing foremen for my grand juries. Once they got the facts and found out that I had a much higher percentage of African Americans, as it turned out, who were grand jury foremen, not because of race, they were just the best leaders on the grand jury. And so, anyway, I didn't find race an issue in my courtroom at all.

I would ask the Chairman of the full Committee, do you wish to make a full statement.

Mr. GOODLATTE. Yes. Thank you, Mr. Chairman. I am very pleased to be here at the third hearing of the Over-Criminalization Task Force following its reauthorization earlier this year.

This hearing will focus on the penalties imposed for violations of Federal law. As others have already noted, the subject of penalties is a very broad topic, covering a wide array of complex legal and policy issues. Many of these issues have already been covered in detail by this Task Force, including the need for an adequate intent requirement in the Federal criminal law, the problems with regulatory crime, the overfederalization of criminal law, and the need for criminal code reform.

The issue of adequate mens rea is of particular interest to me, and it is especially significant when considering the penalties associated with violations of Federal law. As I and other Members of this Task Force have stated repeatedly, no American citizens should be subjected to a Federal criminal penalty without the intent to do something the law forbids.

Today I expect to hear from our panel about these and many other issues associated with Federal penalties. Obviously, mandatory minimum sentences are a significant part of this. Advocates for reform to mandatory minimums have argued that these reforms are necessary to ensure low-level, nonviolent offenders, particularly in drug cases, are not serving long prison sentences.

While I have some concerns about many of the proposals to reform the Federal sentencing scheme in this way, I am open to hearing arguments on both sides of this issue. However, one ever-present hurdle to reform in this and other areas is the repeated actions by this Administration to circumvent Congress' constitutional role in drafting, considering, and passing legislation important to the American people.

At the Judiciary Committee's DOJ oversight hearing last month, I and other Members of the Committee questioned the Attorney General at length about the Holder Justice Department's persistent attempts to change the law by executive fiat. I do not believe that any of us received satisfactory answers. It will be difficult to find support for reform if Congress cannot trust that the Administration will abide by these reforms.

I can assure everyone that under my leadership the House Judiciary Committee will continue to closely monitor and analyze this and other issues associated with the imposition of Federal criminal penalties, and I am confident that the Task Force will continue its outstanding work. And I want to thank our distinguished panel of witnesses today, and I look forward to their testimony.

Thank you, Mr. Chairman.

Mr. GOHMERT. Thank you, Mr. Chairman.

With that, we are ready to proceed under the 5-minute rule with questions.

At this time, Mr. Otis, you may proceed in your 5 minutes.

TESTIMONY OF WILLIAM G. OTIS, ADJUNCT PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. OTIS. Mr. Chairman, Ranking Member Scott, and Members of the Committee, I am honored that you have invited me here today to talk with you——

Mr. GOHMERT. Is the green light on your microphone?

Mr. OTIS. Can you hear me better now?

Mr. GOHMERT. Yeah. If you would move that a little closer so we can make sure everybody here can hear. You spent too much time getting here for people not to hear what you have to say. Thank you.

Mr. OTIS. Again, Mr. Chairman, Mr. Ranking Member, reMembers of the Committee, I am honored that you invited me to talk with you today about this extremely important subject of Federal criminal penalties.

The Task Force is rightly concerned about overcriminalization, and in particular about the proliferation of statutes that impose criminal liability without the traditional requirement that the defendant harbor bad intent. Such statutes undermine the very legitimacy of criminal law, which is understood by ordinary people to forbid only behavior the average person would recognize as wrong.

I am happy to take questions on this subject and have written a few articles about it. However, I want to focus for the moment on a different topic: mandatory minimum penalties. Serious mandatory minimums continue to be needed. Under current law, sentencing judges have wide discretion, as they should. But judges and the judicial branch can make breathtaking mistakes. Some of you view Citizens United as one of them. Others view Kelo as another. All of us view Plessy v. Ferguson as a drastic mistake in American history.

Judges are not infallible. The Framers recognized in adopting the separation of power that no one person and no one branch should have 100 percent discretion 100 percent of the time. Congress is fully warranted in directing that for some appalling crimes a strong, rock-bottom sentence must be imposed.

Criticism of mandatory minimum sentencing is often at the heart of the charge that the Federal criminal justice system is broken or failing. It certainly looks broken to a heroin trafficker facing long incarceration. But the health of the system is properly measured not by the incarceration rate, but by the crime rate. By that standard, it is anything but broken. Crime is down 50 percent over the last 20 years in the era of mandatory and longer sentencing. Would that some of our other, vastly more expensive domestic initiatives have had anything like that success.

Much of the debate now seems to be driven by two misconceptions. The first is that mandatory minimums require Federal judges to imprison for years some high school kid who has been caught smoking a joint. That is simply false. Mandatory minimums apply overwhelmingly to trafficking, trafficking in deadly drugs like heroin, methamphetamine, and PCP.

The second misconception is that having a larger prison population is per se a bad thing. One might as well say that having more criminals in jail rather than in your neighborhood is a bad thing. When criminals are not imprisoned, they don't just disappear. Five-year recidivism figures show that more than three-quarters of drug offenders return to crime after they are released. If we go back to the naive, failed policies of the 1960's and 1970's, we will get the failed, crime-ridden results of the 1960's and 1970's.

Finally, a number of recent developments tell us that lighter sentencing at the Federal level is, for good or ill, already largely the new norm. The prudent thing for Congress to do is to assess over the next few years whether those developments and their promise of big cost savings and no increase in crime turn out to be true.

Last summer, for example, the Attorney General himself directed that, for roughly the set of drug defendants for whom some pending legislation would apply, Federal prosecutors are no longer to seek mandatory minimum sentences. This new policy has effectively mooted a large body of mandatory minimums and has shifted discretion back to judges. The Sentencing Commission has adopted the two-level reductions in Guidelines offense levels for almost all nonviolent drug offenders, producing notably shorter sentences, and has announced just recently that for the first time ever more sentences are being given below the guidelines range than within it.

Perhaps most stunning is the Administration's announcement of impending clemency for hundreds and more likely thousands of offenders serving what it views as excessive sentences. In an unprecedented move, the defense bar has been given a broad and proactive role in proposing clemency candidates. With these proposals already in train, Congress has the opportunity to see for itself whether more discretion and lighter sentences keep their promise of frugality and low crime. Maybe they will. Maybe they won't. It is only common sense for Congress to find out before weakening a system we know has helped keep us safe.

Mr. GOHMERT. Thank you very much.

[The prepared statement of Mr. Otis follows:]

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Statement of

William G. Otis
Adjunct Professor of Law
Georgetown University Law Center

Former Assistant U.S. Attorney and Chief of the Appellate Division,
Eastern District of Virginia (1981-1999).

Before the House Judiciary Committee
Over-criminalization Task Force of 2014
Hearing on "Penalties"

May 30, 2014

It's hard to recognize Ronald Reagan's America in the landscape we see today. President Reagan believed in strength, resolve and accountability for bad actors, both foreign and domestic. What we see now is doubt, decline and retreat – retreat as the not-so-former Soviet Union invades the Ukraine and, at home, as the Administration, and some in our party, seem to want to find a way to be more accommodating to drug dealers.

In recent months, many Members of Congress have advocated for "reform" in federal sentencing law. However, it would be more accurate to say that the advocates for federal sentencing "reform" are less interested in "reform" than a slashing of the minimum sentences for trafficking in a large variety of dangerous drugs. The most direct beneficiaries of such an approach will be heroin salesmen, it will give more power to ideologically-driven judges for whom no criminal is without an excuse, and it will pave the way for the creeping return of irrational disparity in sentencing.

In this way, many advocates of so-called sentencing "reform" would all but dismantle the last monument of Reagan's signature achievement in criminal law – the system of determinate sentencing. When Eric Holder and a politicized Department of Justice tell us that this system is "broken," they're not telling the truth. As determinate sentencing and existing mandatory minimums have taken hold over the last generation, crime is down by 50%. Not only is the system of determinate sentencing not broken, it is very likely the most successful domestic initiative of the last half century. For a tiny fraction of the money we've spent building the dependency state and financing the unrestrained growth of government, we have achieved, through more serious and uniform sentencing, an improvement in public well-being that other kinds of social spending, though massively greater, have not even approached.

The criticisms of existing mandatory minimums are familiar by now: That they have helped swell the prison population, are excessively harsh, target non-violent offenses, disproportionately harm minorities, and inappropriately tie the hands of judges.

None of this is true. The attacks have gained traction only because the critics ignore how mandatory sentencing came about, how it actually works, and how widespread its benefits have been.

Two generations ago in the Sixties and Seventies, federal law had an unguided sentencing system – that is, a system with no mandatory guidelines or statutory minimum sentences. We were convinced that rehabilitation works, and that we could trust judges to get it right at sentencing with only tepid, or with no, binding rules from Congress.

For our trouble, we got a national crime wave. In the two decades after 1960, crime went up by well over 300%. It was twice what it is now. Whole neighborhoods in our major cities, including our nation's capital, became free-fire zones, largely because of the gunplay inevitably associated with drug dealing.

In the Eighties, Congress got the message, and embraced determinate sentencing. That meant, for a few very serious offenses – child pornography, firearms trafficking, and drugs including methamphetamine, PCP, cocaine and heroin – that Congress embraced mandatory minimums below which even the most willful judge cannot go.

Although seldom mentioned in the current critiques, the country got something vital in exchange for the reforms that made sentencing conform to law instead of taste. From the early Nineties to the present day, we have enjoyed a massive reduction in crime, to levels not seen since your parents were in grade school.

This increase in our ability to live in peace and safety has been a moral

and an economic boon. According to Bureau of Justice statistics (http://www.disastercenter.com/crime/uscrime.htm), there are more than 4,000,000 fewer serious crimes per year in America today than there were a generation ago. The financial benefits alone of having so much less crime are enormous, but seem invisible to those who want to cut back on the relatively small costs of imprisonment. But most important are the human benefits. Crime reduction has given a more secure life to every American, but has especially helped the disadvantaged. The hundreds, if not thousands, of people who were being gunned down in the streets of our big cities were mostly members of minority groups. Just as they were disproportionately victims of crime in those days, they have been disproportionately the beneficiaries of the drop in crime as stiff sentencing has taken hold.

It's true that sentencing laws and increased imprisonment have not alone produced these benefits, but they have contributed significantly. The late Prof. James Q. Wilson agreed with a University of Chicago study finding that increased imprisonment in the Nineties accounted for a quarter or more of the decrease in crime.[1]

The most prominent arguments for slashing today's successful sentencing system miss the mark because of the mileage they get from three very clever, because largely unspoken, misconceptions.

The first is that this "reform" is about marijuana – that is, making sure that a kid who smokes a joint or two doesn't wind up with a judge who is forced to send him off to federal prison for years and thus ruin his life. Many of the most vivid horror stories we hear about the excesses of mandatory sentencing are designed to convey the impression that this is what goes on.

It isn't. The on-the-ground reality is that essentially no one goes to jail *at all* for simple possession of pot. For the very few who do – after two or three repeat performances – you might see a sentence of 30 or 60

days. In the real world, mandatory minimums are reserved almost exclusively for trafficking, and for trafficking in the hard drugs the bill's backers prefer to keep quiet about because, after all, heroin and PCP just aren't all that popular.

The second clever but powerful misconception is that the health of the criminal justice system is measured, not by the crime rate, but by the incarceration rate. This is what Eric Holder means when he says the system is "broken." It's true that the prison population generally, and the federal prison population in particular, has risen dramatically over the last 20 years. But if you'd ask people on Main Street, what's the problem with the criminal justice system, would they say, "We've caught too many criminals"?

I don't think so. They'd say, "We've still got too much crime." The tacit centerpiece of the argument for sentencing "reform" – that the true measure of the system's health is the incarceration rate – is not merely wrong but absurd. The true measure is the crime rate. The obsession with people who are incarcerated – incarcerated because of their own criminal choices – while discounting any consideration of the huge, law-abiding majority – is something that could happen only inside the Beltway. Ordinary people must be wondering, "What *are* they thinking about?"

This is related to the third powerful misconception: That a bigger prison population is, per se, a bad thing. One might as well say that having more criminals in jail, *rather than in your neighborhood,* is a bad thing. When criminals are not incarcerated, they don't just disappear. Studies over many years have shown that the majority go back to crime. Those proposing to cut the prison population through watered-down sentencing seldom deal seriously with this fact. If we cut sentencing now, we'll repeat what happened when we cut it in the Sixties and Seventies: We'll get more crime.[11]

Those advocating for reform promise, however, that it will be different this time. One can almost hear in the background Eric Holder's soothing words: "If you like your crime reduction, you can keep your crime reduction."

The unspoken premise here is that "non-violent" drug transactions, that is, those conducted without a gun, aren't all that serious. But the question for punishment purposes is not just whether there was violence; the question is whether there was **harm**.

The trafficking and consumption of hard drugs is one of the most harmful and socially destructive enterprises going on in America today. Even if a particular drug defendant does not engage in violence, his participation in the drug business creates the conditions in which history tells us that violence is certain to occur. The crack wars were not a myth, and neither is the gunplay that is still a commonplace feature of drug conspiracies from the organizers to the street dealers.

Let me give an analogy. People sometimes ask why mere consumers (as opposed to producers) of child pornography should get long sentences. The answer is that the consumers create the market in which the producers thrive. A criminal is properly held accountable for the harms he knowingly facilitates, not just those he directly causes.

While many drug crimes are "*non-violent*" (because they are consensual sales), they are anything but *non-harmful.* Indeed, they can be lethal, and often are. Recently, the actor Philip Seymour Hoffman died as a result of what was almost certainly a "non-violent" heroin transaction. But he's just as dead as if he'd been shot through the heart. So are the 13,000 to 14,000 heroin addicts who overdose every year. Selling heroin to an addict has the same moral valence as selling a loaded gun to a desperate, suicidal man, but results in vastly more fatalities.

It is in part for these reasons that a myriad of law enforcement organizations, as well as the National Association of Assistant US Attorneys, have opposed significant changes to federal penalties. The opposition of Assistant U.S. Attorneys is particularly noteworthy. AUSA's are career prosecutors – non-political appointees hired in administrations of both parties. They have taken the very unusual, and for them the very risky, step of publicly opposing the Attorney General and his support for the significant reform of federal criminal penalties. They have done so because they know that this "reform" will drastically handicap their efforts to break down and prosecute the bigger and more violent drug conspiracies that states hand off to the federal government.

Finally, let me address the argument that existing law routinely traps low-level defendants in draconian sentences. That's not so. Existing law provides at least four escape hatches for deserving defendants facing a mandatory minimum.

First and most commonly, they can plea bargain their way to a lesser charge; such bargaining is overwhelmingly the way federal cases are resolved, and, as you would think, the most lenient bargains are offered to the least culpable offenders.

Even if convicted under a mandatory minimum charge, however, the judge on his own can sidestep the sentence if the defendant has a minor criminal history, has not engaged in violence, was not a big-time player, and makes a clean breast of his crimes. This "safety valve," as it is known, has been in the law for almost 20 years.

Separately, a defendant can avoid a mandatory minimum by helping prosecutors bring his cohorts to justice. Prosecutors correctly regard this as an essential tool in encouraging cooperation and, thus, breaking down large conspiracies.

Finally, for very unusual cases, there is Presidential clemency.

Recently, in a nearly unprecedented move, the President exercised this power, granting to inmates convicted of crack cocaine offenses the second largest number of commutations in a single day in 43 years. With the President's power as the ultimate failsafe based on truly exceptional circumstances, there is no need, and considerable hazard, in adopting a meat-axe approach, as many proponents of sentencing reform have advocated.

One last thought. When we consider proposals to dramatically "reform" federal penalties, let's not lose sight of the central, prepossessing question: Are we going to lose our nerve?

Are we going to retreat, to turn away from a system we know succeeds to start back down the path to one we know fails? Forgetfulness about our past naiveté, and complacency about the crime reduction we've achieved, are the calling cards of decline. We already tried watered-down sentencing and hoping for the best with the scattershot ideologies of several hundred federal district judges. We learned what happens. It confounds the rule of law, overestimates judicial discipline, and endangers the public. If we ignore these lessons, our children will be the ones who pay the price.

CONCLUSION

In conclusion, I would like to address an additional argument for sentencing "reform": namely, that, with tight budgets and so much borrowing, we cannot keep spending more on prisons; and second, that mandatory minimum sentences under existing law are excessive, given the arguably sympathetic circumstances of some of the defendants serving them.

Assuming *arguendo* that these arguments had merit early last year when support for sentencing reform started percolating to the surface, times have changed.

1. As to the cost argument, two developments are particularly noteworthy. First, last August, the Attorney General directed that, for certain federal drug offenders, federal prosecutors are no longer to seek mandatory minimum sentences. They are to do this by declining to include in (some might say "airbrush") indictments the drug amounts that, if they had been stated, would require such a mandatory minimum sentence upon conviction. This new policy, which has effectively all but eliminated mandatory minimums (because they simply do not get charged) has been the state of play for close to a year as of this writing. In other words, to the extent advocates of reform would shift discretion back in the direction of judges, the deed has been done.

The Attorney General's unilateral action has been highly effective – perhaps too effective for some prominent advocates of sentencing reform. For example, in his keynote address to the Federalist Society's May 2014 Conference on Executive Branch review, Senator Ted Cruz decried Mr. Holder's charging directive as essentially the kind of executive branch overreach that undermines Congress's preeminent role in writing law, and is likely to be seen as a species of disrespect to the legislative branch that will *discourage* Congressional advocates of "reform".

Second, in April 2014, the Sentencing Commission adopted a sweeping, all-comers-accepted two-level reduction in Guidelines offense levels for

drug traffickers. Although the Guidelines do not *per se* affect mandatory minimum sentences (statutory sentences trumping guideline calculations), they will produce a significant savings in the federal prison budget by reducing the sentences of the majority of prisoners – a majority who are *not* serving mandatory minimum sentences. As the Commission announced when it promulgated the reductions, the result will be very significant savings.

The Commission's two-level reduction theoretically will not be implemented until November 2014, but in practice it has already begun. The Attorney General, again acting preemptively, has ordered line prosecutors not to object when defense counsel seek immediate application of the reduced guidelines. For any real-world purpose, then, this means that the reductions are already at work reducing costs (and, as I have argued, beginning the reduction in public safety as well).

2. The idea that there are hundreds or even thousands of offenders serving unjust and excessive sentences is, in my view, considerably overstated. Even assuming it were correct, however, these circumstances will be addressed in short order by the Administration's unprecedented and aggressive clemency program announced in April 2014 by Deputy Attorney General James B. Cole.

Department documents show that the program could result in slashed sentences for up to 23,000 drug dealers. The actual number is likely to be less than that – perhaps 5000, as Professor Douglas Berman has estimated – but in any event is all but certain to include every "horror

story" touted by advocates of "reform". This is true not least because, as Mr. Cole has said, the defense bar nationwide will itself be actively involved in recommending candidates for clemency. The Attorney General has brought in a new Pardon Attorney whose thinking mirrors the Department's new and different approach, and has told prosecutors that clemency applications will be reviewed with an eye toward remedying what he sees as past excesses.

Finally, obviously, lopping years from thousands of offenders' sentences will swell the already considerable savings stemming from the charging and Sentencing Commission changes noted above, changes already underway.

3. In addition to the recent developments undermining the most important rationales for the reform of federal penalties, there has been at least one other development calling into question the wisdom of adopting it at all.

Specifically, DEA Administrator Michele Leonhart told Congress, in a way that cannot be viewed as other than a rebuke to those supporting sentencing reform, that strong mandatory minimum sentences are essential to the success of her agency's fight against dangerous drugs. In particular, she told the Senate Judiciary Committee in her testimony on April 29, 2014:

> Having been in law enforcement as an agent for 33 years [and] a Baltimore City police officer before that, I can tell you that for me and for the agents that work at the DEA, mandatory minimums

> have been very important to our investigations. We depend on those as a way to ensure that the right sentences equate the level of violator we are going after.

This is a truly remarkable statement from a Department official who worked her way up from Baltimore beat cop to become President Obama's choice to head the country's front-line drug fighting agency.

To summarize: In just the last weeks and months, there have been far-reaching developments that both call into question the central rationales for significant reform of federal criminal penalties and the wisdom *ab initio* of going down that path. America has lived with its present regime of mandatory minimum sentences for at least a generation – a generation in which crime has decreased by half, to the enormous benefit of our citizens. At the minimum, before Congress slashes those sentences, it should give itself and the rest of us time to assess these recent developments and, in particular, to see whether the promises of big cost savings and no crime increases will be kept.

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[1] The author of the University of Chicago study, Professor Stephen Levitt, has more recently said that as the crime rate continued to drop and the prison population continued to grow, the increase in public safety has diminished. As he told The New York Times in 2013, "In the mid-1990s I

concluded that the social benefits approximately equaled the costs of incarceration." But today, "I think we should be shrinking the prison population by at least one-third."

Prof. Levitt's remarks do not rebut *or purport to rebut* his 2004 finding that the increased use of incarceration accounts for "a quarter or more" of the decrease in crime since 1990 (that is, in the era of mandatory minimums). *See* Stephen Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVES 163, 177-79 (2004). Nor do they rebut his specific finding that, "The evidence linking increased punishments to lower crime rates is very strong," *id.* at 178.

Prof. Levitt has never said that either of those findings was erroneous or misleading, and the late Prof. James Q. Wilson of UCLA agreed with both in his 2011 piece in the Wall Street Journal. James Q. Wilson, *Crime and the Great* Recession, Wall St. Journal (May 28, 2011), available at http://online.wsj.com/news/articles/SB10001424052702304066504576345553135009870. Wilson said (emphasis added):

> So we have little reason to ascribe the recent crime decline to jobs, the labor market or consumer sentiment. The question remains: Why is the crime rate falling? One obvious answer is that many more people are in prison than in the past. Experts differ on the size of the effect, but *I think that William Spelman and Steven Levitt have it about right in believing that greater incarceration can explain about one-quarter or more of the crime decline.* Yes, many thoughtful observers think that we put too many offenders in prison for too long. For some criminals, such as low-level drug dealers and former inmates returned to prison for parole violations, that may be so. But it's true nevertheless that when prisoners are kept off the street, they can attack only one another, not you or your family.

The criticisms based on Professor Levitt's remarks to the NEW YORK TIMES elide a crucial distinction: The difference between *returns* to the dollar and *diminishing marginal returns* to the dollar. Levitt said that the increase in public safety "diminished" as the prison population continued to grow in the 2000's; he didn't say that it had "stopped," and it hasn't. It has slowed because the law of diminishing marginal returns to scale applies to imprisonment just as it applies to everything else. The critics' argument is merely a loud truism.

Returns are still returns, now as in the past. And it remains the case that increased incarceration was a very significant factor in the decrease in crime over the last generation.

Moreover, Professor Levitt's more recent remarks were not specifically about the *federal* prison population, and he has not expressed a view on that to my knowledge. More importantly, that Prof. Levitt believes we should reduce the prison population in general may be his opinion as a citizen, but that is hardly the same as his findings as a social scientist. He has never doubted or in any way moderated his findings that increasing the number of criminals put in prison helps decrease the amount of crime.

[ii] There is a fourth misconception of growing popularity: That because several states, notably Texas and Michigan, have slightly reduced their prison populations in recent years and have still seen crime decrease, the federal government can to the same thing with the same results.

As noted, the increased use of incarceration has accounted for about a quarter of the decline in crime. *See* Stephen Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVES 163, 177-79 (2004). What this means is that about three quarters of the decline is attributable to other factors (things such as hiring more police and improved and proliferating private security measures). When three quarters of the factors responsible for the decrease in crime are still on-going, crime is very likely to continue to decrease. What reducing the prison population will do, by putting recidivist criminals back on the street, is slow the *rate* of the decrease. And that is, in fact, what's been happening. As some large states have been marginally lowering their prison populations, crime has continued to decease, but at a slower rate.

In addition, crime is a lagging indicator, and crime statistics lag even more. Criminals generally do not return to crime and get caught immediately. It typically takes several years. And crime statistics lag even further; the statistics available today reflect only what was the state of play two or three years ago.

To the extent we have more recent data, they come from California, the state laboring under the effects of the *Plata* decision, ordering it to make substantial cuts to its prison population. Accordingly, and because of its very large size to begin with, California has had a greater reduction in its prison population than any other state. Result: crime is up, including a nearly 7% increase in property crime. *See* Ken Scheidegger, *California Crime Update*, Crime and Consequences Blog (July 30, 2013), available at http://www.crimeandconsequences.com/crimblog/2013/07/california-crime-update.html; Ken Scheidegger, *FBI Releases Final 2012 Crime Stats*, Crime and Consequences Blog (Sept. 16, 2013), available at http://www.crimeandconsequences.com/crimblog/2013/09/fbi-releases-final-2012-crime-.html.

Even if prison reduction programs work for the states, however, they are not going to work for the federal government. The Department of Justice prosecutes precisely the kind of drug gangs, and drug offenders, who are the most violent, the most entrenched, and the most prone to recidivism. The kind of offender one sees coming out of the county courthouse is a choir boy compared to what comes out of the federal courthouse.

Finally, to the extent there is doubt about this question, who should have to bear the risk of that doubt? The public, or drug dealers?

Mr. GOHMERT. We will hear from our next witness, Mr. Evenson. You are recognized for 5 minutes.

TESTIMONY OF ERIC EVENSON, NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS

Mr. EVENSON. Thank you, sir. Chairman Gohmert, Ranking Member Scott, and Members of the Task Force, I am honored to appear before you on behalf of the National Association of Assistant United States Attorneys. I would like to thank Congressman Holding for his kind introduction. NAAUSA shares strong concern over legislative proposals to reduce minimum mandatory sentences.

In the 1980's, I was a State prosecutor, and when we would do drug cases in front of a court, we would often hear the complaint that you are only getting the little guy, you are not getting the big fish. And, unfortunately, because of weak State laws and diminished resources, there was a lot of truth to that complaint.

State prosecutions are based on two things. You either have to catch the drug dealer in possession of drugs or you have to catch him selling it. And as a result, what ends up happening is you oftentimes don't get the source of supply. The State laws are just too weak. The resources are too minimal. What happens is that the leader of the drug organization is largely untouchable for years. We all live in communities where people say, why don't they get that big drug dealer, and all the neighbors know that. This is why. Because the State laws don't have the leverage that is needed.

In 1990, I became an Assistant United States Attorney. I quickly realized that we focused on a different set of defendants, ones that were selling significant quantities of drugs, enough to trigger what are called minimum mandatory sentences. Congress mandated that we pursue these organizations and provided us with the tools, including minimum mandatory sentences, that we needed.

Now, here is the key difference between State prosecution and Federal prosecution. Sometimes the average man on the street just doesn't understand what we are doing. It is this: It is called conspiracy. Conspiracy law. If you don't remember anything else, I hope you remember that. I am going to explain how it works on a day-to-day basis, and I am going to show you where the rubber meets the road.

In order for us to charge the leader of an organization, we generally do it with conspiracy law, because they don't sell to undercover officers; they are too clever. They sell it to their conspirators who sell it on the street at the retail level.

Now, what do we need to charge conspiracy in Federal court? Simple. We need co-conspirator testimony. That is how we do it. To go after the big fish, we have to have the cooperation of the smaller fish. And every Assistant United States Attorney worth his salt knows this.

I will tell you that securing their cooperation is no easy task. They don't want to cooperate. This is hard, mean business. If the sentence they face is too low, they will tell you they can do their time standing on their head. I have debriefed personally hundreds of arrested drug dealers and explained to them, in the presence of their attorney, the need for them to assist and testify truthfully.

Congress provided their sentence could be reduced by the judge if they substantially assisted. You see, their attorney has already explained to them that they are facing a strong minimum mandatory sentence, and the only way that they are going to get a sentence reduction is to substantially assist. They have to be willing to testify.

Now, this straightforward choice of options, designed by Congress and enforced by the Department of Justice, has led to the dismantling of numerous drug organizations in every district, city, and town in America. But without the cooperation of these co-conspirators, Federal law enforcement will be unable to charge and arrest these leaders and sources of supply. Without minimum mandatory sentences, many, if not most, would simply refuse to testify.

Minimum mandatory sentences and the presumption of pretrial detention have given Assistant U.S. Attorneys the leverage they need to garner these witnesses and to stop drug organizations. If this leverage is removed or weakened, then vital witnesses will become unavailable. It is really very simple.

In essence, reducing the minimum mandatories will substantially cut down on our witnesses. Fewer of the big drug dealers will be arrested, and we will revert back to convicting only the lower level dealers we can buy directly from or we find in possession of drugs. We won't be able to convict the sources of supply.

Mr. GOHMERT. Thank you very much, Mr. Evenson.

Mr. EVENSON. Your Honor, may I have just a few more minutes? I still have some time.

Mr. GOHMERT. Well, actually, your time is——

Mr. EVENSON. Okay.

Mr. GOHMERT [continuing]. Five minutes is up.

Mr. EVENSON. I am sorry. I didn't see the yellow light.

Mr. GOHMERT. It did come on with a minute to go.

Mr. EVENSON. I am very sorry, Your Honor. Thank you.

[The prepared statement of Mr. Evenson follows:]

National Association of Assistant United States Attorneys
12427 Hedges Run Dr. • Suite 104
Lake Ridge • VA • 22192-1715
Phone: 800-455-5661 • Fax: 800-528-3492 • Email: staff@naausa.org
www.naausa.org

Testimony of

ERIC EVENSON

on behalf of the

NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS

for the hearing on

PENALTIES

before the

Over-Criminalization Task Force of 2014

of the

Committee on the Judiciary

UNITED STATES HOUSE OF REPRESENTATIVES

May 30, 2014

Chairman Sensenbrenner, Ranking Member Scott and Members of the Task Force:

I am Eric Evenson, a former federal prosecutor. I retired as an Assistant United States Attorney from the Department of Justice in November 2013 after over twenty-three years of federal service. I served 17 years in the drug unit of the United States Attorney's Office for the Eastern District of North Carolina, including twelve years as Chief Prosecutor for the Organized Crime Drug Enforcement Task Force. From 2006 – 2011, I had the honor of serving under then-United States Attorney George Holding, a current member of the House of Representatives and a member of the Over-Criminalization Task Force.

I am pleased and honored to appear before you today on behalf of the National Association of Assistant United States Attorneys (NAAUSA). NAAUSA shares a strong concern over legislative proposals that would substantially reduce mandatory minimum sentences. I want to devote my testimony to explaining why strong mandatory minimums, along with safety-valves built into the current system, are so critical to the ability of federal prosecutors to induce cooperation from the so-called "small fish" to build cases against kingpins and leaders of criminal organizations.

During the 1980's I served as a state prosecutor. Whenever we prosecuted drug cases, we would often hear complaints that we were only prosecuting the lower-level dealers, and not the "big fish." Unfortunately, because of the weakness of state laws, there was a lot of truth in that complaint.

Most state prosecutions hinge on whether a drug dealer can be caught in possession of narcotics, or whether he can be caught selling the drugs. As a result, most state prosecutions are based on undercover buys or search warrants. While local drug agents might be able to make an undercover buy from a street dealer, it is unusual for a state prosecution to be able to gather the needed evidence to charge a source of supply, or a leader of a drug organization. These sources of supply can continue selling drugs to their street dealers for years without fear of arrest or prosecution.

When I became an Assistant United States Attorney in 1990, I quickly realized that federal law enforcement and prosecutorial efforts targeted a different set of drug defendants, ones involved in selling significant quantities of narcotics, typically larger than those sold by state defendants, and sizeable enough to trigger the application of mandatory minimum sentences. Congress also mandated that the Department of Justice pursue these criminal organizations and their leaders and provided the necessary tools, including mandatory minimums and the authority to charge drug organization leaders and others with conspiracy to distribute and sell large quantities of outlawed drugs.

What is needed to charge the leader of a drug organization, engaged in the trafficking of large quantities of heroin and other dangerous drugs, with a conspiracy charge? Cooperating defendants are needed as trial witnesses. To go after the big fish, prosecutors need the cooperation of the little fish. Every federal drug prosecutor worth his salt knows that he has to induce the cooperation of the lower-level dealers to testify against the kingpins and

their source of drug supply.

Securing witness cooperation is not an easy task for prosecutors. Lower-level dealers and conspirators have a strong incentive not to cooperate. The foremost reason for their restraint lies in their personal safety and that of their loved ones, whose lives can be snuffed out in a flash by higher-level drug leaders in reprisal for cooperation. This is a mean business, involving vicious people who prey on weak people who suffer from addiction. In weighing the risks of cooperation, lower-level defendants will be much more likely to refrain from cooperating when they are faced with only minor jail terms. It's easier to serve their time, secure interim protection for their families, and rejoin the drug business following their release from prison. Strong mandatory minimums alter that dynamic and cause defendants to reflect on the choice of cooperating, plea bargaining and receiving a relatively shorter sentence, or facing the prospect of a guilty verdict and a substantially longer sentence.

I have personally debriefed hundreds of arrested drug dealers and explained to them, in the presence of their attorney, the benefits of cooperating with law enforcement. Their attorney had already explained to them that they faced a strong mandatory minimum prison term and that the only way they might receive a reduced sentence was to cooperate, provide information and be willing to testify truthfully. This straightforward choice of options, designed by Congress, has led to the dismantling of numerous dangerous drug organizations in every district, city and town in America. Without the cooperation of the lower-level dealers, federal authorities simply will be unable to ever charge, arrest and convict the major sources of

illegal drugs in our country.

Deserving defendants who cooperate with federal authorities can receive leniency from judges. Current law permits federal prosecutors to move in court for a sentence reduction for a cooperating drug defendant, and leaves up to the federal judge what the appropriate sentence should be. This simple scheme works well and plays out in the majority of cases. If a defendant cooperates before sentencing, the prosecutor may file a motion pursuant to § 5K1.1 of the United States Sentencing Guidelines (also known as a "5K" motion). If a defendant cooperates after sentencing, the prosecutor can file a Rule 35 motion. The cooperation provided by the defendant must amount to "substantial assistance." These available options under current law undermine the notion that our current system is draconian or in need of change.

In reflecting upon my thirty-three years of public service as a state and federal prosecutor, my experience has clearly shown to me that our success in the pursuit of drug organizations relies upon mandatory minimum sentences to induce lower-level dealers and conspirators to testify against the higher-level dealers. Without them, many, if not most, of these lower-level defendants would simply refuse to cooperate and testify. Mandatory minimum sentences and the presumption of pre-trial detention in federal drug arrests have given federal prosecutors and investigative agents the leverage they need to garner witnesses and remove a very serious drug problem in our communities. If this leverage is removed or weakened, then these vital witnesses will become unavailable to prosecutors. In essence, reducing mandatory minimums will substantially diminish our testimonial

witnesses, and fewer drug organization leaders will be arrested and convicted. We will revert back to convicting only the little fish and will be unable to arrest the big fish.

Drug organizations set up strongholds in neighborhoods within communities. With drug gangs come guns and violence. Show me a city with a violence problem, and you will find an underlying drug trafficking problem. Those who suffer under such conditions are the most vulnerable, the poor, the elderly, the young, and the addicted. The local drug house quickly brings negative consequences into an area. When neighborhood property values plummet, the poorer families are stuck in their homes, unable to sell and move away. Their only choice is to hunker down and put bars on their windows. We as federal prosecutors represent these voiceless victims in our courts every day. We are deeply concerned about the impact of sentencing reductions on public safety. We urge you and your colleagues to refrain from reducing mandatory minimum sentences for drug trafficking and other serious federal crimes.

Mr. Chairman, thank you for the opportunity to share the comments of the National Association of Assistant United States Attorneys on these important issues. I will be happy to answer any questions that you and the panel may have.

Mr. GOHMERT. Thank you.

At this time, we will proceed with Mr. Levin.

You are recognized for 5 minutes.

TESTIMONY OF MARC LEVIN, ESQ., POLICY DIRECTOR, RIGHT ON CRIME INITIATIVE AT THE TEXAS PUBLIC POLICY FOUNDATION

Mr. LEVIN. Well, thank you for having me. We at Right on Crime are very pleased that Congress is examining various options for reining in unnecessary Federal criminal laws that are properly the province of State governments, ensuring, as Chairman Goodlatte said, that there is a culpable mental state required for conviction, reexamining mandatory minimums for nonviolent offenses, implementing evidence-based practices and community supervision, improving programming in Federal prisons, and strengthening reentry so we can reduce that high recidivism rate that Mr. Otis talked about.

We are committed to the 10th Amendment and to making sure that criminal justice matters. The garden variety street crimes are the province of State and local governments. We recognize that although there has been a sixfold increase in incarceration rates from the early 1970's to today, that some of that was necessary, particularly to incarcerate violent and dangerous offenders for long periods of time. But we believe that the pendulum has swung too far, and now we have too many nonviolent and low-risk offenders behind bars; and that through developments and new technologies and techniques, whether their drug courts, electronic monitoring, risk and needs assessments, we have a better ability to supervise more nonviolent offenders in the community.

Over the past several years, we have worked with conservative governors, conservative lawmakers across the country to enact successful reforms, including many dealing with mandatory minimums that we are discussing today. As an example, 29 States in the last decade have reduced mandatory minimums relating to nonviolent offenses, and crime has continued to decline. One example is South Carolina reduced mandatory minimums as part of a comprehensive reform in 2010, and crime has declined dramatically in South Carolina, 14 percent, since reducing those drug mandatory minimums.

So we would argue that we need to reexamine mandatory minimums for several reasons, and simply those of course relating to nonviolent offenses.

Number one, of course, they can result in excessive prison terms. And the reality is the vast majority of those affected by it are not supervisors, leaders, kingpins. That is only 7 percent of those cases. And so instead what we need to do is look at the fact that most individuals affected by Federal drug mandatory minimums are, in fact, nonviolent. More than half had no prior criminal record; 84 percent no weapon involved.

Now, certainly we can also see even outside of the drug issue. Another example is when somebody has ever had an offense, even decades ago, they can't have a gun, or they are subject to Federal mandatory minimums. There was a gentleman in Tennessee hunting a turkey with a rifle and had a minor offense decades ago, ended up with a 15-year mandatory minimum. And the Federal

judge in that case, like many other Federal judges, including many conservative ones, like Judge Cassell, have said, the sentence I am being forced to hand down by this mandatory minimum is excessive.

Now, of course mandatory minimums are supposed to produce uniformity, but they have not done that. And part of that is because of the enhancements, the 851, the 924 enhancements that prosecutors can file. And what we have seen is across various districts the rate at which those enhancements are filed varies dramatically. One district was 3,994 percent more likely to file enhancement than another.

And another question is really we have to look at essentially the main reason mandatory minimums for nonviolent offenses came into being was the concern that judges were exercising excessive discretion. But, interestingly, in fiscal year 2013 only 17.8 percent of the below-guideline sentences were as a result of judicial departures; more than 38 percent, and this is drug offenders, came from urging of prosecutors for substantial compliance and other reasons. So judges are actually adhering very closely to the sentencing guidelines in more than 80 percent of the cases.

Now, it has also been argued mandatory minimums are necessary to encourage defendants to plead guilty. Ninety-seven percent of Federal cases are resolved by guilty plea. And in fact, the Sentencing Commission found a greater percentage of those Federal criminal charges that don't apply to mandatory minimums resulted in a guilty plea, compared to those where mandatory minimums do apply.

Now, we certainly don't want to have unlimited discretion. In Texas, for example, we have sentencing ranges for various crimes; 18 States have sentencing guidelines. There does need to be some constraint on judges. So I think it is a false dichotomy to say we have to just go back to where judges can decide on any sentence willy-nilly.

Now, let me just address a couple of other issues. One is that we are still talking about people going to prison for a long time. When the crack powder disparity was narrowed in 2010, those who have subsequently been convicted of crack cases have received an average Federal prison term of 97 months. That is real time.

And let me just also conclude by saying we would urge Congress to rein in overcriminalization by consolidating all the Federal criminal laws in one code; adopting a rule of construction that applies a strong mens rea protection when the underlying statute is unclear; codifying the rule of lenity, which says that when there are two objectively reasonable interpretations of a statute, the one favoring the defendant should prevail; and finally, making sure that agencies cannot unilaterally enact criminal penalties on regulations without the express approval of Congress.

Mr. GOHMERT. Gentleman's time has expired. Thank you very much.

[The prepared statement of Mr. Levin follows:]

Testimony of Marc Levin, Esq.
Policy Director, Right on Crime Initiative
at the Texas Public Policy Foundation
House Judiciary Committee Overcriminalization Task Force
May 30, 2014

Introduction

- I am very pleased this Task Force on Overcriminalization and distinguished members of both parties have come together to identify ways we can improve the federal criminal justice system. We applaud Congress for examining various options for reining in unnecessary criminal laws that are properly the province of state governments, revising mandatory minimums for nonviolent offenses, implementing evidence-based practices in community supervision, improving programming within federal prisons, and strengthening reentry. As an organization committed to the Tenth Amendment and the founders' vision of states serving as laboratories of innovation, I am pleased to share with you today that many states, particularly those led by conservative Governors, have taken these steps and found great success in reducing costs, and much more importantly, reducing their crime rate. I am attaching a document that summarizes the recent successful reforms in many states.

- Keeping Americans safe, whether accomplished through our military or justice system, is one of the few functions government should perform and perform well. As crime began increasing in the 1970's, Americans and particularly conservatives were correct to react against the attitudes and policies that stemmed from the 1960's, which included an "if it feels good, do it" mentality and a tendency to emphasize purported societal causes of crime while disregarding the fundamental individual responsibility for crime. In the ensuing couple of decades, a six-fold increase in incarceration occurred, some of which was necessary to ensure violent and dangerous offenders were kept off the streets.

- However, the pendulum shift, while necessary, went a bit too far, sweeping too many nonviolent, low-risk offenders into prison for long terms while at the same time new research and techniques have emerged on everything from drug courts to actuarial risk assessments to electronic monitoring to pharmacological interventions to treat heroin addiction. One of the most recent and promising models is the Hawaii HOPE Court launched by former federal prosecutor Steve Alm that utilizes swift, sure, and commensurate sanctions, which has reduced substance abuse and re-offending by two-thirds.[1] With all of these advancements, just as we recognize that locking up violent offenders and international drug kingpins continues to make us safer, we must also follow the examples of many states that demonstrate utilizing more alternatives for low-level, low-risk offenders can lead to better public safety outcomes at a lower cost to taxpayers.

- The astronomical growth in the breadth of federal criminal law is in tension with the primary constitutional role of state and local governments in the area of criminal justice. With more than 4,500 federal statutory offenses on the books, and hundreds of thousands of regulations carrying criminal penalties, it is time to right-size the federal criminal law as part of a broader effort to revive federalism and the Tenth Amendment. We recommend that all necessary federal criminal laws be consolidated into one federal criminal code with clear *mens rea* requirements, which will make it simple for the average citizen to determine what is prohibited, and that agency regulations be precluded from carrying criminal penalties unless expressly authorized by Congress. In the 1970's, Dick Thornburgh, serving as the Assistant Attorney General for the Justice Department's Criminal Division under President Ford, urged Congress to create a unified criminal code.[2] It was a good idea then, and it is only more urgently needed now as the volume, scope, and complexity of federal criminal laws continues to grow.

About the Texas Public Policy Foundation & Right on Crime

- Since 1989, the Texas Public Policy Foundation has served as the state's free-market think tank and in 2005 I launched our Center for Effective Justice. Our work in Texas which included research, data analysis, and legislative testimony helped shape Texas' historic shift in criminal justice policy in 2007 away from building more prisons to instead strengthening alternatives for holding nonviolent offenders accountable in the community, such as drug courts. Since making this shift, Texas has achieved a drop in its incarceration rate by more than 12 percent and, most importantly, a drop in its crime rate by more than 22 percent, reaching its lowest level since 1968.[3] Taxpayers have avoided spending more than $2 billion on new prisons.

- Building on the Texas success, we launched Right on Crime in 2010. Our Statement of Principles signed by conservative leaders such as Jeb Bush, Newt Gingrich, Bill Bennett, Grover Norquist, and J.C. Watts, as well as leading experts in the field such as John DiLulio and George Kelling, explains how conservative principles such as personal responsibility, limited government, and accountability should apply to criminal justice policy. Our focus areas include: 1) maximizing the public safety return on the dollars spent on criminal justice, 2) giving victims a greater role in the system through restorative justice approaches and improving the collection of restitution, and 3) combating overcriminalization by limiting the growth of non-traditional criminal laws. Right on Crime does not endorse or oppose legislation, but continues to highlight how these principles can be applied at all levels of government.

- Over the past few years, we have worked with our counterpart free-market think tanks and conservative Governors and legislators across the country to advance tough and smart criminal justice reforms, which in most cases have passed unanimously or with just a few votes against. Examples include Georgia, South Carolina, Ohio, and Pennsylvania. These legislative packages have shared many similarities, such as strengthening and expanding alternatives such as drug and other problem-solving courts, reducing penalties for low-

level drug offenses while still holding these offenders accountable and requiring treatment, reinvesting a share of prison savings into proven community corrections and law enforcement strategies, imposing swift, certain, and commensurate sanctions for non-compliance with community supervision terms, implementing earned time policies that incentivize offenders to succeed, and instituting rigorous, outcome-oriented performance measurements to hold the system accountable for lowering recidivism. Also, in Georgia, the mandatory minimum safety valve for drug cases in the successful legislative package spearheaded by Governor (and former prosecutor) Nathan Deal is very similar to pending federal legislation.

- While in the last two years, state incarceration rates have been declining, the federal prison system continues to grow. Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.[4] Some 46.8 percent of federal inmates are drug offenders.[5]

Mandatory Minimums for Nonviolent Offenders

- In 1999, Ed Meese told the *New York Times*, "I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it." More than two decades later and three years after Ed Meese became one of the signatories to our Right on Crime Statement of Principle, today we have that opportunity to do that. As you consider recalibrating mandatory minimums that apply to nonviolent offenses, we think the following factors should be taken into account:

  - Judges and juries have much more information as to the specific facts of the case, yet mandatory minimums prevent the judge and jury from considering the defendant's background and especially his risk level. Research shows that actuarial risk assessments can accurately determine that two offenders who committed the same offense pose very different levels of risk to the community.

  - Some mandatory minimums result in excessive prison terms, particularly following the abolishment of parole in the federal system. For example under 21 U.S.C. § 851(a), if a federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions for a "felony drug offense," the mandatory minimum is 20 years with a maximum of life in prison. If there were two prior "felony drug offenses" that the prosecutor files notice of, life in federal prison is mandatory. Notably, a prior "felony drug offense" can be satisfied by a state misdemeanor in states where a misdemeanor is punishable by one or more years behind bars and even a diversionary disposition in state court. Furthermore, there is no limit on how old the prior offense can be and in some cases it has been decades old. Also, the current safety valve for federal drug cases is too narrow, as it applies to only 24 percent of cases even though only 7 percent of those charged were considered leaders, supervisors, or managers.[6]

- Most federal drug offenders are not violent. Of the 22,300 federal drug offenders sentenced in FY 2013, half had little or no prior criminal record and 84% had no weapon involved in the crime – and most of the 16% who did merely possessed the weapon.[7] Despite these facts, 97 percent of all federal drug offenders went to prison in FY 2013, and 60% received mandatory minimum sentences of five, 10, 20 years or life without parole.[8] Yet, of drug offenders sentenced in FY2012, just 28 defendants (.1%) received a seven-year increase under 18 U.S.C. § 924(c) for brandishing a firearm, and just 44 (.2%) received a ten-year increase, either for discharging a weapon or possessing a more dangerous type of weapon. Only 89 (.37%) of the 23,758 defendants sentenced under USSG §2D1.1 in FY2012 received the 2-level increase under (b)(2) for having "used violence, made a credible threat to use violence, or directed the use of violence." Just 6.6 percent received any increase for playing an aggravating role in the offense, and only .4 percent received a super-aggravating adjustment under §2D1.1(b)(14).

- There are many cases where federal judges have lamented in the record that the sentence they are forced to give by the applicable mandatory minimums is unjust and far beyond what is needed to sufficiently punish and ensure public safety. Among those are the case of college student Michael Wahl just this year in Florida who received ten years for growing marijuana in his apartment due to a § 851 enhancement for drug possession case two decades earlier. An Iowa 40 year-old man named Robert Riley was sentenced to mandatory life in federal prison for selling 10 grams of drugs, including the weight of the blotter paper they were attached to, due to the prosecutor filing § 851 enhancements based on prior drug convictions involving small amounts. The judge said the sentence he was forced into was "unfair" and wrote a letter supporting presidential clemency which has proven futile so far. In addition to the drug cases, there are also many problematic cases involving guns otherwise legally owned by persons previously convicted of any crime punishable by more than a year behind bars. Some such defendants have received mandatory terms of 10 to 40 years even when the prior offense was nonviolent and decades ago and the gun they currently possessed was otherwise legal and not being used for any illicit purpose. In one such case where the gun was a sixty year-old hunting rifle used to hunt turkey in rural Tennessee, the judge described the 15 year mandatory term he was forced to impose as "too harsh."

- A Rand Institute study found mandatory minimums for nearly all drug offenders are not cost-effective, although long sentences for major international drug kingpins trafficking enormous quantities were found to be cost-effective.[9]

- Mandatory minimums do not allow for input from the victim in cases where there is one. Research has shown that in some cases victims do not want the maximum prison term and that restitution is much more likely to be obtained if an alternative sentence is imposed.[10]

- Mandatory minimums have not met the goal of achieving uniformity in sentencing. Mandatory minimum sentences can actually create geographical sentencing disparity, because whether to charge someone with an offense carrying a mandatory minimum is entirely up to prosecutors – and the 94 US Attorney offices around the country have different charging policies and practices. For example, a defendant in the Northern District of Iowa "who is eligible for a § 851 enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska," a defendant in the Eastern District of Tennessee is "3,994% more likely to receive" the enhancement than in the Western District. *United States v. Young*, __ F. Supp. 2d __, 2013 WL 4399232 (N.D. Iowa 2013). The USSC's 2011 report found that the charging and application of the 18 USC 924c penalties, for example, depended greatly on where the crime was committed – nearly half of all cases came from just three districts in 2010, despite no difference in the prevalence of that offense conduct among all districts. (p. 276).

- Mandatory minimums were implemented in large part due to concerns with excessive use of judicial discretion, but judicial adherence to drug sentencing guidelines is relatively high overall. An overreliance of mandatory minimums effectively results in a massive transfer of discretion from judges to prosecutors, since the sentence is dictated by what charges and notices are filed. Indeed, it is prosecutors, not judges, who are responsible for the largest proportion of deviations from the guidelines in drug cases. In FY2013, only 17.8% of below-guidelines sentences for drug offenders were initiated by the court for *Booker* reasons.[11] More than 38% of below-guideline sentences for drug offenders in FY 2013 came at the urging of prosecutors for reasons Congress has sanctioned (Table 45 of USSC 2013 Sourcebook).

- Mandatory minimums are not necessary to encourage defendants to plea. Some 96.9% of federal cases are resolved by plea, with only 3.1% going to trial.[12] These figures are very high for every category of cases, even those to which mandatory minimums do not apply. For example, 99.4% of immigration cases result in pleas, as do 93.4% of fraud cases. In fact, the U.S. Sentencing Commission found that those convicted of an offense carrying a mandatory minimum penalty pled guilty at a slightly lower rate (94.1%) than offenders who were not convicted of an offense carrying a mandatory minimum penalty (97.5%).[13] Furthermore, offenders facing longer mandatory minimum penalties were less likely to plead guilty.

- We do recognize the value of appropriate sentencing ranges to guide the discretion exercised by judges and juries as well as judges being aware of the sentencing patterns of their colleagues. If mandatory minimums were revised for certain nonviolent offenses and/or if the safety valve was expanded, judges in each circuit could be asked to annually review data comparing their sentencing patterns in similar cases with those of their colleagues. In short, policymakers should not be forced to choose between the false dichotomy of a sentencing regime that is entirely rigid and one with no limits and monitoring to constrain discretion.

- It is important to remember that, even if mandatory minimums did not apply to certain drug cases, these offenders would be going to federal prison. Recent experience illustrates that federal judges would generally impose tough sentences even if Congress dialed back mandatory minimums in such cases. For example, even after the crack/power disparity was narrowed in 2010, those convicted in subsequent crack cases received an average prison term of 97 months.

- We appreciate the outstanding work that prosecutors typically do at all levels of government. We have heard the concern that prosecutors in some jurisdictions have excessive caseloads and mandatory minimums provide the leverage needed to quickly extract plea bargains that are satisfactory to them, but the better way to address this concern is to ensure there are sufficient prosecutors to properly examine the facts of each case and, when necessary, fully prosecute those cases that merit a trial. The growth in the Bureau of Prisons, however, is consuming an ever greater share of the Department of Justice budget, the same budget that funds federal prosecutors.

- It is useful to note that Texas generally does not have mandatory minimums, except for repeat seriously violent offences, but still has long provided for meaningful [and appropriately stringent] sentencing ranges and penalties for criminal offenses. In the recent groundswell of state policy innovations in this area, a number of states have addressed their mandatory minimums. For example, in 2010, South Carolina eliminated mandatory minimums for the manufacture, distribution, dispensing, delivery or purchase of drugs below certain weight thresholds for first and second offenses. Delaware reduced its mandatory minimum sentences for many drug trafficking offenses in 2003. In 2013, Georgia provided judges with a "safety valve" for departing below mandatory minimums for trafficking and manufacturing, if certain findings were made. Reductions in state mandatory minimums does not appear to have had an adverse impact on crime, as the crime rates have continued to decline in these states. Since the reforms in South Carolina 2010, the crime rate has decreased by 14 percent.

Beyond Mandatory Sentencing: Other Federal Criminal Justice Reforms

- The criminal justice reforms in some states like Texas have not dealt with mandatory minimums because Texas only had minimum prison terms for repeated seriously violent offenses. However, at the federal level, since mandatory minimums affect many cases, including many nonviolent cases, comprehensive reform approaches should address both mandatory minimums and other changes that do not involve sentencing laws such as earned time and strengthening reentry.

- Our recent paper "The Verdict on Federal Prison Reform" focuses on policy changes that are backed by empirical research and proven success in the states.[14] These include: utilizing validated risk and needs assessments, earned time policies, strengthening

alternatives to incarceration such as problem-solving courts and electronic monitoring, reducing collateral consequences of convictions that make it harder for rehabilitated ex-offenders to find employment, and strengthening reentry. With regard to both alternatives to incarceration and reentry, we suggest considering subcontracting in some instances with state, local, and non-profit agencies, as this can be more efficient than the federal government reinventing the wheel, particularly in areas where there are not that many federal offenders on probation or on supervised release.

- Congress must also act to rein in overcriminalization by reducing the number of superfluous criminal laws, consolidating all necessary criminal laws into one unified criminal code, adopting a rule of construction that applies a strong *mens rea* protection where the underlying statute is unclear, codifying the rule of lenity[1], and removing the authority of agencies to apply criminal penalties to regulations unless expressly authorized by Congress.

- When it comes to conduct that is properly criminalized, limited federal criminal justice resources should be refocused on areas where the federal government is uniquely situated to supplement the role of states and localities, such as matters involving homeland security and international drug and human trafficking. The garden variety drug, property, or even violent offense that occurs on one street corner can and should be addressed by prosecution at the local and state levels. Congress and the administration should look at how to develop mechanisms, such as guidelines and performance measures, to ensure federal prosecutorial resources are being appropriately prioritized.

- In addition to considering the statutory penalties for various crimes, we urge the Task Force to examine collateral consequences. One example is the federal law that requires states to suspend the driver's licenses of all individuals convicted of any drug offense, even a misdemeanor. While those who are driving while inebriated with any substance should be taken off the road, this issue should be dealt with at the state and local levels. States should not be subject to losing federal transportation funds based on their policy in this area, as the threat of withholding unrelated funds involves coercion that undermines the framework of federalism embodied in the Tenth Amendment.

Conclusion

[1] This canon of statutory interpretation provides that, if there are two objectively reasonable meanings of a statute, the court should adopt the one that is favorable to the defendant. The rule of lenity has a long pedigree in Western law (See *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.") and has been applied on occasion by the U.S. Supreme Court and federal appellate courts in recent years. It is tied to the core principle that citizens should have fair notice as to what is a crime, since a statute capable of an objectively reasonable interpretation whereby the conduct at issue would not be prohibited would, thereby, fail to provide such notice. By codifying the rule of lenity, Congress can ensure it is uniformly applied.

- The successes of many states in reducing both crime and costs through reforms anchored in research and conservative principles provide a blueprint for reform at the federal level. By learning from what is working in the states and taking steps to ensure the federal role in criminal justice does not intrude on the constitutional purview of state and local governments, Congress can focus federal resources on those areas where it can most uniquely contribute to advancing public safety and the rule of law. We are encouraged by the remarkable vision and leadership of the distinguished members of this Task Force and look forward to being of assistance in any way we can.

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[1] "Program Evaluation Results," Hawaii State Judiciary's HOPE Probation Program, http://www.hopeprobation.org/about/program-evaluation-results.

[2] Dick Thonburgh, "Codification and the Rule of Law," http://www.justice.gov/ag/aghistory/thornburgh/1990/01-22-90.pdf.

[3] Marc Levin, "The Texas Model: Adult Corrections Reform, Lower Crime, Lower Costs," Texas Public Policy Foundation, Sept. 2011, http://www.texaspolicy.com/sites/default/files/documents/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf.

[4] The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted. See also "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.

[5] Federal Bureau of Prisons Quick Facts, http://www.bop.gov/news/quick.jsp.

[6] U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Tbls. 37, 39, 40, 44, (2012), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm.

[7] All data come from U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[8] U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[9] Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa , "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?," Rand Institute, MR-827-DPRC, 1997, 217 pp., ISBN: 0-8330-2453-1

[10] "The 1997 Iowa Adult Crime Victimization Survey," Center For Social and Behavioral Research University of Northern Iowa, April 1998, http://www.csbs.uni.edu/dept/csbr/pdf/CRI_Crime_Victimization_Survey-1998.pdf. "Empowering and Restoring Crime Victims," Texas Public Policy Foundation, http://www.texaspolicy.com/sites/default/files/documents/Empowering%20and%20Restoring%20Crime%20Victims.pdf.

[11] U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 168-69 (2011), http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[12] U.S. Sentencing Commission, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table11.pdf.

[13] U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 168-69 (2011), http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[14] Marc Levin & Vikrant Reddy, "The Verdict on Federal Prison Reform," Texas Public Policy Foundation, July 2013, http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf

Mr. GOHMERT. Mr. Stevenson, you are recognized for 5 minutes.

TESTIMONY OF BRYAN STEVENSON, PROFESSOR OF CLINICAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, FOUNDER AND EXECUTIVE DIRECTOR, EQUAL JUSTICE INITIATIVE

Mr. STEVENSON. Thank you. I am going to express my gratitude to this Task Force for the opportunity to appear before you today.

I want to contextualize a little bit just how serious the problem of overcriminalization and overincarceration is. There are new reports, one published by the National Law Employment Project and one by the Brennan Center, that now estimate that 68 million Americans—68 million—have criminal records. That is, they have been arrested, fingerprinted, and are subject to all of the restrictions that come with having a criminal record.

Most of this dramatic increase is a consequence of a policy choice we made 30 years ago to treat drug addiction and drug possession as a crime problem rather than a healthcare problem. Many of our allies across the globe have actually made a different choice and have seen dramatic reduction in drug addiction and drug abuse. We have seen the opposite.

The consequence of that choice is what has put States in great crisis. And I would like to urge this Task Force to look to the States for some leadership on these issues. As my colleague has mentioned, States have had to deal with the consequences of overincarceration, the costs, $6 billion in jails and prisons in 1980, $80 billion today. Many States governments found themselves seeing their State budgets bankrupt by the spending that is being directed to jails and prisons. They couldn't spend on public safety, they couldn't spend on health and human services.

And so they have made the difficult decision to retreat from mandatory minimum sentencing, from overincarceration. And what I think is important about what they can teach us is that, as was indicated, 29 States have now eliminated these laws or restricted these laws and seen their crime rates fall, seen their budgets improve. And I think that lesson is an important lesson for this Task Force.

There are a bunch of concerns that need to be addressed. Number one, when we have mandatory minimum sentences, we do not eliminate discretion. There is this theory that we were going to solve inequality in sentencing by taking discretion away from judges. What we do with mandatory minimum sentencing is actually take the discretion, shift it from the judge, and give it to the prosecutor.

I have a great deal of respect for my friends, men and women, who work as U.S. Attorneys across this country. But all of us bring biases into this process. And to empower any agent—any agent—to exercise the kind of power that now exists, with no transparency, no accountability, I think creates the kind of disruption that we have seen.

I want to emphasize that the overwhelming majority of people in the Federal system serving long sentences for mandatory minimum sentences are not the kingpins. I agree with the colleagues here. If we want to go after these kingpins, I don't have any concerns with that. But the U.S. Sentencing Commission estimates that two-

thirds of the people serving these sentences are low-level or mid-level offenders. It is that consequence that I think we can address by reform.

There are particular problems that I think are reflected by what we are doing beyond the costs, beyond the challenges that are being created, and one is the effect that we are having on communities. I am deeply disturbed by the fact that I go into communities where I talk to 13- and 14-year-old kids who expect to go to jail or prison. You can't have the kind of data that we have—for example, one in three Black kids is expected to go to jail—you can't have that data without it having very serious collateral consequences.

And many of the data suggest that we are actually pushing people into crime lifestyles, into drug lifestyles, into criminogenic lifestyles because there is this hopelessness that I think comes from these excessive, extreme, misguided sentences.

There are vulnerable groups that I also want to emphasize. The rate of women going to prison in the Federal system has increased 700 percent. Children. We actually have Federal statutes that allow the prosecution of children as young as 13 years of age to be subject to life sentences, some for behaviors that do not reflect serious crime categories. And veterans. We have a growing population of men and women who served abroad who come back with trauma, who come back with drug addiction, who come back with a lot of disabilities, and because of our mandatory minimum schemes, we are not authorized to account for their service. We don't have the discretion to account for that. That creates very, very disparate outcomes, unfair outcomes, unjust outcomes.

I want to emphasize two things. One, there are 17 States that have reduced these mandatory minimum statutes that have seen their crime rates fall. I think we should look to those States for the kinds of reductions and the kinds of adjustments that need to be made.

And the last thing I want to emphasize is that we are at a moment in American history where we have unparalleled, widespread consensus that this is the thing that we need to do, eliminate these mandatory minimums. When the American Legislative Exchange Council was making this recommendation, as is the American Civil Liberties Union, when people on the right and on the left recognize that we are spending too much money, wasting too much money on incarcerating people who are not a threat to public safety, I think it creates an opportunity for this Task Force to lead this Congress.

In 2012—and the last point I will make—the voters of California in a referendum, in every county voted to eliminate three-strikes laws and mandatory minimum sentencing. I think that signal is the signal this Task Force needs to move forward on this important issue.

Mr. GOHMERT. Thank you. We will hear more.

[The prepared statement of Mr. Stevenson follows:]

STATEMENT OF BRYAN STEVENSON

Professor of Clinical Law
New York University School of Law

House Judiciary Committee's Over-Criminalization Task Force
Hearing on Penalties

May 30, 2014

OVERVIEW OF MASS INCARCERATION IN THE UNITED STATES

Nationwide

Over the last four decades, the rate of incarceration in the United States has more than quadrupled – growing from 200,000 individuals in 1973 to 2.2 million individuals today.[1] This growth has resulted in the United States having the largest penal population in the world.[2] Indeed, despite the fact that the United States makes up only around 5 percent of the world's population, almost 25 percent of the world's prisoners are held in prisons in the United States.[3] Nearly 1 out of every 100 adults in the United States is in jail or prison – an incarceration rate that is 5 to 10 times higher than rates in Western Europe and other democracies.[4]

This growth in the prison population was driven by changes in laws on the state and federal level, increasing penalties for non-violent drug offenses, violent crimes, and repeat offenses, making many of those penalties mandatory, and enacting "truth-in-sentencing" laws.[5] These legal changes were shaped by a policy choice to be "tough on crime," but have created serious questions about whether the costly penalties we have imposed are sensible, fair and appropriate public safety or harsh, excessive and cruel punishment that can't be reconciled to a just society. As a report from the National Research Council recently found, these policies "that increased the incarceration rate to unprecedented levels violated traditional jurisprudential principles, disregarded research evidence that highlighted the ineffectiveness and iatrogenic effects of some of those policies, and exacerbated racial disparities in the nation's criminal justice system."[6]

This massive increase in prison population has had sweeping collateral consequences on our society. Spending on jails and prisons has risen from about 6 billion dollars in 1980 to close to 80 billion today. Taxpayers are left to pay the rising cost of prison and jail expenditures, which rank behind only Medicaid and education in most state budgets.[7] From 1980 to 2009, per-prisoner spending remained virtually flat; however, there was still a 400% increase in nationwide prison expenditures during this period due to the increasing number of people being held behind bars.[8]

The effects of these policies on the families of incarcerated individuals and communities are acute. An estimated 2.7 million minor children today are

growing up with at least one parent behind bars,[9] with two thirds of those parents serving time for a nonviolent offense.[10] More than 10% of African American children lost their fathers to incarceration during their childhood, while 1% lost their mothers.[11] Men who were married when incarcerated are three times more likely than their peers to divorce after their release,[12] while the lost wages and extra expenses associated with paternal incarceration mean that the partners and children of incarcerated men are more likely to suffer homelessness and to depend on public assistance.[13] The children of incarcerated fathers are also more likely to develop behavior problems such as aggression and to be arrested as juveniles.[14]

The rise in incarceration predominately impacts communities of color – more than half the prison population is African American or Latino.[15] In some African American communities, 3 out of 4 young men are likely to spend time in prison.[16] Overall, 1 out of every 3 African American men can expect to go to prison over the course of their lifetimes, while this is true for only 1 out of 17 white men.[17] These statistics are driven in large part by drug arrests. While white individuals are at least as likely as African Americans and Latinos to use and sell drugs,[18] African Americans and Latinos account for three quarters of all those imprisoned on drug charges.[19]

When prisoners are released, studies suggest that the economic productivity of former inmates undergoes lasting damage. A multitude of barriers exist to prevent the formerly incarcerated from finding employment which compounds their inability to support their families and contribute to society. Even among those who do find employment, all other things being equal, incarceration reduces future wages by 11%, cuts annual employment by 9 weeks, and reduces yearly earnings by 40%.[20] Not surprisingly, former inmates enjoy far less economic mobility than their peers; two thirds of those who were in the bottom quintile of earnings nationally in 1986 remained in that position in 2006, while only one third of men who weren't incarcerated remained stuck at the bottom.[21]

In addition to this reduction in expected earnings, formerly incarcerated individuals often suffer what has been deemed "'civil death,' or the loss of certain civil rights due to a criminal conviction."[22] Based on prior felony convictions, many states deny individuals licenses to work in certain professions.[23] In addition, some states revoke driver's licenses, thus preventing individuals from being able to get to work or school.[24] A felony conviction can also eliminate your eligibility for most forms of public assistance, including food stamps, public

housing, and student loans – and many states ignore federal guidance to the contrary and terminate felons from the rolls of Medicaid, taking no steps to re-enroll them following their release.[25]

Previously incarcerated citizens are often stripped of many basic rights of citizenship. Nearly 1 in 40 adults and 1 in 13 African Americans of voting age are forbidden to vote by laws that disenfranchise former felons, despite their having served their full sentences.[26] Meanwhile, current prisoners in all but two states are forbidden to vote; however, those prisoners are counted in their prison districts by the census for the purpose of determining political representation, often shifting political power from the poor urban districts from which prisoners originate to the rural districts in which prisons are located.[27] For all intents and purposes, these policies create a new "class" of individuals in our society, who are pushed to the margins and given little chance to succeed.

Federal Incarceration

Like the United States prison population as a whole, the federal prison population has exploded over the last few decades, rising from 24,252 individuals in 1980 to 209,771 individuals in 2010.[28] While in the past decade more than half the states have reduced their prison population, the federal prison population has continued to grow – increasing in size by more than 40% from 2001 to 2010.[29] More than half of the federal prison population is in prison for non-violent drug offenses – offenses which are most commonly the subject of mandatory minimum sentences.[30] As of September 30, 2010, 58.1% of the individuals in the custody of the Federal Bureau of Prisons were convicted of an offense carrying a mandatory minimum penalty and 39.4% of the individuals in the custody of the Federal Bureau of Prisons, were subjected to a mandatory minimum sentence at sentencing.[31]

In addition to the huge societal costs discussed in the above section, the cost of running the federal prison system has skyrocketed over the last three decades. In 1982, the federal corrections budget was a little over 1 billion dollars.[32] In 2012, the federal corrections budget was 6.6 billion dollars.[33] Even accounting for inflation, this is an increase in expenditures of more than 450%.[34] This unsustainable and fiscally irresponsible increase must be curtailed in the coming years and can only be remedied with a change in policy focused on reducing the incarceration of individuals in the federal system.

MANDATORY MINIMUM SENTENCES

The Problems with Mandatory Minimum Sentencing

As the term itself defines, mandatory minimum sentences mandate that individuals receive certain penalties without any consideration for the individual's background, criminal history, or involvement in the crime, the circumstances of the crime, any other available mitigating evidence, and in many instances, even the severity of the crime.[35] This approach often leads to disproportionate sentences, with individuals receiving increasingly harsh penalties for crimes that we, as a society, have generally felt did not warrant such extreme punishment. Such harsh and disproportionate sentences cannot be justified, especially since the "benefits" of mandatory minimum sentencing have never come to fruition.

The increased use of mandatory minimum sentencing laws was driven by many supposed rationales. Primarily, policy-makers argued that mandatory minimums would deter crime. In addition, they argued that such laws would equalize punishment, by removing discretion from judges, create more just sentences as a whole, and eliminate racial bias in sentencing.[36] Repeated studies over the following decades have shown that mandatory minimum sentences fail to achieve any of these goals.

Deterrence

Despite the fact that deterrence is the primary reason given for mandatory minimum sentences, the vast majority of studies on this subject have proven that mandatory minimum sentences have little to no deterrent effect on crime.[37] As the National Research Council recently concluded, "estimated effects [of mandatory minimum sentences on deterring crime] are so small or contingent on particular circumstances as to have no practical relevance for policy making."[38] Indeed, research has shown that it is the certainty of conviction, not the severity of the sentence, which has the biggest deterrent impact on an individual.[39] Moreover, in the past decade, 17 states have undertaken sentencing and prison reform, including eliminating or reducing mandatory sentencing schemes that had been created, and in all 17 states crime rates fell.[40] As a result, the deterrence rationale can no longer be used to justify these harsh mandatory minimum sentences.

Equalizing Punishment and Eliminating Bias

Mandatory minimum sentences are simple in definition – every person who commits a particular offense is punished with the same minimum amount of time in prison. However, this simple definition is almost never borne out into reality. Rather than result in uniformity, the mandatory sentencing systems in place in the United States result in disparate, inconsistent, and disproportionate sentences.

As the National Research Council concluded, "[t]he evidence is overwhelming that practitioners frequently evade or circumvent mandatory sentences, that there are stark disparities between cases in which the laws are circumvented and cases in which they are not, and that the laws often result in the imposition of sentences in individual cases that everyone directly involved believes to be unjust."[41] This evidence makes clear that mandatory minimum sentencing schemes do nothing to create equality in outcome. In fact, if anything, such schemes create less equal outcomes, and certainly less just ones, by allowing certain individuals to avoid the Draconian penalties due to circumvention, while others, who are often even less deserving of this punishment, are not so lucky. As the study notes, and as the examples discussed below illustrate, rather than creating equal and appropriate sentences, these mandatory minimum sentences often result in disproportionate sentences that no just society should tolerate.

An example of this inequality in treatment under mandatory schemes is Mandy Martinson, who had no prior criminal history, but whose involvement with a drug-dealing boyfriend resulted in her being sentenced to a 15-year mandatory minimum sentence – a term more severe than the boyfriend himself received.[42] Ms. Martinson, who unfortunately was struggling with an addiction to methamphetamine at the time, began dating a man who was a known drug dealer in December 2003.[43] Mandy never sold any drugs or carried a gun, but she would travel with her boyfriend when he would go to buy or sell drugs.[44] The police began investigating her boyfriend and when they searched their home in 2004, they found a duffel bag with drugs and two guns.[45] While awaiting trial, Mandy was released on bond, successfully completed drug treatment, and was working as a dental hygienist.[46] Meanwhile, her boyfriend took a plea deal from prosecutors and testified against Mandy, stating that he was a better drug dealer with her help and that he had given her a gun.[47] She was convicted of conspiracy and possession of the drugs and of possession of the gun.[48] As a

result, the trial judge regrettably imposed the mandatory 15 year sentence – 10 years for the drug charges and 5 years for the firearms enhancement – despite a finding that "the Court does not have any particular concern that Ms. Martinson will commit crimes in the future."[49] Her boyfriend, due to his cooperation, received a lesser sentence than Ms. Martinson.[50]

Another example of the disproportionate sentences that result in this system is Sharanda Purlette Jones, a woman with no criminal record, who, in November of 1999, was sentenced to die in prison for a nonviolent offense.[51] At the time, Ms. Jones, age thirty-two, was raising her 8-year old daughter by herself and caring for her paraplegic mother.[52] Ms. Jones became a subject of law enforcement interest after a couple she was friendly with was arrested on drug charges as a result of a drug task force operation in Terrell, Texas.[53] After their arrest, the couple decided to act as government informants, and during a taped phone conversation with Ms. Jones asked her if she knew where they could purchase drugs.[54] Ms. Jones "told the couple she might know someone she could introduce them to so that they could buy drugs."[55] Ms. Jones was indicted on six counts of crack cocaine possession and one count of conspiracy to distribute cocaine.[56] She was acquitted of the possession counts and convicted of conspiracy to distribute cocaine. Because the sentencing judge found that crack cocaine was the final result of the conspiracy, the judge converted the 30 kilograms of powder cocaine, which her co-conspirators alleged Ms. Jones bought over time from a supplier in Houston, to cocaine base, making Ms. Jones culpable for crack cocaine, which carried harsher sentences than powder cocaine.[57] Ms. Jones's sentence was then enhanced by six levels based on her role in the conspiracy, possession of a firearm that she had a license to carry in Texas, and obstruction of justice for testifying in her own defense – the judge concluded that because Ms. Jones was convicted, the jury in essence found that her testimony under oath was false.[58] This resulted in a sentence of mandatory life without parole.[59] She has now served more than 14 years of her sentence.[60]

Removing Discretion from Judges

Further, while mandatory minimum sentences do remove discretion from the trial judges, such schemes simply shift the discretion to the prosecutors. As noted in a report by the Brennan Center, "[f]ederal prosecutors today wield unprecedented influence in the sentencing of criminal defendants through discretionary decisions made at multiple stages of a criminal prosecution, including charging decisions, plea agreements, and sentencing recommendations."[61] As a result, rather than the discretionary sentencing

determination being in the hands of an individual tasked with being an impartial adjudicator, the sentencing determination is in the hands of a member of the executive branch that does not have the same accountability.

Moreover, studies show that the discretion exercised by federal prosecutors is the subject of their own racial biases, whether conscious or unconscious.[62] Indeed, over twenty years ago, the United States Sentencing Commission recognized this problem of racial bias, finding that "[t]he disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum."[63] This signal two decades ago has not been answered and racial bias continues to permeate this system. For example, a more recent study has shown that there are "notable differences" in a prosecutor's decision to seek, or not seek, a firearm enhancement based on the race of the defendant.[64]

No evidence exists to show that judges, were they given discretion within a range of outcomes, would engage in a practice of imposing unequal and racially disparate sentences upon similarly situated individuals at a higher rate than exists in our current system where the prosecutors hold that discretion.

Use of Mandatory Minimums in Plea Bargaining

This Task Force is concerned that the elimination of mandatory minimum sentences will remove a "weapon" from the prosecutor's arsenal when attempting to plea bargain. To begin with, according to the United States Sentencing Commission, mandatory minimum sentences might actually encourage people to go to trial – 94.1% of those convicted of an offense carrying a mandatory minimum pled guilty pre-trial, while 97.5% of those convicted of an offense not carrying a mandatory minimum penalty pled guilty pre-trial.[65] The Commission further found that "the longer the mandatory minimum penalty an offender faces, the less likely he or she is to plead guilty."[66] As a result, there is a distinct possibility that mandatory minimum penalties, as a whole, do not encourage plea bargains.

Moreover, to the extent the mandatory minimum sentences are a "weapon" of the prosecutor, studies have shown that this is an extremely coercive tool that can leave individuals with very little choice.[67] "In 2012, the average sentence of federal drug offenders convicted after trial was three times higher (16 years)

than that received after a guilty plea (5 years and 4 months)."[68] The ability of prosecutors to tell charged individuals that they will seek enhancements against them if they do not plea – enhancements that would invoke mandatory minimum penalties that will tie the hands of the judge and at least double their prison time, and possibly even result in a life sentence – provides prosecutors with a far too powerful stick that they can wield without any supervision by the judiciary.[69] This leads to tremendous unreliability where even innocentpeoplearesomtimes compelled to plead guilty to avoid more serious sentences.

Equipping prosecutors with this coercive "weapon" to get individuals to give up their constitutional right to a fair trial is hardly a sufficient justification for maintaining a system that is so clearly broken. The story of 23-year-old Weldon Angelos illustrates both the disproportionate sentences one can receive under the current broken sentencing scheme and the danger that an individual encounters for failing to accept a plea deal. Mr Angelos had his own business in the music industry, but sold a half-pound of marijuana on two occasions to one of his acquaintances, who was acting as a confidential informant to the police and arranged the sales.[70] The informant claimed that during two of the sales he observed Mr. Angelos with a gun – once in Mr. Angelos's car and once holstered on Mr. Angelos' ankle; however, Mr. Angelos did not use the weapon or threaten anyone with the weapon during either of these sales.[71] After a search of his home turned up additional guns and drug paraphernalia, Mr. Angelos was charged with several drug, firearm, and money laundering offenses.[72] Prior to trial, the government had offered to recommend a sentence of sixteen years if Mr. Angelos would plead guilty to the gun charges, but because Mr. Angelos denied carrying a gun during the sales, he rejected the plea.[73] Despite the dismissal of one charge and his acquittal of three others, Mr. Angelos, age 25, with no prior criminal record, was sentenced to a mandatory 55 years in federal prison.[74] In a sixty-seven page opinion, Mr. Angelos's sentencing judge, Bush-appointee Paul Cassell[75] decried Mr. Angelos's sentence as "unjust, cruel, and even irrational," writing he had "no choice" but to impose the sentence, and recommended that President Bush "commute Mr. Angelos's sentence to something that is more in accord with just and rational punishment."[76] In addition, eleven of the twelve jurors that convicted Mr. Angelos thought he should only receive a five to ten year sentence.[77] Twenty-nine former judges filed an amicus brief calling for Mr. Angelos's sentence to be overturned as unconstitutional.[78] But their pleas could not be heard under current federal sentencing law; the Tenth Circuit Court of Appeals upheld the sentence, and Mr. Angelos is still serving his sentence.[79]

Mandatory Minimum Sentences Should Be Eliminated

For all of these reasons, it is clear that mandatory minimum sentences fail to achieve any of the purposes for which they were enacted and, instead, result in an unjust system with disproportionate and racially biased outcomes. As a society, we should only permit such a system to continue if it results in just outcomes and benefits to society, which the mandatory sentencing system clearly does not do. As a result, eliminating mandatory minimum sentences from our justice system is an important step forward in making our system more rational, balanced, and equal. It is worth noting that support for ending the practice of mandatory minimum sentencing is widespread across party lines shared by organizations with very diverse political perspectives. The following advocacy groups and individuals have made statements about the need to eliminate or curtail the use of mandatory minimum sentences in our government:

Organizations

- American Legislative Exchange Council (ALEC)[80]
- American Correctional Association[81]
- American Probation and Parole Association[82]
- American Bar Association (ABA)[83]
- American Civil Liberties Union (ACLU)[84]
- Brennan Center For Justice[85]
- Committee on Criminal Law, Judicial Conference of the United States[86]
- The Evangelical Lutheran Church of America (ECLA)[87]
- Families Against Mandatory Minimums (FAMM)[88]
- Human Rights Watch[89]
- The International Community of Corrections Association[90]
- The International Union of Police Associations[91]
- Justice Fellowship[92]
- The Leadership Conference on Civil and Human Rights[93]
- Major Cities Chiefs Associations[94]
- National Council on Crime and Delinquency (NCCD)[95]
- National Association of Evangelicals[96]
- Right on Crime[97]
- The Sentencing Project[98]
- Southern Baptist Convention (SBC)[99]
- The Urban Institute[100]
- The United States Conference of Catholic Bishops[101]
- The Vera Institute of Justice[102]

Notable Individuals

- Grover Norquist, Founder and President of Americans for Tax Reform[103]
- Senator Rand Paul[104]
- Pat Robertson, Chancellor of Regent University and Chairman of the Christian Broadcasting Network[105]
- Judge Patti B. Saris, Chair United States Sentencing Commission[106]
- Anthony Kennedy, Associate Justice, United States Supreme Court[107]
- Tim Lynch, Director Criminal Justice Project, Cato Institute[108]
- David Koch, Co-Owner and Executive Vice President of Koch Industries[109]
- David Keene, Former National Rifle Association (NRA) President, former Chairman of the American Conservative Union, and founding member of Right on Crime[110]
- Ward Connerly, Founder and Chairman of the American Civil Rights Institute[111]
- Stephen Breyer, Associate Justice, United States Supreme Court[112]

The wide range of support for reform provides Congress with unusual broad political consensus that action is urgently needed to eliminate extreme sentencing within the federal system.

VULNERABLE POPULATIONS IN OUR PRISON SYSTEM

As the prison population in the United States has exploded over the past four decades, the prison population has disproportionately impacted several vulnerable groups at high rates – individuals with mental illness, children, women, and veterans. This Task Force should take steps to lower the rate at which these individuals are imprisoned and work to propose laws that permit judges more discretion in sentencing.

Individuals with Mental Illness

In the 1800s, as a society, the United States had determined that incarcerating the mentally ill in jails and prisons was inhumane, and, instead, these individuals should be housed in mental health facilities where they can receive treatment.[113] From the 1870s through 1970, jails and prisons rarely housed mentally ill individuals, who were treated, instead, as sick individuals that required treatment rather than as criminals.[114] In the 1960s, the process of deinstitutionalization began, resulting in the release of numerous mentally

ill individuals from mental health facilities.[115] Because of this process, mentally ill individuals were forced out of mental health facilities and into our criminal justice system – arrested for crimes, treated as criminals, and thrown into jails and prisons, rather than being treated as sick, treated as patients, and placed in mental health facilities.[116] This problem has only gotten worse as the years have gone by.

A 2006 report from the Bureau of Justice Statistics found that 45% of federal inmates had a mental health problem.[117] Individuals were classified as having a mental health problem if they either had received a clinical diagnosis or were treated by a mental health professional in the prior 12 months, or if they were experiencing symptoms of a mental disorder based on the Diagnostic and Statistical Manual of Mental Disorders, fourth edition.[118] In addition, the majority of individuals suffering from mental illness committed non-violent offenses – 51.3% of federal prisoners with mental health problems were incarcerated for non-violent drug offenses.[119]

While these incarcerated individuals often did violate the law, in many instances their violation of the law was driven by their mental illness. As discussed above, we used to recognize, as a society, that these individuals deserved treatment rather than incarceration, but our current system simply throws them into federal prison. Moreover, across all federal and state institutions, inmates with mental health problems were more likely to be sexually victimized than others, and inmates with serious psychological distress were nine times as likely as those without mental health problems to be victimized by another inmate and five times as likely to be victimized by staff.[120] The current sentencing guidelines provide almost no ability to account for an individual's mental illness and to fashion a more appropriate punishment based on that illness. The sentencing guidelines should be revised to allow the sentencing judge to take mental illness into account in determining the appropriate punishment.

Children

In the 1980s and 1990s, because of a fear of increased youth crime, the United States shifted from treating children as delinquents to prosecuting children as adults and sentencing them to time in adult prisons.[121] In the federal system, children as young as thirteen years old can be transferred to adult courts and sentenced as adults.[122] While federal-specific statistics are not maintained, nationwide statistics indicate that in 2010, 6,000 juvenile cases

were transferred to adult court, with the children being tried and sentenced as adults.[123] According to the Bureau of Justice Statistics, 1,325 children under the age of 18 were being held in state and federal prisons at the end of 2012.[124] Thousands more are held daily in state adult jails.[125]

This change in practice occurred despite repeated scientific studies establishing that children are, in fact, developmentally distinct from adults.[126] The OJJDP recently concluded that "[d]evelopmental psychologists strongly question whether juveniles have the cognitive ability, psychosocial maturity and judgment necessary to exercise their legal rights."[127] Moreover, the United States Supreme Court recently recognized this distinction, finding that "children are different" and that a sentencer must be given the opportunity to consider youth and all that accompanies it before imposing a mandatory life-without-parole sentence on a child.[128] Thus, children should not continue to simply be charged and sentenced as adults when all the established evidence proves that children are inherently different from adults.

Further, recent studies have determined that not only are these policies of treating children as adults incredibly misguided, they are, in fact, counter-productive, as transferring children to the adult criminal justice system has been found to increase, rather than decrease, rates of violence.[129] Indeed, in February of this year, given this established evidence of ineffectiveness, the OJJDP issued a report recommending that policymakers "[c]onsider raising the minimum age for criminal court to 21 or 24" years old.[130]

Not only is placing children in the adult criminal justice system ineffective, it exposes those children to horrific abuse and violence – children are five times more likely to be sexually assaulted when placed in an adult facility then when placed in a juvenile facility.[131] Given this risk of abuse, coupled with the documented ineffectiveness of treating children as adults, this Task Force should work to raise the minimum age at which children can be prosecuted in adult court.

Women

Over the last three decades, the number of women in federal facilities has increased exponentially, from 1,627 women in federal prisons in 1982 to 13,925 in federal prisons in 2012 – an increase of over 700%.[132] As of 2012, only 3.8% of women incarcerated in federal prison had been convicted of violent offenses while 57.9% of women in federal prison had been convicted of non-violent drug

offenses.[133] Since women are often the primary, or sole, caregivers in a family unit – almost two-thirds of mothers incarcerated in state prisons were living with their child or children prior to incarceration, "many in single-parent households" – removing mothers from their homes for violation of federal drug crimes can have devastating effects.[134] While studies into this issue have been limited to date, available data reveal "that maternal incarceration is associated with a host of negative child outcomes, including poor academic performance, classroom behavior problems, suspension, and delinquency."[135] This Task Force should take into consideration the collateral consequences associated with unecessarily imprisoning women at this incredibly high rate, mostly for the commission of non-violent offenses.

Veterans

In 2007, the Bureau of Justice Statistics reported that as of 2004 just under 10% of all federal prisoners were veterans, that 64% of those individuals served during a wartime period, and that 26% of those individuals saw combat duty.[136] While the percentage of incarcerated veterans in federal prisons in 2004 represented a low point from the high of 20% in 1991,[137] these numbers will likely increase due to our military involvement in Iraq and Afghanistan, though this increase could take some time to materialize. Indeed, the co-author of this study by the Bureau of Justice Statistics, Margaret Noonan, recently stated that it would take years for the numbers to reflect the veterans of Iraq and Afghanistan because "[g]enerally, veterans don't get in trouble immediately."[138] While no recent comprehensive study has been done, a 2012 survey by Iraq and Afghanistan Veterans of America (IAVA) of its members found that 12% reported being involved with the criminal justice system since returning from combat.[139] Another recent study found that incarcerated Iraq and Afghanistan veterans are three times more likely to suffer from combat-related PTSD than incarcerated veterans from other wars.[140] These studies indicate a growing need to be able to account for these and other concerns involving veterans at sentencing.

All of these populations are disproportionately impacted by our current system's inability to account for legitimate factors that should influence sentencing. Mandatory sentencing schemes require judges to disregard disabilities and life circumstances that unfairly punish vulnerable members of our society. There is an urgent need for reform.

OVERCRIMINALIZATION: THE FEDERAL DEATH PENALTY

Our government's administration of the death penalty provides yet another example of both overreaching and misuse. While there is a popular notion that the federal capital punishment system sets a "gold standard" to which states should aspire, this is far from the case, as the federal death penalty is tainted by problems both familiar and unique. Expansion of the federal death penalty has contributed to racial disparity and arbitrariness in its application. The federal death penalty was traditionally reserved for treason, espionage and terrorist activity or for jurisdictions solely under federal control (i.e. murder of a federal prison guard, murder on a military facility). Yet the Anti-Drug Abuse Act of 1988 and the Federal Death Penalty Act of 1994 extended the federal death penalty's reach, making more than 60 crimes eligible for federal death sentences. These offenses now include conduct that, historically, had been left to states to prosecute. "Among the most frequently charged federal capital crimes are the use of a gun to commit homicide during and in relation to a crime of violence or drug trafficking in violation of 18 U.S.C. § 924(j), murder in aid of racketeering activity in violation of 18 U.S.C. § 1959(a), and murder in furtherance of a continuing criminal narcotics enterprise in violation of 21 U.S.C. § 848(e)(1)(A)—all targeting conduct proscribed by every state."[141] This great expansion of the federal death penalty has opened the door to arbitrary federal prosecutions as local United States Attorneys' offices pursue low level drug deals or robbery-murders, offenses that are difficult to differentiate from crimes that local D.A.s or states' attorneys have prosecuted for years.

Moreover, racial bias continues to be a major problem in the federal system: of the 57 prisoners currently under sentence of death (a death row population larger than that of most states), 65% are African American, Latino, Native American or Asian. Since 2009, 92% of the men (11 of 12) sentenced to die have been people of color.[142] Although, according to the Bureau of Justice Statistics, fully 89% of homicides are intra-racial crimes,[143] 58% of those under federal sentence of death were convicted of killing white people and nearly a quarter of current federal death row cases are minority-on-white crimes.[144]

Department of Justice regulations provide that where there is concurrent jurisdiction between state and federal authorities, in the vast majority of cases, the federal government should avoid involvement in what are traditionally state decisions. However, due in part to the expansion of the federal death penalty, the ideal of uniformity in federal capital sentencing remains elusive, and geographic and racial disparities persist. Two-thirds of the federal districts have never sentenced a defendant to death, and the vast majority of federal death sentences come from a few jurisdictions. "While there are ninety-four federal

jurisdictions, forty-three (75%) [federal] death sentences have come from sixteen districts; and just nine districts have returned nearly half (twenty-nine) of the death sentences."[145] Over a fifth of the current death row population comes from jurisdictions within the Fifth Circuit alone: of these prisoners, 83% are African American or Latino. In several jurisdictions responsible for a large number of federal death sentences, the state county of the offense has had a much higher proportion of African Americans from which to choose a jury than has the federal district – thus, the very decision to prosecute federally can have the effect of transforming the capital defendant's jury into one that is majority white. Geographic differences are also widely evident in the way a case is handled (in the appointment of counsel, for example, or the provision of defense resources), similarly undermining claims of uniformity in the nation's use of the ultimate sanction.

The federal interest in seeking a death sentence, with its attendant human and financial costs, has often proved questionable. For example, in an Oklahoma case a man was arrested and tried twice in state court for the killing of a state trooper during a raid on the defendant's home. After two state trials (the first resulting in a hung jury), the defendant was convicted of manslaughter and related crimes and sentenced to thirty years. The federal government then stepped in to prosecute him a third time for the same offense. The lawyer who had successfully defended him in state court was ultimately forced to withdraw in the federal one, and after seven new informants were produced, a capital conviction and death sentence were obtained, many years and many federal dollars later. Other federal prisoners similarly await execution after state prosecutions for the same conduct produced lengthy but non-capital sentences.

Although trial counsel may be better compensated in the federal system than in most states with capital punishment, those representing the federally accused or convicted are often the same over-worked counsel appointed in state cases or are otherwise ill-equipped to handle the high-stakes litigation, and their work often suffers from the same fatal flaws. Among other ills, this has resulted in a number of cases where trial and appellate counsel have both missed clear evidence of mental retardation – a condition which should preclude execution – and where it was discovered only after procedural rules prevented its full consideration. There are in addition to mentally retarded federal death row prisoners those who have serious mental illnesses that were never properly investigated or presented to the juries who sentenced them. Thus one prisoner believes there are devices implanted in his brain and screams endlessly at inanimate objects in his cell; another spends his days picking off his skin and

has not been outside in a decade, although the jury that decided that he should be executed never learned about his schizophrenia and its effects.

Despite such issues, our federal government continues to spend precious resources seeking and defending sentences of death across the country.

CONCLUSION

Widespread consensus supports this Task Force in making recommendations to Congress that mandatory minimum sentencing be eliminated or severely restricted, that judges be authorized to exercise discretion to more fairly sentence people with disabilities, veterans and our most vulnerable citizens and that we review and reconsider some of our most harsh punishments, including the death penalty. The financial and societal costs of overcriminalization, overincarceration and wasted federal spending on unnecessarily long prison sentences can and should be addressed.

I greatly appreciate this Task Force's invitation to appear today and thank you for this opportunity.

Bryan Stevenson
Professor of Law, New York University School of Law

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Mr. GOHMERT. At this time, we will begin the 5-minute questioning. I will reserve, since I have got to be here till the end, and go ahead and recognize the Chairman of the full Committee for 5 minutes.

Mr. GOODLATTE. Well, thank you, Mr. Chairman.

And first let me commend all four of these witnesses. I think you have made great presentations and you have focused this discussion and the debate.

First, Mr. Otis, let me start with you. In many communities, including many in my congressional district in the Shenandoah Valley, western Virginia, there has been a spike in deaths associated with heroin, including among young people. Do you believe it could send a bad message to young people to have the Federal Government reduce penalties across all drug categories, including for heroin?

Mr. OTIS. I could hardly imagine a worse message. I was appalled the other day when, I think it was on a Monday, I saw the Attorney General give a talk recommending some legislation currently pending in the Senate that would substantially cut back on mandatory minimums without ever mentioning the specific drugs, including heroin, to which mandatory minimums apply. And the very next day, I saw him announce that there was a heroin crisis going on in many communities in this country. The idea——

Mr. GOODLATTE. Let me cut you short just because I want to give some other people the opportunity, and I have got a few questions I want to ask.

Let me let Mr. Stevenson respond to the same question.

Mr. STEVENSON. Yes. I actually think that we are not going to affect use of heroin, use of some of these very serious drugs by creating harsher penalties. When you have an addiction, when you have a disability, when you have a disorder, the last thing you are thinking about is, what kind of sentence am I going to serve? I think we are going to disrupt the heroin epidemics that we have identified in these communities with interventions that recognize what works to get people off heroin. And that is healthcare models. We have got a lot of very successful models that will help us achieve that. But we are not going to do it through sentencing.

Mr. GOODLATTE. Mr. Otis, back to you. If you are not enamored with the present reform proposals, do you have any suggestions or are you simply standing pat on the current law?

Mr. OTIS. I do, Mr. Chairman. I would actually support stronger reform than is currently being proposed, but it would be reform in a different direction.

For example, I would retain the requirement currently pending in some Senate legislation that the Attorney General list all nonmens rea statutes. I would require, in addition, the Attorney General to explain as to each how criminal penalties can be squared with the traditional notion of blame and culpability. Such explanations would have to include a discussion of why regulatory violations could not more effectively and fairly be processed as civil matters.

I would eliminate incarceration as a potential punishment for non-mens rea crimes. I would require that enforcement be under-

taken only by the three agencies that have professional experience with this. That is——

Mr. GOODLATTE. Let me cut you short because I am mainly interested in reforms. I am interested in those reforms very much, and I would like you to submit those to us.

But I am mainly interested at this hearing today about mandatory minimums and alternatives to those.

But because my time will run short, let me turn next to Mr. Levin. You state that a primary focus of the Right on Crime Initiative is maximizing the public safety return on the dollars spent on criminal justice. Do you assert that there are no costs, social or otherwise, involved with the early release of drug offenders into communities where the mechanism is reduce penalties, broaden safety valve provisions, or executive clemency?

Mr. LEVIN. Thanks your for question. Right on Crime doesn't support or oppose any actual legislation. But I will tell you what we have worked with many States on is how do you take some of the savings, if you are going to have people serve lightly less time for nonviolent offenses, how do take some of those savings and reinvest them in stronger parole supervision; reentry programs, where people, when they come out of prison, have to be drug tested, have to report to a parole officer, can't see certain people, including gang members; electronic monitoring; a whole host of models. The Hawaii HOPE Court, which is now being used in reentry in Washington State.

So I think what we need to do is make sure when we have people perhaps coming out of prison a little earlier for certain nonviolent offenses, who are determined to be low risk, that we then in the community make sure they have the supervision so that they don't go back to their old ways.

Mr. GOODLATTE. Thank you.

And, Mr. Evenson, in your 23 years as a Federal prosecutor, how often were drug-trafficking cases brought within your district where the drug quantity was below the statutory mandatory minimum level?

Mr. EVENSON. I can't think of one.

Mr. GOODLATTE. Anybody else want to respond to that very briefly?

Mr. EVENSON. And let me just say this: The majority of defendants that were brought in had prior drug convictions in State court.

Mr. GOODLATTE. And is it your opinion that these are serious drug offenders and not occasional users?

Mr. EVENSON. Absolutely. The individuals that our agents were looking at were heavily involved with distributing narcotics over extended periods of time. And they usually had prior State convictions that resulted in no time or probation, suspended sentences. And when we were able to obtain necessary evidence against them, we were able to bring them in, convince them that they were looking at strong minimum mandatory sentences, and it was at that point they realized that they wanted to cooperate, they assisted us, and were willing to testify. That is how we built our case and went up the chain and got the source of supply.

If I can just say this. Drug organizations set up strongholds in neighborhoods and they affect everybody in that community. We

represent the law-abiding citizens in that community. And as the Congressman said here a moment ago, referring to poor communities of color. We represent many of those poor communities of color who are sick and tired of that drug trafficker abiding by that kind of behavior in the district.

I will tell you one example. We arrested a significant drug trafficker who was involved with violence.

Mr. GOHMERT. The time has expired.

Mr. EVENSON. I am sorry, Your Honor.

Mr. GOODLATTE. I thank the gentleman. If you want to submit something for the record to expand on that, we would welcome that.

Thank you, Mr. Chairman. I appreciate your forbearance.

Mr. GOHMERT. Thank you, Mr. Chairman.

At this time Mr. Scott, the Ranking Member, would be asking questions, but he had indicated to me he would like to first yield to the Ranking Member of the overall Committee, Mr. Conyers, for 5 minutes.

You are recognized.

Mr. CONYERS. Thank you, Judge Poe.

Let me begin with Marc Levin, Policy Director.

And I want to express my appreciation for this discussion going on here. It is quite balanced and, to me, quite revealing.

Mr. Levin, can you speak about States that have eliminated or reduced mandatory penalties and their effect on the crime rate, the guilty plea rate, the cooperation rate.

Mr. LEVIN. Yes. Thank you very much, Congressman Conyers.

In fact, one of the examples is Michigan, which you are probably familiar with, in 2000 eliminated their drug mandatory minimums, including retroactively, and then, in the subsequent decade, property crimes fell 24 percent; violent crime, 13 percent.

I mentioned earlier South Carolina, as another example, in 2010, rolled back their drug mandatory minimums and has seen crime drop 14 percent since then.

Georgia recently under Governor Deal, who is a former prosecutor—his brother is a drug court judge, and drug courts are one of the best solutions we have. They rolled back drug sentencing laws about a year ago, the penalties on low-level drug possession. And they have seen crime continue to decline in Georgia.

So Texas, where I am from, we are definitely still tough on crime, and we say we are tough and smart. And so that does involve making the sentence fit the crime. For our drug possession cases, just as an example, if you have 1 to 4 grams of drugs, your sentence could be 2 to 10 years. That could be probation or prison.

I think that what we need to do is—the heroin epidemic was mentioned earlier. That is a scourge. But, for example, there is new pharmacological interventions to literally block the receptors so the heroin addict doesn't feel anything anymore.

Certainly those kingpins dealing large amounts of drugs, they are going to continue to get heavy Federal sentences. And we are just talking here about mandatory minimums, but there could still be sentences above that. That is just the floor.

And no one is talking about getting rid of any mandatory minimums, just recalibrating them to some degree, expanding the safety valve, for example.

And so I really think we have to keep in focus that, when you go back on the crack/powder disparity, after that was narrowed, the average sentence is 97 months. That is 7 or 8 years. That is a lot of incentive to cooperate with the prosecutor and have that prosecutor be able to tell the judge, "This guy is fully cooperating."

So given 97 percent of cases plea out, I don't buy that we need penalties that are unjust simply to convict a third party. We ought to be focusing on what sentence fits the crime in that individual case before the court.

Mr. CONYERS. Thank you very much.

So there has been, in effect, no increase in crime rates when we have reduced these penalties, and the plea rates and cooperation have gone on.

Mr. LEVIN. I think that is correct. And I would also say the Federal system is a very small percentage. There is over 2 million people locked up in the U.S. Only 10 percent of them are in the Federal system.

So I would argue that, frankly, some of the best things we could do to reduce crime and have been doing are like policing—data-driven policing like CompStat in New York City. We can actually deter crime by having police in the right places.

And so, again, you know, with the Department of Justice, we are getting to a point where close to a third of the budget is the Federal prison system, and we could be using those funds for prosecutors, for other strategies.

Mr. CONYERS. Is this from the State that you are giving us this experience, State instead of Federal?

Mr. LEVIN. Yes. I am pointing out to you that I think the crime rates are more tied to State policy because, of course, the vast majority of defendants are sentenced and those incarcerated in State systems rather than the Federal Government. So I think the Federal Government has a very limited effect on the crime rate.

Mr. CONYERS. And after crack reductions, there was no increase in recidivism for those offenders either?

Mr. LEVIN. Yeah. In fact, in Texas, we have seen our crime rate lowest since 1968. We have closed three adult prisons. Our probation and parole recidivism rates have fallen dramatically.

And it is because, instead of building more prisons, we took some of that money and put it into strengthening probation, lower caseloads, more drug courts, more treatment programs. So I think that the Federal Government can learn from that.

Mr. CONYERS. Let me ask my final question to Mr. Otis.

The media chooses how to portray the face of crime. It can choose to paint the face of a criminal as one—or someone of color.

Law enforcement decides which neighborhoods and crimes to focus on, and that means not all neighborhoods are targeted. "You show me the man, and I will find you the crime."

Officers decide which cases are presented for prosecutors, and prosecutors frequently decide who is charged with mandatory penalties and who is not.

Are you saying, sir, that it is impossible for bias, unconscious or not, to seep into our system?

Mr. OTIS. May I answer that question?

Mr. GOHMERT. Yes. Go ahead and answer. This is the last question.

Mr. OTIS. Of course it is not impossible for bias to get into the system. Anyone who would say that would be out of his mind.

Nor is it impossible for ideology or naivete to creep into judges' decisions on what sentencing is when they are not constrained by a mandatory minimum.

And I would cite for you a specific example, that being the Corey Reingold case, the child pornography case in New York where a Federal district judge imposed a sentence of 30 months on a defendant who did not merely possess, but had distributed, child pornography.

And I am not talking here just about nude pictures of teenagers. I am talking about elementary school-age children in contorted poses that I am not going to describe in a setting like this.

The district judge was so influenced by his own personal opinions and so convinced that Congress's mandatory minimum of 5 years was unfair that he sentenced the defendant to 30 months. A unanimous panel of the Second Circuit with a majority of Democratic-appointed judges reversed him.

And the only reason that panel was enabled to require the district judge on remand to impose at least 5 years was that Congress had had the wisdom to say, "For a crime like this, you cannot go below that."

Mr. CONYERS. Professor Otis, you sound more reasonable this morning than I could have had any right to expect, and I thank you for your response.

Mr. OTIS. I apologize.

Mr. CONYERS. Please don't.

Mr. GOHMERT. At this time we will recognize the gentleman from Alabama. Mr. Bachus is recognized for 5 minutes.

Mr. BACHUS. Thank you.

I noticed that there was general agreement that we ought to focus first on the kingpin, the organizer. And I think we all agree maybe with Mr. Evenson that, to do that, you have to get cooperation from someone down the line.

With that in mind, I want to ask you about—the Attorney General back—August of last year directed U.S. attorneys in a criminal division to—and he was talking about Title 21, the safety valve, how you could not charge if certain elements were there. And he said, "If these elements aren't there, this is what you can—you don't have to charge."

One element that had existed before that was cooperation, but he dropped that one. So you can deviate even though there is unwillingness to cooperate. So that is not even taken into consideration.

Were you aware, Mr. Evenson or Mr. Otis, that there was a change made? He also—he elevated the number of points.

Mr. EVENSON. Congressman, I am aware of the August 2013 memo. Essentially, prior to that time, prosecutors were authorized to file what is called an 851 enhancement in every drug case.

That is, essentially, if a drug dealer is arrested and he has a prior drug felony conviction, a notice is filed with the court that basically doubles the minimum mandatory. That particular tool has been very effective in gaining cooperation. That is one of the tools that we have used.

Now that tool has been greatly modified for assistant United States attorneys, and only in certain cases are we authorized to file that.

Also, there was in the memo that we are not to put the drug quantities in the indictment which trigger the minimum mandatory.

Mr. BACHUS. Right.

And, you know, it gives criteria when you don't put them in there. It is just general—you don't put them in unless these things are present, like violence.

Mr. EVENSON. In effect, the minimum mandatories have been done away to a large extent by that memo.

Mr. BACHUS. And used to cooperation was one of those things that you could consider, but then—I guess you still can.

But what I am saying, the safety valve, the current—you know, according to this memo, even if they are not cooperating and they could—they could finger somebody, you still—you know, that is not——

Mr. EVENSON. You are exactly——

Mr. BACHUS [continuing]. That was the one thing that was dropped.

Mr. EVENSON. You are exactly correct.

5C1.2 says, if you have a dealer with not any real record and he tries to cooperate, but doesn't come up to the level of a substantial assistance, there is no violence, then the court can come underneath minimum mandatory. Now that is not even necessary that he cooperate.

Mr. BACHUS. It just seems like that—you know, it goes against that philosophy.

Mr. STEVENSON. Just on that point, Mr. Bachus, typically, the charging decision is made before there is any opportunity to assess cooperation. And even in those cases, cooperation can still be considered in terms of recommendation.

Mr. BACHUS. Well, I think, you know, if you make the decision before you charge, it is more effective, the cooperation, because the kingpin doesn't know sometimes what is going on.

Mr. STEVENSON. Well, the only point I would make is that the range of sentencing is still extremely broad, extremely broad, and I think the data would support that most cases are going to plead.

Mr. BACHUS. Yeah. I just found that strange, that the cooperation was the one that was totally dropped out. You know, to me, it is—let me ask one that is not in here that I think ought to be considered, and that is age of the offender.

You know, nowhere in these guidelines does it talk about age of the offender, and I think that is one of our biggest problems. You know, an 18- or 19-year-old is quite different from a 23- or 24-year-old. A 30-year-old is tremendously different, his judgment.

Particularly, I have five children, two girls and three boys, and the boys mature a little later, I mean, you know, in most cases. I

hope I don't hear about that. But, you know, there—I can say my 18-year-old at 30, after 4 years in the Marines, has much better judgment.

But anybody want to comment on whether we ought to take that into consideration?

Mr. STEVENSON. Yes, Mr. Bachus. I will comment on that.

I absolutely agree. And I think most states are actually moving in that direction where they are actually reintroducing age as an important factor, particularly when you start talking about drug conspiracies.

Because what a lot of these kingpins do is they actually look for young, little kids, some as young as 13 and 14 years of age, where they have enormous influence over them, and they acculturate them into these behaviors.

And right now judges and prosecutors don't have the discretion to consider the fact that this kid was brought in at 13 and 14 and stayed in for 4 or 5 years. I absolutely agree.

And the Supreme Court has actually issued a couple of decisions that I think would support this Congress and Task Force in taking steps to now recognize the importance of age when it comes to culpability and sentencing.

Mr. EVENSON. Congressman, I will say that most of the offenders that we charged were in their 20's. A juvenile in Federal court is under 18. We have to get Department approval.

I will tell you one example, that we had one drug dealer who was involved with an organization in our district and we had to charge him with two murders and, after we did the debriefing, he told us he had committed four others. So he was 19 years old.

Mr. BACHUS. Yeah. And I am not talking about murder. But I am talking about a drug—a 21-year-old is just a different person when he is 30, in most cases.

I mean, they are just almost two different people in many cases, particularly if he hasn't had some of the supervision that other children do.

Mr. GOHMERT. Thank you very much.

At this time Mr. Scott indicates he will still yield.

And Mr. Jeffries from New York, you are recognized for 5 minutes.

Mr. JEFFRIES. Thank you, Mr. Chair.

And I thank the distinguished panel that has appeared before us.

And, Professor Stevenson, it is great to see you.

I want to start with Professor Otis.

Criminal justice is largely the province of 50 States. Is that correct?

Mr. OTIS. Yes, it is.

Mr. JEFFRIES. And that is consistent, of course, with the constitutional landscape and the fact that prevention of crime wasn't necessarily an enumerated power given to Congress. It was left to the State. And the 10th Amendment obviously factors into that.

And the majority of individuals who are incarcerated in this country right now are in the state penal system. Is that correct?

Mr. OTIS. That is also correct. Only about 217,000 are in the Federal law prisons.

Mr. JEFFRIES. So the State experience is a relevant indicator of what could potentially happen if criminal justice reform occurs. Correct?

Mr. OTIS. That is correct, with a qualification. And the qualification is one that I would say I built on Mr. Evenson's experience as well as my own as an assistant U.S. attorney.

The Federal prison population is not like the State prison population. The States turn over to the Feds the really tough, broad-ranging conspiracies.

And the kind of people you find in Federal prisons are the ones the State didn't have the toughness or the resources or the sentencing system to deal with.

Mr. JEFFRIES. Okay. That is interesting, because about 50 percent of the Federal prison population actually constitutes non-violent drug offenders, many of whom did not have a prior criminal record or engaged in violent criminal activity prior to them being incarcerated in Federal criminal prison.

Is that correct, Mr. Stevenson?

Mr. STEVENSON. That is correct.

Mr. JEFFRIES. In fact, about 10 percent of the prison population in the Federal system actually are violent offenders. In fact, I think that is less than 10 percent.

Mr. Stevenson, is that correct?

Mr. STEVENSON. That is correct.

Mr. JEFFRIES. So the premise that the Federal system is somehow different in nature and is filled with kingpins and mafia lords and terrorists is just inconsistent with the facts.

Is that fair, Mr. Stevenson?

Mr. STEVENSON. Yes. And the U.S. Sentencing Commission has made that point repeatedly in its assessment of who is doing time in the Federal system.

Mr. JEFFRIES. So I think it is clear there is no real difference between the individuals in the State penal system and the individuals in the Federal penal system.

And so I would argue, since the majority of individuals are actually in the State penal system, that the State penal system experience, in terms of criminal justice reform, is instructive. To me, that seems like a reasonable premise.

But, Mr. Levin, does that seem fair?

Mr. LEVIN. I think it is.

There are obviously some differences in the composition, but, frankly, those have lessened over the years as more and more, frankly, low-level street-corner drug offenders have ended up in the Federal system.

And I would also say one of the provisions of the Smarter Sentencing Act would say you could have two criminal history points instead of one and still be able to get this benefit of the safety valve.

Now—but in order to get the safety valve, you have to cooperate. And so that would actually increase the incentive to cooperate for more people. Right? Because now, if you have at least two criminal history points, you can't get the safety valve anyway.

Mr. JEFFRIES. Let me stop you there because my time is limited, but I appreciate that observation.

Now, 29 States, as Mr. Stevenson pointed out, have limited or restricted mandatory minimums. And I would think, based on some of the testimony that we have heard today, that that perhaps would have resulted in a crimewave being unleashed on the good people of America in those 29 States.

Has that been the experience, Mr. Stevenson?

Mr. STEVENSON. No, it is not. And as was indicated, some States have actually seen dramatic increases in their crime reduction after the passage of these reforms.

Mr. JEFFRIES. Okay. Mr. Otis, are you familiar with the Rockefeller Drug Laws that were first put into place in New York State in the 1970's?

Mr. OTIS. Generally, but not in specifics.

Mr. JEFFRIES. Okay. And it is widely understood that these were some of the most restrictive, punitive drug laws anywhere in this country. Correct?

Mr. OTIS. I would have to defer to you.

Mr. JEFFRIES. Okay. Mr. Stevenson, is that correct?

Mr. STEVENSON. That is correct.

Mr. JEFFRIES. Okay. Now, these are some of the toughest, most draconian mandatory minimums related to non-violent drug offenders.

In 2009, I was in the State legislature. I was pleased to be part of the effort to dramatically reform those Rockefeller Drug Laws. This happened in 2009.

Are you familiar with that, Mr. Otis?

Mr. OTIS. I am not.

Mr. JEFFRIES. Okay. Well, it occurred.

Are you familiar with that, Mr. Levin?

Mr. LEVIN. Yes, I am.

Mr. JEFFRIES. Okay. Now, again, based on this premise, I would assume in New York State that a dramatic crimewave, as some argued would have occurred as a result of the reforms that took place, would follow.

Is that what took place in New York State, Mr. Otis, or did the crime actually continue to decline subsequent to the repeal of the Rockefeller Drug Laws in New York, as has been the experience in every other State that has changed or reformed its mandatory minimums?

Mr. OTIS. My answer to that is going to be a little bit long, but you have to forgive me. I am a law professor, after all.

The answer is that, yes, in the States that have experimented in this way, crime has continued to decline, but that is because imprisonment and the use of imprisonment, while very significant, probably the most significant factor in the overall decrease in crime in this country in the last 20 years, is only one factor.

Other factors are at work as well, and those factors have continued to be in play, other factors like hiring more police, better police training, better private security measures, better EMT care to reduce the murder rate, for example.

So while it is true that crime has continued to decrease, the decrease has been at a lower rate in the States in which they have tried this. And the best example is California.

Mr. JEFFRIES. My time is expired.

But let me just make the observation one of the reasons that States have been able to invest resources in those other areas that you enumerated is because, when you reduce the prison population, you reduce the State budgetary burden and you can actually invest in things that have been empirically proven to lower crime.

I yield back.

Mr. GOHMERT. Thank you, Mr. Jeffries.

At this time we would move to the gentleman from North Carolina. Mr. Holding, is recognized for 5 minutes.

Mr. HOLDING. Thank you, Mr. Chairman.

Mr. Evenson, I would like for you to give us some, you know, real line—real life, frontline context.

First, you know, just to establish—you know, in your 20-plus years as a prosecutor, most of that as a drug prosecutor, how many drug defendants do you think you have prosecuted and who have been prosecuted under your supervision? Just a general number.

Mr. EVENSON. I had my own caseload while I was supervising a drug unit. I would say I have done hundreds myself over that period of time, but we have done over those years thousands. And we specifically went after the biggest organizations by using the techniques I described earlier.

Mr. HOLDING. So in the thousands of drug defendants that you have personally dealt with, how many of those were low-level, nonviolent drug offenders?

Mr. EVENSON. Well, let me just say this. I hear the term "nonviolent" thrown around.

Mr. HOLDING. Is the trafficking of drugs a violent crime?

Mr. EVENSON. It is by its very nature.

You show me a city with a violence problem, and I will show you an underlying drug-trafficking problem. With drugs comes guns and violence. It is the nature of the game. They don't take their problems to court. They enforce it at the end of a gun.

And any sheriff in my district, they would tell me—because I knew them all—I had 44 counties—their biggest problem was drugs and drug-related crime. That is what they were focused on, if they could get that problem solved.

So I don't accept the term "non-violent" when it comes to drugs. These organizations are, by their nature, drug—and the higher they get, the more——

Mr. HOLDING. But drug trafficking is a crime of violence?

Mr. EVENSON. Yes, sir. It is.

Mr. HOLDING. I mean, by statute, it is a crime of violence.

Mr. EVENSON. And I am just going to say this right now. I have an opportunity.

Law enforcement does not have a war on drugs. We have a war on drug traffickers. We seize drugs and we arrest traffickers. That is our mission. And we represent many of these people in these poor communities of color who are victimized by that.

Mr. HOLDING. I want you to focus in on—another Member of the Task Force pointed out that, you know, law enforcement prosecutors can choose the communities in which they go into and—you know, to look for crime and prosecute crime.

Talk about some of those communities that you have been a part of going into and trying to eradicate drug trafficking.

Mr. EVENSON. Congressman Bachus a moment ago asked me a question, and I didn't get to finish.

One example: We had a community where a drug dealer had been selling for years. He had a fence around his yard. He had high-dollar vehicles. He had four of them. He had built an addition on his house.

And there was a photo of one of my agents driving one of these high-dollar vehicles out of the driveway.

He said, "Eric, you see that picture?"

I said, "Yeah."

He said, "You know what happened when I drove it down the street?"

I said, "No."

He said, "The neighborhood had come out on the street and they were clapping."

And this was a bad, violent drug dealer. And that's the kind of people that we represent.

Mr. HOLDING. That is, when the agent drove down the street, the neighborhood came out and clapped?

Mr. EVENSON. It was a Corvette. He took the Corvette out of the driveway. And he said, "Right as I turned and went down the street, they were lined up, clapping."

You know, we represent some of the most vulnerable people, the poor, the elderly, the young, the addicted, and they have no voice. They have no way to sell their home and move away when a drug dealer sets up shop in a neighborhood and the property values drop.

So, quite frankly, I am personally offended when I hear charges of racism. The laws are race neutral. We go where the battle is hottest. We represent people who are victimized by this activity. It doesn't make any difference what neighborhood it is.

I have never prosecuted anybody on the basis of race and neither has any AUSA. The Department of Justice does not prosecute anybody on the basis of race. We have to go where the evidence leads us, and that is where we go.

Mr. HOLDING. Thank you.

Mr. Chairman, I yield back.

Mr. GOHMERT. Thank you.

At this time the Chair recognizes the gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you. I appreciate the opportunity. I apologize for being late. A couple of post-midnight sessions, whatever.

I walked in, Mr. Evenson, to hear you say something that just was incredulous, that there is not a war on drugs. You said there is a war on drug dealers.

Is that what you said, something to that effect?

Mr. EVENSON. Yes, sir. I did say that.

Mr. COHEN. And you said that the laws are race neutral. You said the laws are race neutral.

Mr. EVENSON. Yes, sir. They are.

Mr. COHEN. Nobody denies the fact that the laws are race neutral. But the fact is the implementation of the laws is not race neutral and it is racial profiling. All laws are race neutral since 1865,

except in the South, which went to 1963. Then they were not race neutral.

But the implementation by people under color of law who arrest eight times more African Americans for possession of marijuana than White is not race neutral. Is that not a reality?

Mr. EVENSON. Congressman, I understand there is a lot of statistics being thrown around. But——

Mr. COHEN. Yeah. Like the 99 percent of the people believe in climate change, and some of the people go with the 1 percent. We will go back to the statistics.

Mr. EVENSON. Sir, I cannot argue the statistics.

All I can tell you is, on a daily basis, I deal with drug agents that are Black, White, Indian. I have drug dealers that are Black, White, Indian in our district. We have prosecuted wherever the evidence led us.

Mr. COHEN. I don't deny you don't prosecute them. I understand that. I am saying arrest. And a lot of it is street-level arrests.

You are a Federal prosecutor; are you not?

Mr. EVENSON. Yes, sir. And uniformed patrol is unable to stop this problem. It has to be investigators. They can't do anything in uniformed patrol. They just pick up a person with possession, and it ends there.

Mr. COHEN. Do you believe that marijuana is less dangerous to our society than meth, heroin, crack, and cocaine?

Mr. EVENSON. Well, the laws indicate that. Yes, sir. Meth is highly addictive.

Mr. COHEN. The laws don't indicate that. Marijuana is a Schedule I drug, the same as heroin and LSD. That law does not indicate it.

Mr. EVENSON. In our courtroom, it is treated differently, I can tell you that. Methamphetamine is instantly addictive.

Mr. COHEN. I agree with you. That's right.

And you might be the best in your courtroom. I don't know. But I—and I hope you are. But you're right. You need to go after meth and heroin and crack and cocaine.

Mr. EVENSON. We do that, sir.

Mr. COHEN. How about marijuana, though?

Mr. EVENSON. Well, marijuana—some of the most violent dealers that I have experienced were marijuana growers.

Mr. COHEN. Because it is illegal and they are violent when the police come—in or the DEA to try to bust them. So it is not just that they are like malum in se. They are not violent in se. They are violent because of the laws.

Mr. EVENSON. Well, I have been threatened by marijuana growers.

Mr. COHEN. Right.

Mr. EVENSON. They want to do their thing.

Mr. COHEN. If it was legal, do you think they would threaten you? They threaten you because it is illegal.

Mr. EVENSON. Well, that is a different question, Congressman. I am just telling you my experience.

Mr. COHEN. I got you.

And when alcohol was illegal—I mean, Al Capone and Frank Nitti and all those guys we watched on "The Untouchables," Robert

Stack—I mean, they were bad guys, but now they are wholesalers. They are nice guys. You know, it is just a matter of how you flip it.

Do you think that the—you support mandatory minimums, I understand.

Mr. EVENSON. Yes, sir. We need those. We really need those.

Mr. COHEN. Do you think that there are mistakes with mandatory minimums sometimes when the judge tells us so many times that there are situations where they didn't want to sentence this person to life when maybe the third offense that triggered or something was some minor thing or there was some nice woman who was involved with a man who led her astray, like Ms. Smith, who wrote a book? She served 6½ years, got pardoned—or commuted by President Clinton. She is a wonderful woman. Her son is at Washington and Lee.

Mr. EVENSON. Congressman, as long as we have human beings, there are going to be mistakes. But I can tell you that our system now is so regulated from the time they appear before a magistrate to a Federal judge, to the appeal process, that every case is scrutinized.

I would say those kind of cases are rare. Every defendant is given a chance, in my experience, to provide assistance so that I can go to bat and tell the judge——

Mr. COHEN. She was provided assistance. And the guy that led her into it was out in northwest Washington state, and he was murdered. So she couldn't provide assistance anymore.

So they put her in jail and they put her in prison for a long time. And if it weren't for President Clinton, she might still be there. Because you can't provide assistance doesn't make your incarceration more just.

Mr. EVENSON. Well, there may be a case like that. But there is an old saying in law school that hard cases make bad law. And right now the law works. It has worked to remove a lot of drug organizations in America.

Mr. COHEN. Well, how do you think that the experiment in Colorado and Washington is going?

Mr. EVENSON. I don't know, sir.

Mr. COHEN. Mr. Stevenson, do you have anything you want to add?

Mr. STEVENSON. Well, I just want to emphasize that these exceptions, these extreme bad cases, I think should not inform what this Committee's Task Force does. We have a lot of data to tell us how to look at the system.

And the truth of it is communities of color are not celebrating mandatory minimums. I think we really need to be sober about the impact of these laws on vulnerable populations.

I am not suggesting that individual officers go out with racist intent, but there is a real difference in how easy it is to prosecute people in communities where you have to do your drug dealing on the streets as opposed to communities where you actually have the resources to do it covertly. And I think, if we don't acknowledge that, we are going to contribute to this problem of extreme racial disparity.

Then the other point. I think you are right to emphasize that the way in which our system identifies who is bad, who is violent, is going to be shaped by the way we characterize and direct these laws.

If we eliminate mandatory minimums, it will not, in my judgment, eliminate or even restrict our ability to go after bad kingpins. We can still do that.

Nobody is talking about shielding drug dealers or drug traffickers from arrest and prosecution. What we are talking about doing is protecting people who are sometimes caught in the web and sometimes end up with these very unjust sentences.

Mr. COHEN. Thank you. And I yield back.

Mr. BACHUS. Most bank robbers aren't violent unless you try to stop them.

Mr. GOHMERT. Gentleman is not recognized at this point.

Mr. COHEN. Willie Sutton was a sweetheart.

Mr. GOHMERT. The Chair will recognize himself for 5 minutes. Thank you.

I really appreciate the level of commitment here. Obviously, we have got people that are quite familiar with the system.

I am also pleased that we have such an experienced group on this Task Force, people that have dealt with the law in so many respects.

Having been a state judge and a chief justice at a State Court of Appeals, we used different terminology. And so, when I hear an immediate adverse reaction to mandatory minimums—in the State, we called it a range of punishment, and it seemed perfectly appropriate for the legislature to say, you know, for these crimes, state jail felony—and I was a felony court—this is the minimum, 0 to 2 years for state jail felonies; 2 years to 10 years for a third-degree; 2 to 20. But you add that bottom level.

Now, if you—and first degree, 5 to 99 or life. And then, of course, if you enhanced it up with prior convictions, then you could—I think there was a guy arrested for stealing a Snickers at one point, and that runs into strange facts when you have got a guy looking at maybe a mandatory 25 years because of enhancements.

But it seems like we could deal with the areas in which there are great injustices without totally eliminating floors.

Although most judges I know would be fair and try to act fairly within a proper range, I am old enough to remember before the Sentencing Guidelines back when Federal judges actually got mad that they were having discretion taken away.

I was shocked when I started having more Federal judges say, "Well, we kind of like it. We don't have to make such tough decisions. The Sentencing Guidelines tell us what we want to do."

Mr. Evenson, I cut you off twice when you seemed to be ready to proceed further, and I have got time.

Anything that you were wishing to illustrate that you didn't have time to do earlier?

Mr. EVENSON. Well, thank you, Your Honor.

I just want to emphasize on behalf of the over 5,000 assistant United States attorneys that I read the comments that they provided on this legislation. We had a survey, and I read it again this morning.

And if you could hear and see those statements, I think you would be amazed at how profound reducing the minimum mandatories would be on our ability to do our job. We will not be able to go after the biggest drug dealers unless we have witnesses.

And, as I said, this is a hard, mean business we are in. We need the inducement to allow conspirators to testify, and they do that. They have to make a decision. It is a go or no-go situation.

And there with their lawyer they decide, "All right. My drug days are over." We build a rapport with them, and they tell us everybody that they have been getting their drugs from.

And they are willing to testify. Oftentimes they don't have to testify, but they are told, "We don't care what you tell us, as long as you tell us the truth." And most of them do, and those that don't go off to prison.

And I had a lawyer tell me one time—he said, "You know who is in Federal prison? Those who cooperated and those who wished they had cooperated. Those are the two people in Federal prison."

We need the ability to negotiate. And the sentences are fair. We are not prosecuting users. We are not prosecuting marijuana users. That is a myth.

We are prosecuting people, for the most part, who have prior convictions and are dealing in significant quantities over a long period of time. That is why we have conspiracies that run 1, 2, 3, and 5 years.

That was the thing that amazed me when I went to Federal court. You could actually charge somebody with an agreement that lasted that long period of time, but the jury gets to see the whole story then. It's not just a search on a drug house.

So that would be our statement, Congressman. I appreciate the time.

Mr. GOHMERT. Anybody else wish to comment on Mr. Evenson's reflection?

Go ahead, Mr. Otis.

Mr. OTIS. I have two comments on it.

One is—I apologize for interrupting Mr. Levin.

And you will have your chance.

One of the things we need to do is go by our experience. Mr. Levin has pointed out that there has been the experience of, I think, 16 or 17 States that over the last few years have reduced or eliminated mandatory minimum sentencing and have not seen an upsurge in crime.

I would point out two things.

He omitted talking about California, which has had as many premature prison releases as the rest of the States combined.

The reason for that is California is acting under the Supreme Court's Plata decision that required early releases in order to reduce the prison population to make prison conditions constitutional.

What has happened in California, again, which has had as many premature releases as the rest of the States combined, is that crime has gone up, that that is not accounted for.

The other thing I would say is that we can look beyond the experience of 17 States over a few years and look to the experience of

50 States over 50 years. We know what works, and we know what fails.

What fails is what we had in the 1960's and 1970's, when we had a feckless and unrealistic belief in rehabilitation and not really a belief in incarceration. That failed. What works is what we have done for the last 20 years.

Mr. GOHMERT. My time is well expired.

Let me recognize the gentleman from Virginia.

Mr. LEVIN. Well, can I just briefly respond?

First of all, with regard to California, I believe the reason they got in that situation is policymakers there failed to act proactively.

That is why we have been working with legislators around the country to address prison crowding in a prospective way, in a way, for the Democratic process, so you don't invite Federal court supervision.

So I think California illustrates why we need to tackle this Federal prison overcrowding issue up-front rather than leaving it to unelected—Supreme Court or other judges.

I would also say one of the reasons I think we have seen the experience with the Rockefeller Drug Laws, as you mentioned, with the drug reform in South Carolina and other States not leading to an increase in crime is we know that the research has shown staying longer in prison does not reduce recidivism.

Prisons do one thing well, which is incapacitate, which, obviously, with murderers, serial rapists and others, is exactly what's needed.

But with people that have a drug problem—and many of these people who are dealing small amounts of drugs on street corners also have a habit themselves—if we can correct that habit and get them into a productive, law-abiding role as a citizen, including through appropriate supervision after release, which we are not investing in on the Federal level, I think then we can continue to drive down the crime rates in this country.

Mr. GOHMERT. Thank you.

At this time we recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you.

And I thank all of our witnesses.

Mr. Stevenson, you indicated that penalties do not affect drug use.

Is there any evidence that the 5-year mandatory minimum for small amounts of crack when we had the 100-to-1 disparity encouraged people to instead use powder where they can have 100 times more powder? Is there any indication that people would say, "Oh, I am not going to use the crack. I am going to use the powder"?

Mr. STEVENSON. No. I think anybody who has worked with this population knows that, very sadly, they are driven by an addiction, by a disorder, that is actually shaping their choices. They are not worried about tomorrow. They are not worried about the next week.

Most of them couldn't even tell you what the penalties are. And I think, until we recognize that, we are going to be misdirecting a lot of our resources.

Mr. SCOTT. And if your goal is to reduce drug use, you mentioned a public health approach?

Mr. STEVENSON. No question. A lot of countries have actually invested in interventions and many States have also used drug courts where they authorize treatment and supervision.

I just want to emphasize this point about supervision, which has proved to be very effective. If you spend $50,000 a year to keep somebody in prison, that money doesn't accomplish very much.

If you spend $10,000 a year to take somebody who has just been released from prison and make sure that they are actually complying with very strict guidelines around treatment and services, allowing them to move forward to get a job, et cetera, not only are you spending less money on that person, you are dramatically increasing the chances that they are actually not going to recidivate or continue to be a drug user.

We have got lots of data from lots of countries that talk about these public health approaches that have radically reduced drug addiction and improved the health of these communities.

Now, I am very sensitive to communities that have been highjacked by drug addiction and drug abuse. The interventions that are around health care models are the interventions that have had the biggest impact on the health of those places.

Mr. SCOTT. Mr. Levin, I understand that your organization, Right on Crime, takes the position that there are more cost-effective ways of reducing crime than waiting for people to get arrested and get into a bidding war as to how much time they are going to serve.

Have you seen the research that incarceration rates over 500 per 100,000 are counterproductive?

Mr. LEVIN. Yes. I think what the case is is that you reach a point of diminishing returns when it comes to incarceration rates.

And that is, number one, because you are sweeping in too many non-violent and low-risk offenders into prison, and, number two, people are serving longer than necessary.

Mr. SCOTT. Let me ask you a question on that point, then.

If anything over 500 per 100,000 is counterproductive and ten States are locking up African Americans at the rate of 4,000 per 100,000, if in a community of 100,000 with that kind of lockup rate you reduced it to the 500, at which you stop getting any kind of return, you have 3,500 fewer people in prison at, say, 20,000 each, that is $70 million.

Are you suggesting that that community could actually reduce crime more by spending that $70 million productively in a public health model, education, after-school programs, getting young people on the right track, keeping them on the right track, than they could just locking up 3,500 extra people?

Mr. LEVIN. Well, I think it is difficult to look at kind of setting arbitrary rates or cutoffs. Obviously, States have different crime rates and so forth.

But I would say that certainly, once you do—Professor Steve Levitt, who has written "Freakonomics," he looked at it. And John Dilulio, who signed our Right on Crime Statement of Principles, he was one of the biggest backers of increasing incarceration a few decades ago.

And what they have said is we have reached a point of diminishing returns and, in fact, potentially in some places, negative re-

turns by the sense that you could be using that money to put another police officer on the street doing some of the things they have done in New York City and other places where they are actually able to deter crime through a greater presence of officers in the right places, targeting those hot spots.

So I think that—and, as you said, we have talked about problem-solving courts, a whole range of other approaches, electronic monitoring and so forth.

And so I think that we really—without necessarily getting into arbitrary caps, we have got to—what we have seen in States is, because so much of the money—90 percent of State corrections budgets are going to prisons—the resources are not there often for these alternatives.

So it is a matter of realigning our budgetary priorities and making sure people don't go to prison simply because we haven't provided the alternatives.

Mr. SCOTT. Well, we have heard you need these bizarre sentences to fight the war on drugs.

How is imposing sentences that violate common sense helpful to the war on drugs?

Mr. LEVIN. Well, I think we—as you said, half of all high school students have tried illegal drugs. We have got to have a broader approach that looks at prevention, that looks at substance abuse treatment where there is many advances being made.

And I really think that certainly we know that undoubtedly drug dealers replace one another. So simply the problem is too broad to solve just by taking what are unfortunately a small number of the total people dealing drugs and putting them in prison for incredibly long sentences.

And, as we have said, these people are still going to be going to prison 97 months on the crack cases even after the disparity was narrowed. We are just talking about——

Mr. SCOTT. When Mr. Evenson says that he can't deal with these people, these people are not—he makes it sound like he doesn't have any leverage over the people. These people are going to jail, just not on bizarre sentences. They would be going to jail on fair sentences.

Mr. LEVIN. Right.

And the question is: Is the last year or 2 of the 8 years or 10 years or 15 years—is that last year getting us that much mileage relative to what else we could be doing with those resources?

Mr. GOHMERT. Thank you.

Let me just comment. We had submitted Chairman Sensenbrenner's statement for the record. He does point out things on which I would hope we would all agree that this Task Force has taken up. Rather unusual to see ACLU, Heritage Foundation, liberal and conservative groups joining together.

But we have a lot of agreement with regard to issue of mens reas requirement for offenses. We have got—and it was mentioned earlier. We really should have these codified into one code instead of having 4,500 or 5,000 Federal crimes where a prison sentence was added simply to show Congress was tough on some issue when maybe it was a clerical error and it shouldn't have gone that route.

So there are many things that we agree on that we really need to deal with. And we really appreciate all of your input on this issue of mandatory minimums, or what I might call a range of punishment.

And you may have other thoughts as you leave. I know I always do: Gee, I wish I had said this, that or the other. So if you wish to have—we provide Members 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Let me just say, if you have additional information that you think of after you walk out, that "I wish I had said that," we would welcome that being submitted in writing for our review, and it will certainly be reviewed.

The Ranking Member has a comment.

Mr. SCOTT. Thank you, Mr. Chairman.

I would ask unanimous consent that letters and testimony from the U.S. Sentencing Commission;* Justice Strategies; Families Against Mandatory Minimums; the Leadership Conference on Civil and Human Rights; the Brennan Center for Justice; the Judicial Conference that often reminds us that judges are often required to impose sentences that violate common sense; the Human Rights Watch;** the ACLU;*** and the Sentencing Project article in The Hill all be entered into the record.

Mr. GOHMERT. Without objection, that will be done.

[The information referred to follows:]

*This submission included a compilation titled "Amendments to the Sentencing Guidelines." The compilation is not reprinted in this hearing record but is on file with the Task Force and can be accessed at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430__RF__Amendments.pdf.

**This submission included a report titled "An Offer You Can't Refuse, How US Federal Prosecutors Force Drug Defendants to Plead Guilty." The report is not reprinted in this hearing record but is on file with the Task Force and can be accessed at http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse.

***The item referred to is not reprinted in this hearing record but is on file with the Task Force and can be accessed at https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

November 26, 2013

Senator Patrick Leahy, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Chuck Grassley, Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Leahy and Grassley,

The United States Sentencing Commission is pleased that the Senate Judiciary Committee plans to take up legislation next month on important sentencing issues, including federal mandatory minimum penalties. We want to draw your attention to the written statement submitted for the Committee's September 18 hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." That statement (attached) made several recommendations relevant to the legislation before the Committee and drew heavily upon the research and conclusions from the Commission's 2011 report on Mandatory Minimum Penalties in the Federal Criminal Justice System.

As set out in that statement, the Commission is concerned about rising federal prison costs and about federal prison populations far exceeding prison capacity. We believe that modifying certain severe mandatory minimum penalties is an important step toward addressing that problem and improving the fairness of federal sentences.

Specifically, the Commission unanimously recommends that Congress consider the following statutory changes:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.

- The provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.

- Congress should consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.

- The safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, should be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

The Commission is also pleased that the Judiciary Committee is considering clarifying the calculation of good time credit for federal inmates to specify that inmates are eligible for 54 days of good time credit per year of sentence imposed. We support Congress addressing this longstanding issue.

As set out in more detail in the attached statement, the Commission reached these conclusions based on its analysis which indicates that mandatory minimum penalties in general have contributed to the overall federal prison population, that certain severe mandatory minimum sentences can lead to disparate charging decisions by prosecutors, and that, in the drug context, statutory mandatory minimum penalties often apply more broadly than to just the high-level drug offenders that it appears Congress intended to target. The Commission's recommendations are also informed by recidivism data showing that crack cocaine offenders released early after modest sentence reductions did not demonstrate an increased propensity to reoffend after a two-year study period.

The Commission stands ready to assist the Judiciary Committee as it prepares to consider these vitally important federal sentencing issues. We are happy to provide any data, analysis, or other assistance that would be useful to the Committee. Please don't hesitate to reach out to me or my staff if we can be helpful in any way.

Sincerely,

Patti B. Saris

Patti B. Saris
Chair

cc: Senate Judiciary Committee Members

Statement of Judge Patti B. Saris
Chair, United States Sentencing Commission
For the Hearing on
"Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"
Before the Committee on the Judiciary
United States Senate

September 18, 2013

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, thank you for providing me with the opportunity to submit this statement on behalf of the United States Sentencing Commission about mandatory minimum sentences in the federal criminal justice system.

We are particularly pleased that the Judiciary Committee is addressing this vital issue that has been a key focus for the Commission for several years. The bipartisan seven-member Commission[1] unanimously agrees that mandatory minimum sentences in their current form have led to unintended results, caused unwarranted disparity in sentencing, and contributed to the current crisis in the federal prison population and budget. We unanimously agree that statutory changes to address these problems are appropriate.

In our 2011 report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,[2] the Commission set out in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. We set out a series of recommendations for modifying the laws governing mandatory minimum penalties that would make sentencing laws more uniform and fair and help them operate as Congress intended. It is gratifying that members of this Committee, including Senators Leahy, Durbin, and Lee, and other Republican and Democratic members of the Senate and House have proposed legislation corresponding to many of these key recommendations.

Since 2011, circumstances have made the need to address the problems caused by the current mandatory minimum penalties still more urgent. Even as state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has continued to grow, increasing by almost four percent in the last two years alone and by about a third in the past decade.[3] The size of the Federal Bureau of Prisons' (BOP) population exceeds the BOP's capacity by 38 to 53 percent on average.[4] Meanwhile, the nation's budget crisis has become more acute. The overall Department of Justice budget has decreased, meaning that as

[1] By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

[2] U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011) (Mandatory Minimum Report), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[3] E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts* 2 (July 2013), http://www.bjs.gov/content/pub/pdf/p12ac.pdf.

[4] U.S. Dep't of Justice, *Federal Prison System FY 2013 Congressional Budget* 1 (2013) http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf.

more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety. Federal prisons and detention now cost more than $8 billion a year and account for close to one third of the overall Department of Justice budget.[5] For these reasons, the Commission feels even more strongly now than in 2011 that congressional action is necessary and has also identified reducing costs of incarceration as a Commission priority for this year.[6]

I will set out the Commission's findings as to why changes in the law are necessary and our recommendations for the changes the Commission believes Congress should consider. The Commission found that certain severe mandatory minimum sentences lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders. The Commission further found that, in the drug context, statutory mandatory minimum penalties often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population. Finally, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission unanimously recommends that Congress consider a number of statutory changes. The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking. We recommend that the provisions of the Fair Sentencing Act of 2010,[7] which Congress passed to reduce the disparity in treatment of crack and powder cocaine, be made retroactive. We further recommend that Congress consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted. Finally, the Commission recommends that the safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

Republican and Democratic members of this Committee and others in Congress have proposed legislation to reform certain mandatory minimum penalty provisions. The Commission strongly supports these efforts to reform this important area of the law. While there is a spectrum of views among the members of the Commission regarding whether Congress should exercise its power to direct sentencing power by enacting mandatory minimum penalties in general, the Commission unanimously believes that a strong and effective system of sentencing

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[5] U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dep't of Justice FY 2014 Budget Request), www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs; *see also* Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013) (http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf).

[6] *See* U.S. Sentencing Comm'n, *Notice of Final Priorities*, 78 Fed. Reg. 51,820, 51,821 (Aug. 21, 2013) (Notice of Final Priorities).

[7] Pub. L. No. 111–220, 124 Stat. 2373 (2010).

guidelines best serves the purposes that motivated Congress in passing the Sentencing Reform Act of 1984.

I. The Commission's Findings on Mandatory Minimum Sentences

Congress created the United States Sentencing Commission as an independent agency to guide federal sentencing policy and practices as set forth in the SRA.[8] Congress specifically charged the Commission not only with establishing the federal sentencing guidelines and working to ensure that they function as effectively and fairly as possible, but also with assessing whether sentencing, penal, and correctional practices are fulfilling the purposes they were intended to advance.[9]

In section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, a provision that originated with members of this Committee, Congress directed the Commission to evaluate the effect of mandatory minimum penalties on federal sentencing.[10] In response to that directive, and based on its own statutory authority, the Commission reviewed legislation, analyzed sentencing data, studied scholarship, and conducted hearings. The Commission published the Mandatory Minimum Report in October 2011 and has continued to perform relevant sentencing data analysis since the report was published. That comprehensive process has led the Commission to several important conclusions about the effect of current mandatory minimum penalty statutes.

A. Severe Mandatory Minimum Penalties Are Applied Inconsistently

The Commission determined that some mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them. These mandatory minimum penalties are triggered by a limited number of aggravating factors, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower penalty.[11] This broad application can lead to a perception by those making charging decisions that some offenders to whom mandatory minimums could apply do not merit them. As a result, certain mandatory minimum penalties are applied inconsistently from district to district and even within districts, as shown by the Commission's data analyses and our interviews of prosecutors and defense attorneys. Mandatory minimum penalties, and the existing provisions granting relief from them in certain cases, also impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups.

Interviews with prosecutors and defense attorneys in thirteen districts across the country revealed widely divergent practices with respect to charging certain offenses that triggered

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[8] *See* 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

[9] 28 U.S.C. § 991.

[10] Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2843 (2009).

[11] Mandatory Minimum Report, *supra* note 2, at 345-46.

significant mandatory minimum penalties. These differences were particularly acute with respect to practices regarding filing notice under section 851 of title 21 of the United States Code for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence. In some districts, the filing was routine. In others, it was more selectively filed, and in one district, it was almost never filed at all.[12] Our analysis of the data bore out these differences. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty.[13]

Similarly, the Commission's interviews revealed vastly different policies in different districts in the charging of cases under section 924(c) of title 18 of the United States Code for the use or possession of a firearm during a crime of violence or drug trafficking felony. In that statute, different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. The Commission found that districts had different policies as to whether and when they would bring charges under this provision and whether and when they would bring multiple charges under the section, which would trigger far steeper mandatory minimum penalties.[14] The data bears out these geographic variations in how these mandatory minimum penalties are applied. In fiscal year 2012, just 13 districts accounted for 45.8 percent of all cases involving a conviction under section 924(c) even though those districts reported only 27.5 percent of all federal criminal cases that year. In contrast, 35 districts reported 10 or fewer cases with a conviction under that statute.

When similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA. Yet the Commission has found severe, broadly applicable mandatory minimum penalties to have that effect.

The current mandatory minimum sentencing scheme also affects different demographic groups in different ways. Hispanic offenders constituted 41.1 percent of offenders convicted of an offense carrying a mandatory minimum penalty in 2012; Black offenders constituted 28.4 percent, and White offenders were 28.1 percent.[15] The rate with which these groups of offenders qualified for relief from mandatory minimum penalties varied greatly. Black offenders qualified for relief under the safety valve in 11.6 percent of cases in which a mandatory minimum penalty applied, compared to White offenders in 29.0 percent of cases, and Hispanic offenders in 42.9 percent.[16] Because of this, although Black offenders in 2012 made up 26.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 35.2 percent of the drug offenders still subject to that mandatory minimum at sentencing.

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[12] *Id.* at 111-13.

[13] *Id.* at 255.

[14] *Id.* at 113-14.

[15] *Id.* at xxviii.

[16] Offenders were most often disqualified from safety valve relief because of their criminal history or because of involvement of a dangerous weapon in connection with the offense. *See* Mandatory Minimum Report, *supra* note 2, at xxviii.

B. Mandatory Minimum Drug Penalties Apply to Many Lower-Level Offenders

In establishing mandatory minimum penalties for drug trafficking, it appears that Congress intended to target "major" and "serious" drug traffickers.[17] Yet the Commission's research has found that those penalties sweep more broadly than Congress may have intended. Mandatory minimum penalties are tied only to the quantity of drugs involved, but the Commission's research has found that the quantity involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. A courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization.

Mandatory minimum penalties currently apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who bring large quantities of drugs into the United States.[18] For instance, in the cases the Commission reviewed, 23 percent of all drug offenders were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences. The category of drug offenders most often subject to mandatory minimum penalties at the time of sentencing – that is, those who did not obtain any relief from those penalties – were street level dealers, who were many steps down from high-level suppliers and leaders of drug organizations.[19] While Congress appears to have intended to impose these mandatory penalties on "major" or "serious" drug traffickers, in practice the penalties have swept more broadly.

C. Mandatory Minimum Penalties Have Contributed to Rising Prison Populations

The federal prison population has increased dramatically over the past two decades, and offenses carrying mandatory minimum sentences have played a significant role in that increase. The number of inmates housed by the BOP on December 31, 1991 was 71,608.[20] By December 31, 2012, that number had more than tripled to 217,815 inmates.[21]

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[17] *See* U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002); http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm; *see also* 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) ("For the kingpins ... the minimum term is 10 years. ... [F]or the middle-level dealers ... a minimum term of 5 years."); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

[18] To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special analysis project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the presentence report. The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form. For more information on the Commission's analysis, please *see* Mandatory Minimum Report, *supra* note 2, at 165-66.

[19] *Id.* at 166-70.

[20] Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin 1 (1995).

[21] Carson & Golinelli, *supra* note 3, at 2.

Offenses carrying mandatory minimum penalties were a significant driver of this population increase.[22] The number of offenders in custody of the BOP who were convicted of violating a statute carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent.[23] Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing – who had not received relief from that mandatory sentence – increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.[24]

These increases in prison population have led not only to a dramatically higher federal prison budget, which has increased more than six fold from $1.36 billion for fiscal year 1991[25] to $8.23 billion this year,[26] but also to significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective.[27] Changing the laws governing mandatory minimum penalties would be an important step toward addressing the crisis in the federal prison population and prison costs.

D. Recent Reductions in the Sentences of Some Drug Offenders Have Not Increased Offenders' Propensity to Reoffend

The Commission recognizes that one of the most important goals of sentencing is ensuring that sentences reflect the need to protect public safety.[28] The Commission believes based on its research that some reduction in the sentences imposed on drug offenders would not lead to increased recidivism and crime.

In 2007, the Commission reduced by two levels the base offense level in the sentencing guidelines for each quantity level of crack cocaine and made the changes retroactive. The average decrease in sentences among those crack cocaine offenders receiving retroactive application of the 2007 amendment was 26 months, which corresponds to a 17 percent reduction in the total sentence.[29] In order to determine whether drug offenders serving reduced sentences

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[22] An increase in the number of prosecutions brought and individuals convicted overall, including for offenses without mandatory minimum penalties, has also contributed to the increasing federal prison population. *See* Mandatory Minimum Report, *supra* note 2, at 81-82.

[23] *Id.* at 81.

[24] *Id.*

[25] Pub. L. No. 101–515, 104 Stat. 2101, 2114 (1990).

[26] U.S. Dep't of Justice FY 2014 Budget Request, *supra* note 5.

[27] Mandatory Minimum Report, *supra* note 2, at 83 (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Comm'n (Mar. 17, 2011)); Brown v. Plata, 563 U.S. ___, 131 S.Ct. 1910, 1923 (2011) (finding the "exceptional" overcrowding in the California prison system was the "primary cause of the violation of a Federal right" and affirming a decision requiring the prison system to reduce the population to 137.5% of its capacity).

[28] 18 U.S.C. § 3553(a)(2)(B) and (C).

[29] U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010).

posed any increased public safety risk, the Commission undertook a study in 2011 of the recidivism rates of the offenders affected by this change. The Commission studied the recidivism rate of offenders whose sentences were reduced pursuant to retroactive application of this guideline amendment and compared that rate with the recidivism rate of offenders who would have qualified for such a reduction, but were released after serving their full sentence before the 2007 changes went into effect.[30] The analysis showed no statistically significant difference between the two groups.[31]

Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the 2007 sentencing amendment, 30.4 percent recidivated within two years. Of the 484 offenders studied who were released in the year before the new amendment went into effect after serving their full sentences, 32.6 percent recidivated within two years. The difference is not statistically significant.[32]

The Commission's study examined offenders released pursuant to retroactive application of a change in the sentencing guidelines, not a change in mandatory minimum penalties. Still, the Commission's 2011 study found that federal drug offenders released somewhat earlier than their original sentence were no more likely to recidivate than if they had served their full sentences. That result suggests that modest reductions in mandatory minimum penalties likely would not have a significant impact on public safety.

II. The Commission's Recommendations for Statutory Changes

Based on the Commission's research and analysis in preparing our 2011 report and in the years since, we support several statutory changes that will help to reduce disparities, help federal sentencing work more effectively as intended, and control the expanding federal prison population and budget.

A. Reduce Mandatory Minimum Penalties for Drug Offenses

In the Mandatory Minimum Report, the Commission recommended that, should Congress use mandatory minimum penalties, those penalties not be excessively severe. The Commission focused in detail on the severity and scope of mandatory minimum drug trafficking penalties. The Commission now recommends that Congress consider reducing the mandatory minimum penalties governing drug trafficking offenses.

Reducing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission's

[30] U.S. Sentencing Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[31] *Id.* at 2.

[32] *Id.* at 4-7.

report. It would also reduce the likelihood that low-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.

Reducing mandatory minimum penalties for drug trafficking offenses would reduce the prison population substantially. For example, under one scenario, a reduction in drug trafficking mandatory minimum penalties from ten and five years to five and two years, respectively, would lead to savings for those offenders sentenced in the first fiscal year after the change of 45,312 bed years over time.[33] That bed savings would translate to very significant cost savings,[34] with corresponding savings over time for each subsequent year of reduced sentences, unless offense conduct or charging practices change over time.

A reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking. These changes would lead to reduced minimum penalties for all offenders currently subject to mandatory minimum penalties for drug trafficking. As noted above, currently available forms of relief from mandatory minimum penalties affected different demographic groups differently, particularly in the case of Black offenders, who qualify for the "safety valve" much less frequently than other offenders.

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[33] The following broad assumptions, some or all of which might not in fact apply should the law change, were made in performing this analysis:

(a) The sentences for all offenders subject to an offense carrying a 10-year mandatory minimum penalty at the time of sentencing would be lowered by half (as a reduction from a 10-year mandatory minimum to a 5-year minimum is a 50% reduction). For those offenders who were convicted of an offense carrying a 10-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission's rough estimate was that their sentence would be reduced by 25% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(b) The sentences for all offenders convicted of an offense carrying a 5-year mandatory minimum penalty would be lowered by 60 percent (as a reduction from a 5-year mandatory minimum to a 2-year minimum is a 60% reduction). For offenders who were convicted of an offense carrying a 5-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission's rough estimate was that their sentence would be reduced by 30% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(c) The analysis did not include any estimate of a change in sentence for offenders for whom a mandatory minimum penalty did not apply (e.g., drug trafficking offenders with drug quantities below the mandatory minimum thresholds);

(d) For offenders who were also convicted of additional (i.e., non-drug) mandatory minimum penalties, those penalties were left in place.

See id. at 3-7.

[34] The Bureau of Prisons estimated the average annual cost per inmate to be $26,359. Bureau of Prisons, *Federal Prison System Per Capita Costs* (2012), http://www.bop.gov/foia/fy12_per_capita_costs.pdf. This cost estimate does not take into account potential increased costs for the United States Parole Commission, the United States Probation Office, and other aspects of the criminal justice system should certain offenders be released earlier.

B. Make the Fair Sentencing Act Statutorily Retroactive

The Fair Sentencing Act of 2010 (FSA),[35] in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.[36] The law did not make those statutory changes retroactive. The Commission recommends that Congress make the reductions in mandatory minimum penalties in the FSA fully retroactive.

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and made these guideline changes retroactive. In making this decision,[37] the Commission considered the underlying purposes behind the statute, including Congress's decision to act "consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere'"[38] and Congress's statement in the text of the FSA that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction."[39] The Commission also concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively, that although a large number of cases would be affected, the administrative burden caused by retroactivity would be manageable.[40] To date, 11,937 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,317 of those cases.[41] The average sentence reduction in these cases has been 29 months, which corresponds to a 19.9 percent decrease from the original sentence.[42]

The same rationales that prompted the Commission to make the guideline changes implementing the FSA retroactive justify making the FSA's statutory changes retroactive. Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions

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[35] Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010) (FSA).

[36] FSA § 2.

[37] The Commission, in deciding whether to make amendments retroactive, considers factors including "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." USSG §1B1.10, comment. (backg'd).

[38] U.S. Sentencing Comm'n, *Notice of Final Action Regarding Amendment on Retroactivity*, Effective November 1, 2011, 76 Fed. Reg. 41,332, 41,333 (Jul. 13, 2011) (Notice of Final Action Regarding Retroactivity).

[39] *See generally* FSA.

[40] Notice of Final Action Regarding Retroactivity, *supra* note 38 at 10.

[41] U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report Fair Sentencing Act*, Table 3 (July 2013), http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf.

[42] *Id.* at Table 8.

already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, 8,829 offenders would likely be eligible for a sentence reduction, with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and to significant cost savings. The Commission estimates that 87.7 percent of the inmates eligible for a sentence reduction would be Black.

C. Consider Expanding the Statutory Safety Valve

In the Mandatory Minimum Report, the Commission recommended that Congress consider "expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines."[43] The "safety valve" statute allows sentences below the mandatory minimum in drug trafficking cases where specific factors apply, notably that the offense was non-violent and that the offender has a minimal criminal history. The Commission recommended that Congress consider allowing offenders with a slightly greater criminal history to qualify.

The Commission found that the broad sweep and severe nature of certain current mandatory minimum penalties led to results perceived to be overly severe for some offenders and therefore to widely disparate application in different districts and even within districts.[44] The Commission also found that in the drug context, existing mandatory minimum penalties often applied to lower level offenders than may have been intended. It would be preferable to allow more cases to be controlled by the sentencing guidelines, which take many more factors into account, particularly in those drug cases where the existing mandatory minimum penalties are too severe, too broad, or unevenly applied. Accordingly, Congress should consider allowing a broader group of offenders who still have a modest criminal history, but who otherwise meet the statutory criteria, to qualify for the safety valve, enabling them to be sentenced below the mandatory minimum penalty and in accordance with the sentencing guidelines.

In 2012, 9,445 offenders received relief under the safety valve provision in the sentencing guidelines. If the safety valve had been expanded to offenders with two criminal history points, 820 additional offenders would have qualified. Had it been expanded to offenders with three criminal history points, a total of 2,180 additional offenders would have qualified.[45] While this

[43] Mandatory Minimum Report, *supra* note 2, at xxxi.

[44] *Id.* at 346.

[45] These totals include offenders not convicted of offenses carrying a mandatory minimum sentence, but subject to safety valve relief under the sentencing guidelines because they meet the same qualifying criteria. The guidelines would need to be amended to correspond to the proposed statutory changes to realize this level of relief. These totals also represent the estimated maximum number of offenders who could qualify for the safety valve since one of the requirements, that the offender provide all information he or she has about the offense to the government, is impossible to predict. *See* 18 U.S.C. § 3553(f).

change would start to address some of the disparities and unintended consequences noted above, it would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders because the demographic characteristics of the offenders who would become newly eligible for the safety valve would be similar to those of the offenders already eligible.[46] For reduced sentences to reach a broader demographic population, Congress would have to reduce the length of mandatory minimum drug penalties.

D. Apply Safety Valve and Other Relief to a Broader Set of Offenses

The Mandatory Minimum Report recommended that a statutory "safety valve" mechanism similar to the one available for drug offenders could be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.[47] Such safety valve provisions should be constructed similarly to the existing safety valve for drug cases with specific factors to ensure consistent application regardless of the location of the offense, the identity of the offender, or the judge. The Commission stands ready to work with Congress on safety valve criteria that could apply in a consistent manner. The Commission has also recommended that Congress consider reducing the length of some mandatory minimum penalties outside of the drug context.[48]

The concerns set out above about disparities resulting from severe mandatory minimum sentences apply in contexts beyond drug offenses, as do the concerns about the effect on the prison population and costs. While drug offenders make up a significant proportion of those subject to mandatory minimum penalties, the number of offenders subject to other mandatory minimum penalties is also substantial. In 2012, 20,037 offenders were convicted of an offense carrying a mandatory minimum penalty. Of those, 4,460 were convicted of non-drug-related offenses subject to a mandatory minimum penalty, and 3,691 of these were still subject to that penalty at the time of sentencing. Statutory provisions allowing for relief when appropriate for this pool of offenders would address the same concerns the Commission has highlighted.

In the Mandatory Minimum Report, the Commission recommended several other legislative provisions to address specific problems documented with existing mandatory minimum penalties, particularly in connection with section 924(c) of title 18 of the United States Code for the use of a firearm during a crime of violence or drug trafficking felony. The Commission recommended that Congress consider amending section 924(c) so that enhanced mandatory minimum penalties for a "second or subsequent" offense apply only to prior convictions, not for multiple violations charged together. The Commission further recommended that Congress consider reducing the length of some of the penalties in that firearms statute and giving courts discretion to impose mandatory sentences concurrently for multiple violations of section 924(c), following the structure currently in place for aggravated identity theft offenses, rather than mandating that the sentences be imposed consecutively.[49] The

[46] Mandatory Minimum Report, *supra* note 2, at 356.

[47] *See id.* at xxx.

[48] *See, e.g., id.* at xxxi.

[49] *See id.* at 364.

Commission also recommended that Congress reassess the scope and severity of the recidivist provisions for drug offenses in sections 841 and 960 of title 21 of the United States Code, which can lead to what some perceive as over-counting for criminal history.[50]

III. The Role of the Sentencing Commission and the Guidelines

These recommendations, all of which impact statutory mandatory minimum penalties and require statutory change, can only be effectuated by Congress. However, the Commission is dedicated to working within its authority and responsibilities to address the issues of unwarranted sentencing disparities and over-incarceration within the federal criminal justice system. First, the Commission is committed to working with Congress to implement the recommendations of the Mandatory Minimum Report. We have identified doing so as the first item in our list of priorities for the coming year.[51] This will entail supporting legislative initiatives and working with Congress to help members craft and pass appropriate legislative provisions that are consistent with our recommendations. We are gratified that Senators on and off this Committee have introduced legislation to reform certain mandatory minimum penalty provisions, and the Commission strongly supports these efforts to reform this important area of the law. We have also called on Congress to request prison impact analyses from the Commission as early as possible when it considers enacting or amending mandatory minimum penalties. This analysis may be very helpful for congressional consideration particularly at this time of strained federal resources.[52]

The Commission is also considering whether changes to the sentencing guidelines are appropriate to address similar concerns about prison populations and costs, noting an intention overall to "consider the issue of reducing costs of incarceration and overcapacity of prisons" pursuant to 28 U.S.C. § 994(g).[53] Specifically, the Commission has listed as its second priority for the coming year review and possible amendment of guidelines applicable to all drug offenses, possibly including amendment of the Drug Quantity Table across all drug types.[54] Should the Commission determine that such action is appropriate, such an amendment would have a significant impact on federal prison sentences for a large number of offenders, though as was the case with the Commission's 2007 crack cocaine amendment, the impact would be limited by current mandatory minimum penalties.

Finally, and most fundamentally, the Commission believes that a strong and effective sentencing guidelines system best serves the purposes of the SRA. Should Congress decide to limit mandatory minimum penalties in some of the ways under discussion today, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing. The Commission will continue to work to ensure that the guidelines are amended as necessary to most appropriately

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[50] *See id.* at 356.

[51] *See* Notice of Final Priorities, *supra* note 6.

[52] *See* Mandatory Minimum Report, *supra* note 2, at xxx.

[53] *See* Notice of Final Priorities, *supra* note 6.

[54] *Id.*

effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.

IV. Conclusion

The Commission is pleased to see the Judiciary Committee and others in Congress undertaking a serious examination of current mandatory minimum penalties and considering options to make the federal criminal justice system fairer, more effective, and less costly. The bipartisan Commission strongly supports legislative provisions currently being considered that are consistent with the recommendations outlined above and stands ready to work with you and others in Congress to enact these statutory changes. We will also work closely with you as we seek to address similar concerns through modifications of the sentencing guidelines. The Commission thanks you for holding this very important hearing and looks forward working with you in the months ahead.

Written Testimony
Judith Greene,
Director
Justice Strategies
Over-criminalization Task Force
Hearing on Penalties
United States House of Representatives
2237 Rayburn House Office Building
May 30, 2014

Chairman Sensenbrenner, Ranking Member Scott and members of the Task Force, I deeply appreciate the effort the task force is making to examine many issues regarding how the current federal criminal statutes are contributing to the growing problem of over-criminalization. I would like to draw your attention to an issue where a sharp increase in criminalization is not only causing a great burden for the federal court system, but is also contributing greatly to overcrowding in the federal prison system. The problem stems from rapid growth, over the past decade and a half, of prosecution of immigrants who cross the border without authorization or proper documentation.

The U.S. Sentencing Commission reports that the proportion of people who are non-citizens that are sentenced in the federal courts has grown steadily over the last decade, reaching 45 percent in 2013. Immigration offenses were tied with drugs as the largest category of federal convictions last year.[1] There are a number of criminal statutes that were under relatively moderate use by federal prosecutors before 2000, which have seen huge increases since then. For example, if they are apprehended at the U.S. border, immigrants can be charged with one of two federal crimes:

> 8 U.S.C. § 1325 – unlawful entry to the U.S., a misdemeanor carrying a sentence of up to 180 days; or
>
> 8 U.S.C. § 1326 – unlawful reentry after deportation, a felony charge normally carrying a federal prison sentence of up to two years, but with aggravated circumstances the maximum may rise to 10 or 20 years.

These two charges are now the most prosecuted offenses in the federal court system. By 2011, the federal court in Arizona had such a clogged criminal caseload that the chief judge was forced to declare a judicial emergency, suspending requirements of the Speedy Trial Act.[2] This flood of immigration cases started to become overwhelming in the mid-2000s with initiation of "Operation Streamline," a Bush administration crackdown on border crossers.

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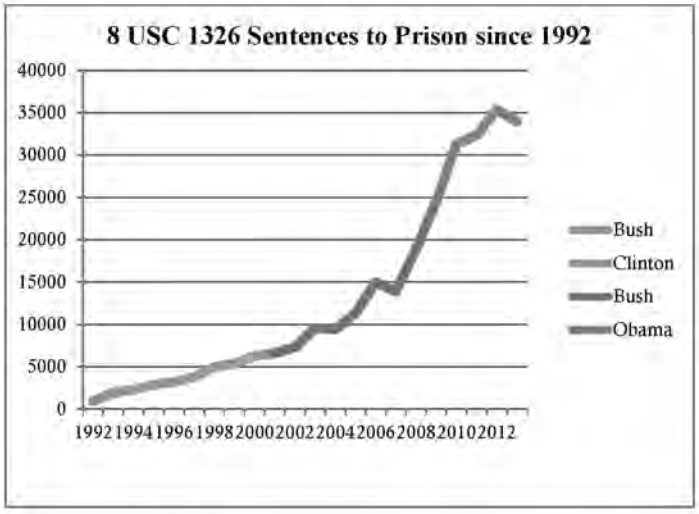
[1] U. S. Sentencing Commission's *2013 Annual Report*, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/annual-report-2013

[2] http://www.uscourts.gov/news/newsView/11-01-25/Judicial_Emergency_Declared_in_District_of_Arizona.aspx

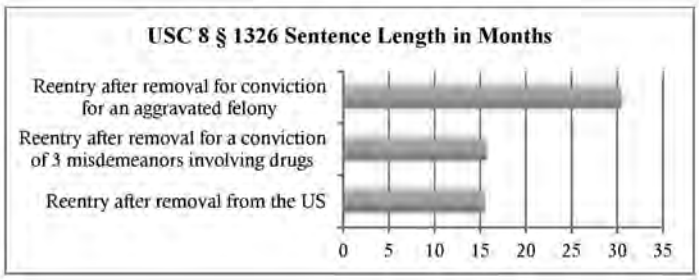
"Operation Streamline" was kick-started in the federal courts along the southern border with an abrupt increase in misdemeanor prosecutions under 8 U.S.C. § 1325. In 2002, just 3,192 cases were filed in the federal courts, but that number jumped to 17,969 in 2004. These prosecutions have continued to surge, reaching 53,822 last year. The average sentence currently imposed at conviction is one month in jail.[3]

The surge in misdemeanor prosecutions has been accompanied by a sharp increase in felony prosecutions (8 U.S.C. § 1326), from 9,337 in 2002 to 37,440 last year. This increase is driving a significant amount of the overcrowding that plagues our federal prison system. Last year 33,938 people were sentenced to prison for unlawful re-entry.



More than 90 percent of those convicted of felony offenses were sentenced for "simple" re-entry after removal, which carries a sentence of up to two years in prison. The average sentence for that offense is 15 months, while aggravated circumstances boost the average to 16 or 30 months.

[3] Data obtained from the Transactional Records Access Clearinghouse at http://trac.syr.edu/



Federal criminal statutes for unlawful entry and reentry to the U.S. are duplicative of our civil immigration laws, which provide for removal, fines, and other civil penalties. These duplicative criminal prosecutions largely represent a departure from the manner in which immigration violations were handled. Prior to the administration of George W. Bush, most border crossers who did not represent any threat to public safety were handled through the civil immigration system.[4]

Federal officials do not argue that they are substituting criminal prosecution for the civil system because it is more efficient. After all, it actually adds a minimum of 15 expensive months in prison in each case, before the person is then sent into the civil system for removal. Rather, they claim that criminal prosecution is necessary to deter immigrant lawbreakers.

Yet recent research shows that these prosecutions do not obtain that goal. It has long been known that immigration patterns are related to the economic needs of migrants and the economic opportunities available to them in the countries they enter. Moreover, a migrant border crossing study conducted at the University of Arizona showed that family reunification was more powerful in drawing people back into the U.S. after removal than the penalties were in dissuading them, with 70 percent of those who have established homes in the U.S. planning to return.[5]

The fiscal impact of these prosecutions is enormous. It is estimated that the federal government has spent $5.5 billion imprisoning people prosecuted for these border-crossing violations since 2005, and those costs are added on top of the $2 billion spent each year on the civil immigrant detention system. Since the Bureau of Prisons relies heavily on private prison contracts to house people sentenced for border crossing violations, the increase in immigrant convictions under federal criminal law has given a massive financial boost to the for-profit prison industry.[6]

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[4] Grace Meng. *Turning Migrants into Criminals: The Harmful Impact of U.S. Border Prosecutions*. Human Rights Watch, May 2013. http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf

[5] Jeremy Slack, Daniel E. Martinez, et al. *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security*. University of Arizona, May 2013. http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf.

[6] Operation Streamline: Costs and Consequences, Alistair Graham Robertson, et al., Grassroots Leadership, September 2012.

Prosecutions of immigrants for a second series of federal criminal statutes is also adding to the problem of over-criminalization of immigrants, as well as the costs associated with their incarceration:

18 USC § 1542 – False statement in application and misuse of passport

18 USC § 1543 – Forgery or false use of passport

18 USC § 1544 – Misuse of passport

18 USC § 1546 – Fraud and misuse of visas, permits and other documents[7]

While prosecutions and sentences for the first three offenses has grown quite modestly since the mid-2000's, criminal enforcement for 18 USC § 1546 (visa fraud and related crimes) shows a very high rate of growth, mirroring patterns for border-crossing violations during the mid-to-late 2000s, increasing from 261 in 2003, and peaking at 1,501 in 2010.[8]

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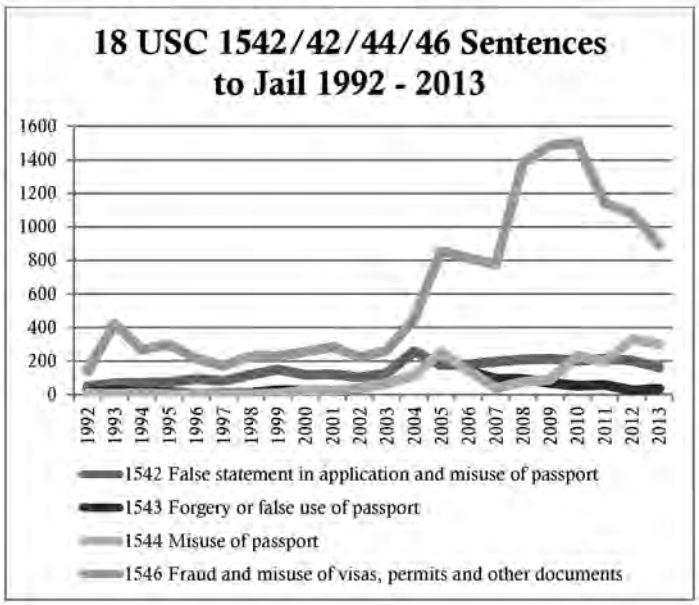
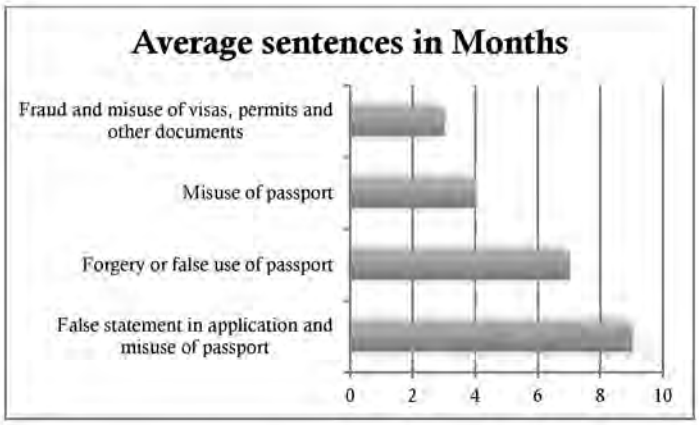
http://grassrootsleadership.org/sites/default/files/uploads/GRL_Sept2012_Report-final.pdf

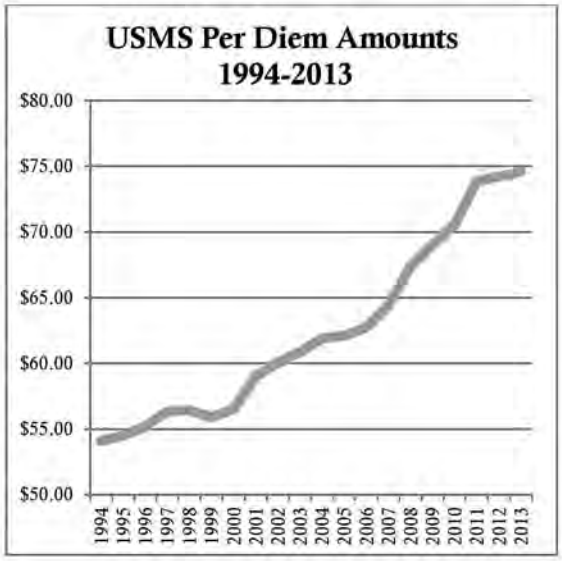
[7] For all four offenses, the statutory penalties are identical, as follows: "[Those convicted s]hall be fined under this title, imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929 (a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both."

[8] Data obtained from the Transactional Records Access Clearinghouse at http://trac.syr.edu/





While the volume of cases in this offense category is much smaller than for border-crossing, a sharp increase in United States Marshal Service contract *per diem* costs for jail beds has multiplied the fiscal impact of ramping up enforcement in this offense category.


USMS Per Diem Amounts
1994-2013
$80.00
$75.00
$70.00
$65.00
$60.00
$55.00
$50.00
1994
1995
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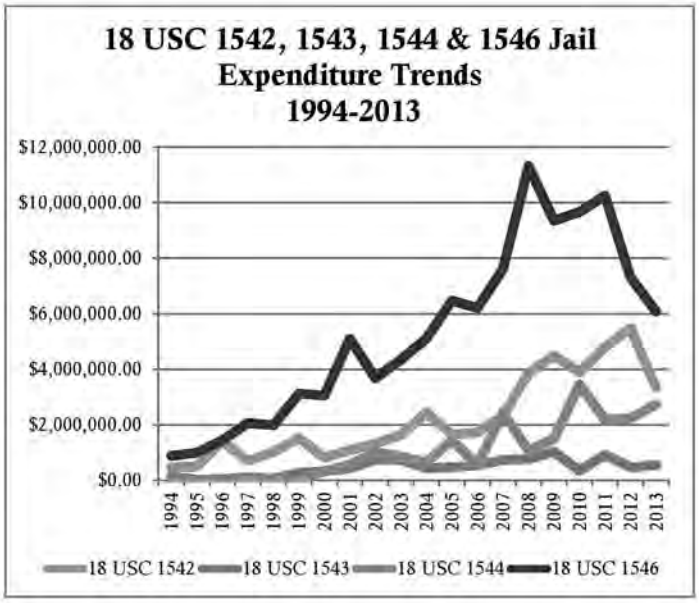
18 USC 1542, 1543, 1544 & 1546 Jail
Expenditure Trends
1994-2013
$12,000,000.00
$10,000,000.00
$8,000,000.00
$6,000,000.00
$4,000,000.00
$2,000,000.00
$0.00
1994
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1996
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2004
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2007
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2009
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2011
2012
2013
18 USC 1542
18 USC 1543
18 USC 1544
18 USC 1546

Your Task Force has taken up issues of great importance. You are poised to make a substantial contribution toward more effective, less wasteful means to promote public safety and respect for the law. Please consider taking up an evidence-based review of the costs and benefits of prosecution policies and sentencing practices for the offenses cited above, and especially in the case of border-crossing violations, where we have seen a wholesale shift from using the civil immigration system to criminal enforcement. This shift constitutes criminalization – in a literal sense – of people who seek to reunite with their families and provide for their economic welfare.

Statement of Julie Stewart, President,
Families Against Mandatory Minimums (FAMM)
to the
U.S. House Judiciary Committee Over-criminalization Task Force

Hearing on Penalties
May 30, 2014
Washington, DC

Families Against Mandatory Minimums (FAMM) is a national nonpartisan, nonprofit organization that advocates for sentencing laws that are fair, cost-effective, and fit both the crime and the offender. Thank you for this opportunity to share our view that mandatory minimum sentencing reform is vital to any effort by this Task Force to address the twin problems of over-criminalization and over-federalization.

FAMM was founded in 1991, after my brother Jeff's arrest for growing marijuana with two of his friends at his home in Washington State. His crime involved 365 small marijuana plants, grown in his garage. Though none of these drugs were ever actually sold or transported across state or international borders, and Jeff and his friends were by all measures small-time growers with no ties to gangs or a major cartel, the state and federal prosecutors made a private, unreviewable decision that this three-man operation somehow merited the intervention of the federal government. My brother was prosecuted and pled guilty in the federal district court rather than in a state court. The federal judge believed two years in prison was an appropriate punishment, as Jeff had no criminal record, had not used weapons or violence, had not profited from the drugs, and had pled guilty. Despite all these facts, the judge regretfully informed my brother that he had no choice but to send Jeff to prison for five years without parole – the applicable federal mandatory minimum sentence. While everyone – including Jeff – admitted that he was guilty and deserved punishment, all of us felt that five years of incarceration was excessive and even potentially counterproductive. We thought then – and still do now – that the court should have had flexibility at sentencing to recognize the compelling mitigating facts in Jeff's case and make the punishment fit both the crime and the offender. I founded FAMM when I realized that Jeff and I were not alone and that tens of thousands of families every year were subjected to the same one-size-fits-all, big-government sentencing system – often for drug offenses that could just have easily been prosecuted and punished in state rather than federal courts.

Jeff's story highlights well the connection between over-criminalization, over-federalization, and mandatory minimum sentences. I, and others from FAMM, have served as panelists in briefings on the issues of over-criminalization and over-federalization here in the House, and in the Senate. We were happy to join The Heritage Foundation, National Association of Criminal Defense Lawyers (NACDL), Texas Public Policy Foundation (home of the "Right on Crime" initiative), and others to sponsor a checklist to help members of Congress analyze new criminal law proposals. We urge lawmakers to consider the following four questions when deciding whether to make certain conduct into a new federal offense:

1. **Should it be a crime?** Members must be convinced that the conduct is so inherently wrongful that it must be prohibited in all circumstances and cannot be discouraged or addressed through civil or administrative penalties;
2. **Is a new federal criminal law needed?** Members of Congress should consider whether the problem is truly federal in nature and whether states can handle it;
3. **If it should be a federal crime, what should the criminal intent requirement be?** Congress should ensure that the criminal intent requirement is adequate to protect the innocent; and
4. **If it should be a federal crime, what is the appropriate punishment?** The threshold considerations for Congress are whether the crime should be a felony or misdemeanor and whether incarceration or some other punishment would satisfy the needs of justice. If incarceration is the appropriate penalty, the sentence imposed should reflect the seriousness of the crime and the culpability, role, and characteristics of the offender.

For more than 20 years, FAMM has focused on this fourth issue. We believe, along with our fellow sponsors of the checklist, that appropriate sentencing is an important part of the discussion of over-criminalization and over-federalization. FAMM's long-held belief is that because mandatory minimum sentencing laws do not allow for the individualized punishment that offenders and the community have a right to expect from courts, they are seldom appropriate and should be repealed.

Mandatory minimum sentencing laws contribute to the over-federalization of criminal law, a problem that experts and commentators from across the ideological spectrum have identified as a major component of over-criminalization. There is a popular expression that captures the news media's seeming obsession with sensational and usually negative stories: "If it bleeds, it leads." I would add a corollary related to the reaction such stories, in particular those involving crime, get in Washington, DC: if the American public sees or reads news about a notable crime, someone in Congress will propose a new federal law to "fix" it. This knee-jerk reaction is bad, but what is worse is that these new proposed federal crimes will often carry new mandatory minimum prison sentences. Over the past 20 years, the number of federal mandatory minimum sentences has doubled, a feat for which both political parties are responsible.[1] This explosion has helped create dangerous overcrowding in our federal prisons – currently at 136 percent of their capacity[2] – and push federal prison spending to a record-high $7 billion for FY2015. Combined with $1.6 billion for federal prisoner detention, in FY2015 we will spend more than 30 percent of the entire Department of Justice budget on federal prisoners.[3] As federal prison populations and costs spiral upwards, funding for other law enforcement, crime prevention, and victim services programs dwindles.[4]

Federal mandatory minimum sentences are a key ingredient in the increased over-federalization of crime since the 1980s. Reliance on lengthy, federal mandatory minimum sentences is a major reason why so many offenses that are already crimes under state law are prosecuted at the federal level. Evidence of this can be found in the recent history of crack cocaine prosecutions. Once Congress adopted mandatory minimum sentences for crack offenses in 1986, which created the indefensible 100-to-one crack-powder cocaine sentencing disparity, federal law enforcement began to prosecute more and more crack-related cases. By FY2009, there were 5,684 offenders sentenced annually in federal courts for crack offenses.[5] In 2010, however, the president signed

into law the Fair Sentencing Act, bipartisan, unanimously-passed legislation to increase the threshold drug amounts triggering crack mandatory minimum sentences.[6] This change not only moved federal crack sentences closer to the penalties for powder cocaine crimes, but also closer to state punishments for crack cocaine crimes.[7] As a result, the federal government has exercised more restraint in pursuing low-level crack offenders, leaving those cases in the capable hands of state law enforcement. In FY2011, there were 4,361 crack offenders sentenced in federal courts;[8] in FY2012, 3,511;[9] in FY2013, it was 2,975.[10] This decrease in prosecutions may reflect more than merely federal restraint. It may also reflect that states are less likely to refer cases to federal courts for prosecution when federal mandatory minimum sentences align more closely with state punishments for similar offenses. The effect of federal mandatory minimum sentences on both state and federal charging practices would be a worthwhile inquiry for the House Judiciary Committee or this Task Force. If new or longer federal mandatory minimum sentences incentivize states to refer more cases for prosecution in federal courts, Congress should show extra restraint in creating or increasing such punishments.

Despite the changes to federal crack sentencing laws, three decades of lengthy federal mandatory minimum drug sentencing laws have had an undeniable impact on the federal criminal caseload and prison population. One of every three federal offenders sentenced annually is a drug offender,[11] and half of all federal prisoners are drug offenders.[12] In FY2013, half of all federal drug offenders had little or no criminal record;[13] 84 percent did not possess or use weapons;[14] only 7 percent played a leadership role in the offense;[15] yet 62 percent received the five-, 10-, or 20-year mandatory minimum drug sentences[16] that Congress intended for "major" and "serious" traffickers.[17] The person most likely to receive a mandatory minimum drug sentence in federal court is not a kingpin, but a street-level seller distributing grams and ounces, not kilograms, of drugs.[18]

Indeed, part of what drives the over-federalization of crime is that federal mandatory minimum drug sentences are triggered by the type and quantity of drugs alone – and those quantities are, in the words of the U.S. Sentencing Commission, "not closely related to the offender's function in the offense." According to the Commission, mandatory minimum drug sentences are "often applied to every function, even those that may not be considered functions typically performed by 'major' and 'serious' drug traffickers."[19] This is because it is easy to inflate drug quantity when a conspiracy charge is filed against a person, and that quantity sets the minimum sentence, regardless of any other facts or circumstances of the case. For example, street-level sellers may personally sell only grams or ounces of a drug, but if charged as part of a conspiracy, they will be held accountable for all the drugs sold, purchased, or transported by everyone else in the conspiracy, too. Drug couriers and "mules" may carry large quantities of drugs, for which they will be held accountable and sentenced, but that quantity ignores other facts that should bear on the punishment, such as their low-level role, how many trips they made, their profits, or their reasons for doing the task (e.g., coercion from an abusive partner, or drug addiction).

While the "largeness" of a drug quantity may be subjective, our current five-year mandatory minimum terms designed for "major" traffickers are triggered by as little as five grams of methamphetamine (the equivalent of a few packets of Sweet-n-Low), a single gram of LSD, an ounce of crack cocaine, a single pound of powder cocaine, a third of an ounce of PCP, and 100 grams of heroin (the weight of two Milky Way candy bars). It is questionable whether these

quantities are really indicators of the "major" drug traffickers Congress wanted to target. It is also questionable whether these drug quantities should trigger federal jurisdiction at all – state law enforcement and courts are perfectly capable of handling many such offenses and are often the first to investigate and arrest many such offenders. Yet every year, thousands of people are prosecuted in federal courts and sent to federal prisons with mandatory minimum sentences for precisely these kinds of drug quantities – regardless of virtually all other facts or circumstances in their cases.

The flood of low-level drug cases into federal courts has had harmful collateral consequences, as well. A few years ago, the Senate Judiciary Committee held a rare and remarkable hearing on the state of the federal judiciary. The two witnesses were Supreme Court Justices Antonin Scalia and Stephen Breyer. The senators and justices discussed the challenges facing the judiciary, including the difficulty in recruiting the best and brightest legal minds to serve as federal judges. Asked about the causes of this particular challenge, Justice Scalia said, "I think it was a great mistake to put routine drug offenses into the federal courts. That is just routine stuff that used to be handled by state courts. If you want excellent federal judges, you want an elite group, and it is not as elite as it used to be."[20]

Another reason that mandatory minimum sentencing reform is important to addressing over-criminalization and over-federalization is related to one of the primary problems addressed by The Heritage Foundation and NACDL in their outstanding 2010 report, *Without Intent*.[21] Like vague criminal laws that fail to require criminal intent, lengthy mandatory minimum sentences can be misused too easily by federal prosecutors. I say this not to question the integrity of federal prosecutors as a group, but rather as an acknowledgement that prosecutors are human, fallible, and therefore should not have unchecked power. In 2013, The Heritage Foundation's John Malcolm testified before this Task Force. He cited specific instances where vague laws had ensnared unsuspecting American citizens. Anticipating the argument that prosecutors could be trusted to minimize such dangers, Mr. Malcolm – himself an experienced former federal prosecutor – eloquently opposed this notion:

> The frequent retort of prosecutors to the over-criminalization problem is that they are very busy people and that we can 'trust them' to decide which cases to prosecute and which to reject when it comes to enforcing vague laws. I know this argument very well because I used to make it myself. Upon reflection, though, I have come to believe that this argument is wrong, not because most prosecutors are untrustworthy, but because it is fundamentally unfair and undermines the very foundations of our legal system. . . .
>
> Most prosecutors are people of good will, but as is the case in any profession, there are good ones and bad ones. Some, fortunately very few, may be prejudiced against a particular group or individual. Some prosecutors are ambitious and might see some personal advantage in pursuing a questionable prosecution against a big company or an infamous person. There, after all, many incentives to bring such charges, and very few not to bring charges. Prosecutors get public kudos for bringing cases. They rarely get praised for declining to prosecute a case. Some might succumb to pressure from law enforcement officers, who may have spent a

> lot of time investigating a case, to find some charge to file to justify that effort, even when doing so is unfair and unjust. And some might simply have bad judgment or be mistaken about what a vague law really means. . . .
>
> [T]he government's 'trust us' argument asks the public to bear the risk that prosecutors might not always do the right thing. This should not be permitted in a system that is premised on being a government of laws, not of men.[22]

Mr. Malcolm's words are a compelling argument against entrusting fallible (and sometimes prejudiced or untrustworthy) federal prosecutors with Americans' personal liberty. His argument also makes the case for abandoning mandatory minimum sentencing laws. Mandatory sentencing laws increase the already awesome authority of federal prosecutors by giving them sentencing power. Because mandatory minimums are tied to specific offenses and charges, the prosecutor's unlimited discretion to bring (or not bring) these charges means that the prosecutor is also picking the sentence an individual will receive. This cuts judges out of the sentencing process completely, eliminating an important check in the system.

This massive transfer of power might be acceptable in many cases since most prosecutors are, as Mr. Malcolm suggests, "people of good will." But as Mr. Malcolm notes, not all prosecutors are perfect. There are "bad ones" who "may be prejudiced against a particular individual." Others are "ambitious and might see some personal advantage in pursuing a questionable prosecution." Finally, some prosecutors will simply exercise "bad judgment." When they do, it is not just a criminal conviction that may result, but also an incredibly unfair sentence.

Eliminating mandatory minimum sentences would not prevent prosecutors from playing a major role at sentencing. It would simply check their power. Prosecutors would still influence sentences in their charging decisions and in their recommendations to the court. Prosecutors would still appeal sentences they find too lenient, and probably (as they do now in 54 percent of their appeals) win.[23]

Vague federal laws coupled with mandatory minimum sentences incentivize federal prosecutions of crimes that could be handled by state authorities, fill the federal system with low-level drug offenses and offenders, and eviscerate any meaningful check on the power of prosecutors, creating a federal criminal justice system that violates our founders' – and our – most cherished principles.

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The problems I have outlined are serious and must be addressed by Congress. To quote again from The Heritage Foundation, "The immediate and most urgent problem facing America's criminal justice system is that district courts must impose unduly severe mandatory minimum sentences on certain small-scale drug offenders."[24] No action, however beneficial, of the president or attorney general can correct these systemic problems. Fortunately, Congress and this Task Force already have before them several modest bipartisan reform initiatives that could help.

The Justice Safety Valve Act (H.R. 1695), cosponsored by Representatives Robert Scott (D-VA) and Thomas Massie (R-KY), would create a new "safety valve" provision that would allow federal judges to sentence a person below the mandatory minimum sentence whenever the required minimum does not fulfill the purposes of punishment listed in 18 U.S.C. § 3553(a). This legislation would apply to all mandatory minimum sentences in the federal code. It would permit judges a check on otherwise un-checked prosecutorial power over charging and sentencing – when over-zealous charging results in an unjust conviction or a disproportionate mandatory sentence, the judge would at least have the means to provide for a fair and humane punishment. Without eliminating a single mandatory minimum term, the Justice Safety Valve Act would, over time, also help alleviate the growth of the federal prison population and its high costs for taxpayers and the Department of Justice.[25]

The more modest option is passage of the Smarter Sentencing Act (H.R. 3382). The Smarter Sentencing Act was introduced by two of this Task Force's members – Representative Scott and Representative Raul Labrador (R-ID) – and is cosponsored by six other Task Force members – Representatives Spencer Bachus (R-AL), Karen Bass (D-CA), Steve Cohen (D-TN), Hakeem Jeffries (D-NY), and Hank Johnson (D-GA). The bill has a Senate companion (S. 1410), introduced by Senators Mike Lee (R-KY), Richard Durbin (D-IL), and Patrick Leahy (D-VT), that is expected to be voted on this summer. Despite this pending action, the House Judiciary Committee should not delay its own hearings on and consideration of this important legislation.

The Smarter Sentencing Act applies only to mandatory minimum-bearing nonviolent drug offenses. The bill has three components: first, it reduces 20-, 10-, and 5-year mandatory minimum sentences for nonviolent drug offenses to 10, 5, and 2 years, respectively. Second, it expands one part of the five-part drug "safety valve" at 18 U.S.C. § 3553(f), permitting low-level, nonviolent offenders with up to three criminal history points under the U.S. Sentencing Guidelines to be sentenced below the mandatory minimum term so long as they meet all of the test's other strict, objective criteria. Third, it makes Congress's unanimously-adopted Fair Sentencing Act (FSA) reforms to crack cocaine punishments retroactively applicable to approximately 8,800 people – 88 percent of which are black[26] – still serving the old, 100-to-1 sentences in federal prisons. No sentence reductions are automatic. Rather, prisoners must petition the court for a sentence reduction in accord with the FSA's 18-to-1 ratio. Prosecutors would be permitted to oppose and argue against a sentence reduction, and courts could deny the reductions in the interest of public safety. Courts, prosecutors, probation officers, and public defenders ably handled even larger numbers of similar requests for retroactively applicable sentence reductions in 2007 and 2011.[27] Beneficiaries from the 2007 sentence reductions re-offended at slightly lower rates than those who received no reduction.[28]

One conservative estimate shows that the Smarter Sentencing Act would save at least $3 billion over 10 years, not including the averted costs of building new prisons and the savings of prison closures as the federal prison population is reduced.[29] The prison population and cost reductions resulting from so-called "front-end" mandatory minimum sentencing reforms outstrip projections for other reforms, including so-called "back-end" reforms to the amount of time credits that federal prisoners may earn for completing rehabilitative programs.[30] In short, the Smarter Sentencing Act's modest reforms nonetheless pack a powerful punch.

As the Congressional Research Service has concluded, it is a combination of the over-federalization of crime and its accompanying mandatory minimum sentencing policies that created a federal prison system that is at 136 percent of its capacity, half-filled with drug offenders, and consuming 30 percent of the Justice Department's crime-fighting budget.[31] Only Congress can remedy this situation, and the most effective, cost-saving, and fairness-enhancing remedy is to reform federal mandatory minimum sentences for nonviolent drug offenders. The Smarter Sentencing Act is a modest policy shift that does not eliminate a single mandatory minimum sentence but ensures that punishments are more proportionate to the crime. We encourage this Task Force to recommend the passage of the Smarter Sentencing Act, and we encourage the House Judiciary Committee to review and advance the bill as soon as possible.

Conclusion

Thank you for your leadership and careful evaluation of the factors driving the enormous growth in our federal prison population and costs. This Task Force has been an exercise in thoughtful deliberation – a welcome change in the way Congress has historically approached the formation of crime policy. However, there is a time to deliberate and a time to act; the time for action is upon us. Study after study – including a new one from the National Research Council[32] – shows that it is our sentencing policies that have produced this dilemma. Both public opinion and state sentencing policy are shifting, too: 30 states have reformed or eliminated mandatory minimum sentencing laws,[33] crime has continued to drop, and a recent Pew Research Center poll shows that 63% of the public thinks these sentencing reforms are a good thing.[34] We thank the Task Force for considering the states' examples and our views and those of other experts, and we urge this Task Force and the full House Judiciary Committee to support and advance mandatory minimum sentencing reforms this year.

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[1] FAMM, Mandatory Minimum Sentences Created, Expanded, or Increased by Congress, 1987-2012, *at* http://famm.org/wp-content/uploads/2013/08/Chart-Fed-MMs-by-Number-Passed-Per-Yr-8.6.pdf.

[2] CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS Summary (Jan. 22, 2013), *available at* https://www.fas.org/sgp/crs/misc/R42937.pdf. Overcrowding is more severe in male high-security prisons (155%) and medium-security prisons (145%). *Id.*

[3] H.R. ___ (113th Cong., 2d Sess.), Title II, *at* http://appropriations.house.gov/uploadedfiles/bills-113hr-sc-ap-fy2015-cjs-subcommitteedraft.pdf.

[4] *See* VERA INSTITUTE OF JUSTICE, THE IMPACT OF FEDERAL BUDGET CUTS ON STATE AND LOCAL PUBLIC SAFETY, FY10-FY13 (Oct. 2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/impact-federal-budget-cuts-public-safety.pdf (describing 34%, 44%, and 67% cuts in funding for Byrne-JAG grants, COPS hiring grants, and residential substance abuse treatment for state prisoners, respectively, since FY2010).

[5] U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 33 (2009), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2009/Table33.pdf.

[6] Pub. Law 111-220 (111th Cong.) (2010).

[7] *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 98-107 (May 2007), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (finding that the majority of states make no distinction between powder and crack cocaine for sentencing purposes, and that the majority of states with disparities had disparities of 10-to-1 or lower).

[8] U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 33 (2011), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/Table33.pdf.

[9] U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 33 (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table33.pdf.

[10] U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 33 (2013), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table33.pdf.

[11] *Id.* at Figure A, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureA.pdf.

[12] BUREAU OF PRISONS, INMATE STATISTICS: OFFENSES, *at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

[13] U.S. SENTENCING COMM'N, 2013 SOURCEBOOK, at Table 37, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table37.pdf.

[14] *Id.* at Table 39, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table39.pdf.

[15] *Id.* at Table 40, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table40.pdf.

[16] *Id.* at Table 43, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table40.pdf.

[17] U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

[18] *Id.* at 171, Fig. 8-11.

[19] *Id.* at 168-69.

[20] Transcript of Hearing before the U.S. Senate Committee on the Judiciary, Considering the Role of Judges Under the Constitution of the United States, Oct. 5, 2011 (112th Cong., 1st sess.), at 25, *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg70991/pdf/CHRG-112shrg70991.pdf.

[21] Brian W. Walsh & Tiffany M. Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), *available at* http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17613.

[22] Testimony of John G. Malcolm, The Heritage Foundation, before the Committee on the Judiciary Task Force, U.S. House of Representatives, June 14, 2013, *available at* http://www.heritage.org/research/testimony/2013/06/defining-the-problem-and-scope-of-overcriminalization-and-overfederalization.

[23] U.S. SENTENCING COMM'N, 2013 SOURCEBOOK, at Table 56A, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table56a.pdf.

[24] Evan Bernick & Paul Larkin, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms* (Feb. 10, 2014), *at* http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms.

[25] Nancy LaVigne, Julie Samuels & Samuel Taxy, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 27, App. A (Nov. 2013), *available at* http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf (showing cost savings of $835 million and 81,000 prison bed years over 10 years).

[26] Statement of Judge Patti Saris, Chair, U.S. Sentencing Comm'n, submitted to the U.S. Senate Judiciary Committee for the Hearing on "Reevaluating the Effectiveness of Mandatory Minimum Sentences," Sept. 18, 2013, at 10, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20130918_SJC_Mandatory_Minimums.pdf.

[27] *See* U.S. SENTENCING COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT, FAIR SENTENCING ACT Table 1 (Apr. 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/20140415-USSC-Crack-Retro-Report-Post-FSA.pdf (showing that federal courts have granted 7,539 of 12,634 requests for sentence reductions).

[28] U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 3 (May 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf (showing that 43.3% of recipients of retroactive sentence reductions recidivated, compared with 47.8% of those who did not).
[29] *Stemming the Tide*, at 24-25, App. A.
[30] *Id.* at 36, App. A.
[31] CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 8-9 (Jan. 22, 2013), *available at* https://www.fas.org/sgp/crs/misc/R42937.pdf.
[32] NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014), *available at* http://www.nap.edu/catalog.php?record_id=18613.
[33] VERA INSTITUTE OF JUSTICE, PLAYBOOK FOR CHANGE?: STATES RECONSIDER MANDATORY MINIMUM SENTENCES (Feb. 2014), *at* http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v2b.pdf.
[34] PEW RESEARCH CENTER, AMERICA'S NEW DRUG POLICY LANDSCAPE: TWO-THIRDS FAVOR TREATMENT, NOT JAIL, FOR USE OF HEROIN, COCAINE 8 (Apr. 2, 2014), *at* http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf. This view predominated among respondents of all party affiliations.

The Leadership Conference
on Civil and Human Rights

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

The Leadership Conference

STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

"HEARING OF THE OVERCRIMINALIZATION TASK FORCE: PENALTIES"

HOUSE COMMITTEE ON THE JUDICIARY OVER-CRIMINALIZATION TASK FORCE OF 2014

MAY 30, 2014

Chairman Sensenbrenner, Ranking Member Scott, and Members of the Task Force: I am Wade Henderson, president & CEO of The Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record regarding the issue of federal mandatory minimum sentences.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, the lesbian, gay, bisexual, and transgender (LGBT) community, and faith-based organizations.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, collective bargaining rights in the workplace, economic opportunity, and financial security. Yet, the wholly unfair and inherently biased nature of our criminal justice system has led to mass incarceration, which is at odds with securing these rights for all Americans.

Mass incarceration, in large part fueled by mandatory minimums, is a legalized form of systematic discrimination, which punishes individuals and groups through the eradication of their education, housing, voting, and employment rights. Mass incarceration is arguably the new structure of systematic enclosure and exploitation, specifically targeting people of color. In order to restore every American's civil and human rights, Congress needs to eliminate mandatory minimum sentences.

As Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, so eloquently stated:

> What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind. It

> is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans…we have not ended racial caste in America; we have merely redesigned it."[1]

The Leadership Conference believes addressing the issue of mass incarceration is one of the great civil rights challenges of this century. To address this urgent need, we support policy proposals that seek to address not only racial disparities in the criminal justice system, but also the ways in which we can reduce our federal prison population and restore fairness in sentencing. The first essential step is elimination of mandatory minimum sentencing schemes.

Fortunately, and partly as a result of financial constraints, policymakers have recognized a need for reform, and begun to work toward remedying the mistakes of the past. In a recent statement, Senator Rand Paul (R-KY) stated, "Our federal mandatory minimum sentences are simply heavy-handed and arbitrary…we should not have laws that ruin the lives of young men and women who have committed no violence."[2] The Leadership Conference supports the efforts of members of this Committee to pass bipartisan legislation that will address the issue of mandatory minimum sentences.

We have an opportunity to correct our previous mistakes. As discussed below, restoring certainty and fairness in sentencing and reducing an imploding prison population is both the moral and financially responsible course of action. Studies have demonstrated that mandatory minimums are inherently unfair and ineffective. They have a disproportionate impact on communities of color, eliminate judicial discretion in the sentencing process, and apply a one size-fits-all approach, resulting in exactly what policy makers intended to guard against – uncertainty in sentencing and no real deterrent in criminal behavior.

Introduction

Over the last forty years, the American penal system has ballooned out of control. State and federal prison populations have skyrocketed, due in large part to the War on Drugs, as well as the rise of so-called "get tough" laws such as "Three Strikes," "Truth in Sentencing," and "Mandatory Minimum" sentencing policies. Decades of these tough sentencing policies have led to the U.S. holding the record for incarcerating more people, and a higher percentage of its population, than any country in the world. Furthermore, federal and state policies affecting the formerly incarcerated after their release obstruct the road to reintegration into society and all but ensure that 67 percent will recidivate.[3]

Prior to the onset of the War on Drugs and "Get Tough" sentencing laws, America's incarceration rate hovered for decades between 100 and 125 per 100,000 people. Yet, today, more than 2.2 million people live behind bars (triple the amount in 1987),[4] and 7 million people are under some form of correctional

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[1] Alexander, Michelle. (2012). *The New Jim Crow*. New York. The New Press, p. 2.
[2] Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013. *available at* http://famm.org/the-facts/#publicsafety
[3] MU News Bureau. (2011, October 3). Prison Education Programs Reduce Inmate Prison Return Rate, MU Study Shows: Correctional facility educational programs a good investment for state of Missouri. Retrieved from http://munews.missouri.edu/news-releases/2011/1003-prison-education-programs-reduce-inmate-prison-return-rate-mu-study-shows/.
[4] American Civil Liberties Union. Retrieved September 17, 2013, *available at* https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties.

control.[5] At the same time, the federal prison population has jumped from 25,000 to 219,000 inmates, an increase of nearly 790 percent.[6] The Federal Bureau of Prisons is overcrowded – with a current population of more than 217,000[7], it is operating system wide at 32 percent over its rated capacity and housing a large population of non-violent drug offenders, at a significant cost to taxpayers.[8] A recent report by the Congressional Research Service (CRS) concludes one of the single most important elements in explaining the record incarceration numbers at the federal level could be "mandatory minimum" sentencing requirements.[9] Moreover, these policies have exacerbated large racial disparities in U.S. prison system.[10] As of 2008, one in every 15 Black men 18 or older was behind bars compared to one in 106 White men.[11] Furthermore, Blacks are incarcerated on drug charges at a rate 10 times higher than Whites, though Whites engage in drug activity at a higher rate than Blacks.[12] In 2000, the National Institute on Drug Abuse conducted a study of drug usage by students, in which it found that White students used cocaine seven times more than Black students, crack cocaine eight times more than Black students, heroin seven times more than Black students, and marijuana at a very similar rate.[13] This sentencing disparity was largely attributed to a quantity disparity that existed between crack and powder cocaine prior to the passage of the Fair Sentencing Act of 2010 (FSA). However, even with the enactment of the FSA, which reduced the disparity from 100-to-1 to 18-to-1, large racial disparities remain today. Our country can no longer afford this trend and serious reform of our criminal justice system and federal sentencing laws is well overdue.

Mandatory Minimums are Bad Public Policy

Beginning in the mid-twentieth century, Congress expanded its use of mandatory minimum penalties by generally enacting more mandatory minimum penalties, broadening its use of mandatory minimums to different offenses, particularly controlled substances, and lengthening the mandatory minimum sentencing.[14] Mandatory minimums require uniformed, automatic, binding prison terms of a particular length for people convicted of certain federal and state crimes.[15]

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[5] The Sentencing Project. *Ending mass Incarceration: Charting a New Justice Reinvestment* Retrieved September 17, 2013, p.3. *available at* http://sentencingproject.org/doc/publications/sen_Charting%20a%20New%20Justice%20Reinvestment.pdf.

[6] Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 2010 (2011), retrieved September 17, 2013, *available at* http://www.bjs.gov/content/pub/pdf/cpus10.pdf.

[7] Federal Bureau of Prisons Website. *Quick Facts*, http://www.bop.gov/news/quick.jsp. (May 29, 2014)

[8] Statement of Director Charles Samuels, before The Sub Committee on The Constitution, Civil Rights, and Human Rights, Committee on The Judiciary United States Senate"Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences," www.judiciary.senate.gov/imo/media/doc/02-25-14SamuelsTestimony.pdf

[9] Congressional Research Service. The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options (Jan. 22, 2013), retrieved from http://www.fas.org/sgp/crs/misc/R42937.pdf

[10] Washington D.C. Bureau of Justice Statistics. "Prisoners in 2010." *available at* http://www.sentencingproject.org/template/page.cfm?id=122

[11] The PEW Center on the States. *One in 100: Behind Bars in America 2008*. Retrieved September 17, 2013, *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

[12] American Civil Liberties Union. Retrieved September 17, 2013, *available at* https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties

[13] Alexander, Michelle. (2012). The New Jim Crow., New York: The New Press, 2012, p. 99.

[14] U.S.S.C. Report to Congress. *Mandatory Minimum Penalties in the Federal Criminal Justice System*. October 2011.. Retrieved September 17, 2013, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf

[15] Families Against Mandatory Minimums. Retrieved September 17, 2013, *available at* http://famm.org/mandatory-sentencing/mandatory-minimums/

Mandatory minimums were enacted for a variety of reasons. Proponents believed that they would: increase certainty in sentencing; act as a deterrent to potential offenders; warn that specific behaviors would result in harsh punishment; and increase public safety by removing dangerous criminals from our streets. This ideology was further buttressed by the belief by some that significant declines in crime over the last several decades were directly related to federal mandatory minimum penalties. Yet, since that time, we have learned that the imposition of mandatory minimum penalties has decreased certainty in sentencing; has not significantly deterred criminal behavior; has no causal relationship to reductions in crime; has increased the likelihood of recidivism; and has had a direct impact on rising incarceration costs.

Exacerbating Racial Disparities: The Application of Mandatory Minimums

Mandatory minimum sentencing systems are especially problematic because they require judges to act on a "one-size-fits-all" mandate for individuals, eliminating any of their judicial discretion and preventing courts from considering all relevant factors, such as culpability and role in the offense and tailoring the punishment to the crime and offender. There is no space to check and balance the prosecutors' decisions in individual cases.

The U.S. Sentencing Commission conducted a study in 2010 that demonstrated the quantitative impact of mandatory minimums. Out of 73,239 offenders sentenced in the federal courts, more than one-quarter (27.2 percent) of those were convicted of an offense carrying a mandatory minimum penalty. More specifically, 77.4 percent of those convictions that carried a mandatory minimum penalty were for drug trafficking offenses.[16] The Commission's study highlighted the disparity among races, with Hispanic offenders accounting for 38.3 percent of those convicted with a mandatory minimum, Black offenders at 31.5 percent, White offenders at 27.4 percent, and "other race" offenders, at 2.7 percent.[17]

In addition, the study also illustrated that for those offenders who were relieved from their mandatory minimum penalty, Black offenders received relief from federal courts *least* often, compared with White, Hispanic, and Other Race offenders. Under a mandatory minimum penalty, Blacks received relief in 34.9 percent of their cases, compared to Whites who received relief in 46.5 percent of their cases, Hispanics who received relief in 55.7 percent of their cases, and Other Races who received relief in 58.9 percent of their cases. Further, even in cases where individuals sought relief under the "safety valve," Blacks qualified for relief 11.1 percent of the time, compared with Whites who qualified 26.7 percent of the time, Hispanics who qualified 42.8 percent of the time, and Other Races who qualified 36.6 percent of the time.[18]

Finally, the study also found racial disparities in the percentage of all federal offenders who were subject to a mandatory minimum penalty sentencing. Black offenders remained subject to the highest rate of any racial group at 65.1 percent of their cases, followed by Whites at 53.5 percent, Hispanics at 44.3 percent, and Other Races at 41.1 percent. Those who were convicted of their offense were subjected to 139

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[16] U.S.S.C. Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011. Retrieved September 17, 2013, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf

[17] *Id.*

[18] *Id.*

months, compared to 63 months for those offenders who received relief from their mandatory minimum penalty.[19]

As a result of this report, the Commission concluded that "If Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently."[20] The Commission further recommended the following actions, which The Leadership Conference supports:

- Expanding the safety valve at 18 U.S.C. § 3553(f) to include offenders who receive two, or perhaps three, criminal history points under the guidelines;
- Mitigating the cumulative impact of criminal history by reassessing both the scope and severity of the recidivist provisions at 21 U.S.C. §§ 841 and 960, including more finely tailoring the current definition of "felony drug offenses" that triggers the heightened mandatory minimum penalties;
- Amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) for firearm offenses, particularly the penalties for "second or subsequent" violations of the statute, to lesser terms;
- Amending 18 U.S.C. § 924(c) so that the increased mandatory minimum penalties for a "second or subsequent" offense apply only to *prior* convictions to reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c);
- Amending 18 U.S.C. § 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently to provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment; and
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act's mandatory minimum penalty.[21]

Clearly, what was once thought to be sound criminal justice policy has had the unintended consequence of increasing disparities in the administration of justice and has led to mass incarceration.

Mandatory Minimums Bear No Significant Relationship to Crime Reduction or Deterrence

Aside from anecdotal accounts, there is no statistical evidence to demonstrate a significant relationship between federal mandatory minimum penalties and reductions in crime. While there have been considerable declines in crime since the early 1990s, and ostensible rises in prison populations, this does not clearly suggest a direct relationship. According to a report by The Sentencing Project, "about 25% of the decline in violent crime can be attributed to increased incarceration. While one-quarter of the crime drop is not insubstantial, we then know that most of the decline — three-quarters— was due to factors other than incarceration."[22] Without conclusive data, it is impossible to determine that federal mandatory minimum penalties in fact have an impact on crime rates.

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[19] *Id.*
[20] *Id.* at 345.
[21] *Id.* at 355-56, 364 - 65.
[22] The Sentencing Project, *Incarceration and Crime: A Complex Relationship*. Retrieved September 17, 2013, *available at* http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

Evidence suggests that it is unlikely that these penalties impact public safety. Prevailing research on the subject demonstrates that sheer increases in the likelihood of punishment are much more likely to serve as a deterrent than enhancements to the severity of punishment.[23] It is also true that mandatory minimums are particularly ineffective in addressing drug crimes. This is due in part to the nature of the drug trade. For example, in most cases, mandatory minimum sentences target mid-level and low-level offenders, who once removed from the trade, are replaced by someone else, creating a cycle of extended incarceration. With a 1,100 percent drug offense increase from 1980 to today, there are more people incarcerated today for drug offenses than there were in all offenses in 1980.[24] And in most cases, these offenders present no threat to society and deserve shorter sentences.[25]

Mandatory Minimums Can Increase the Likelihood of Recidivism

Additionally, given that harsh mandatory minimum penalties serve to increase the length of time in prison by mandating certain terms of imprisonment, studies have noted there is some relationship between longer stays and recidivism. A 2002 meta-analysis of recidivism studies concluded that longer periods of imprisonment "were associated with a small increase in recidivism." Moreover, prison terms that are seen to be excessive and do not serve the legitimate interest of rehabilitation can have a deleterious effect on an individual's ability to re-integrate into a society that has changed dramatically from the time of their incarceration.[26] To best serve the interests of re-entry and public safety, it is important for policymakers to consider the negative impacts that longer stays can have on low-level offenders.

A Financially Irresponsible Move

Finally, in a time where fiscal uncertainty acts a cloud over our society, the cost to incarcerate individuals for lengthy periods of time has become too great. Since 1980, and the transition from the War on Poverty to the War on Drugs in 1982, the United States has spent about $540 million on federal prisons. In 2013, the U.S. will spend over 12 times that amount, reaching $6.8 billion.[27] Mandatory minimums are cost-ineffective. Taxpayers spend almost $70 billion a year on prisons and jails,[28] raising state spending on corrections more than 300 percent over the last two decades.[29] The Department of Justice has cut funding

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[23] Vincent, Barbara. Federal Judicial Review. *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings*. Retrieved September 17, 2013, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf

[24] Alexander, Michelle. (2012). The New Jim Crow., New York. The New Press, 2012, p. 60

[25] Vincent, Barbara. Federal Judicial Review.The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings. Retrieved September 17, 2013, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf

[26] Testimony of Marc Mauer Executive Director The Sentencing Project The Impact of Mandatory Minimum Penalties in Federal Sentencing Prepared for the United States Sentencing Commission, May 27, 2010, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100527/Testimony_Mauer_Sentencing_Project.pdf

[27] Families Against Mandatory Minimums. The Facts (with Sources/References). Retrieved September 17, 2013, *available at* http://famm.org/the-facts-with-sourcesreferences/

[28] American Civil Liberties Union. Retrieved September 17, 2013, *available at* https://www.aclu.org/criminal-law-reform/drug-sentencing-and-penalties

[29] Families Against Mandatory Minimums. *The Cost*. Retrieved September 17, 2013, *available at* http://famm.org/the-facts/#thecost

for crime-fighting equipment and personnel, and spends one out of four of its dollars to lock up mostly non-violent offenders.[30]

In a still recovering economy, there is simply no rationale to spend millions of dollars on the prison system. Our country must adopt criminal justice models that rely less on punishment and focus more on rehabilitation and prevention. Resources should be funneled to programs that have that been proven to impact criminal behavior by diverting low level non-violent offenders away from prison and to treatment.

Recommendations for Sentencing Reform

The Leadership Conference applauds the efforts by members of this task force to ameliorate the injustice imposed by mandatory minimum sentencing laws, through the introduction of bipartisan legislation, "The Smarter Sentencing Act," by Representatives Raúl Labrado (R-ID) and Robert "Bobby" Scott (D-VA). This proposal seeks to provide a pathway to reform harsh sentencing penalties.

The Smarter Sentencing Act takes a moderate approach in reforming mandatory minimum sentences. This bill would:

- Modestly expand the existing federal "safety valve;"
- Promote sentencing consistent with the bipartisan FSA by allowing certain inmates sentenced under the pre-FSA sentencing regime to petition for sentence reductions consistent with the FSA and current law. Federal courts successfully and efficiently conducted similar crack-related sentence reductions after 2007 and 2011 changes to the Sentencing Guidelines. This provision alone could save taxpayers more than $1 billion; and
- Increase individualized review for certain drug sentences. The Act does not repeal any mandatory minimum sentences and does not lower the maximum sentences for these offenses. This approach keeps intact a floor at which all offenders with the same drug-related offense will be held accountable but reserves the option to dole out the harshest penalties where circumstances warrant.[31]

This bill seeks to restore justice and reduce the financial and human cost of harsh sentencing laws. Congress needs to act and eliminate mandatory minimum sentences by passing legislation similar to these bills.

Beyond this, it is past time to chart a new course for reform of our federal criminal justice system—one that uses an evidence- based approach to public safety. The set of Justice Reinvestment initiatives that have been implemented primarily at the state and local level uses such an approach. These reforms have typically been accomplished in three phases: (1) an analysis of criminal justice data to identify drivers of corrections spending and the development of policy options to reform such spending to more efficiently and effectively improve public safety; (2) the adoption of new policies to implement reinvestment strategies, usually by redirecting a portion of corrections savings to community-based interventions; and (3) performance measurement.

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[30] Families Against Mandatory Minimums. *The Facts*. Retrieved September 17, 2013, *available at* http://famm.org/the-facts/#publicsafety

[31] http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736

Using this model, 21 states – including Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas and Vermont – have implemented initiatives, and six others are pursuing similar legislation. In these states, great improvements have been made, resulting in almost immediate reductions in costs and prison populations. Texas, for example, saw a huge impact on its budget and prison populations. The 2007 reinvestment initiative in Texas stabilized and ultimately reduced its prison population between 2007 and 2010.[32] It also produced a 25 percent decrease in parole revocations between September 2006 and August 2008, at a considerable savings to taxpayers.[33]

These are but a few examples of the positive impact of reforming sentencing policies and practices. It is now time for our federal government to redirect its efforts toward common sense reforms, in order to reduce disparities, increase the chances of successful re-entry, improve supervision programming, and increase overall public safety.

Conclusion

The culture of punishment, together with "tough-on-crime" rhetoric, have heavily impacted the relentless growth of the American penal system. This whole system of mass incarceration, and vast expansion of correctional control, did not occur inadvertently, but rather through policy choices that imposed punitive sentences which resulted in longer terms of imprisonment and in many cases contrary to rehabilitative sentences.[34]

It is the duty of policymakers to enact legislation that promotes fairness and equity in our criminal justice system and our country as a whole. Reform of mandatory minimum sentencing schemes is a necessary step toward fulfilling that duty.

Thank you for your leadership on this critical issue.

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[32] See generally, Marshall Clement, Matthew Schwarz Feld, and Michael Thompson, Council of State Gov't's Justice Ctr.,The National Summit on Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending (2011); National Alliance for Model State Drug Laws, Justice Reinvestment Initiatives (2012).
[33] Tony Fabelo, *Texas Justice Reinvestment: Be More Like Texas?* Justice Research and Policy 11 (2010).
[34] The Sentencing Project. "Ending Mass Incarceration: Charting a New Justice Reinvestment" (2013).

House Judiciary Committee Over-Criminalization Task Force
"Penalties"
May 30, 2014
Submitted by
Brennan Center for Justice Legislative Office
For further information contact Danyelle Solomon, Policy Counsel, at
danyelle.solomon@nyu.edu

Chairman Sensenbrenner, Ranking Member Scott, and distinguished members of the House Judiciary Committee Over-Criminalization Taskforce, thank you for the opportunity to address sentencing reform.

The Brennan Center for Justice is a nonpartisan law and policy institute that seeks to improve the national systems of democracy and justice. The Brennan Center for Justice was created in 1995 by the clerks and family of the late Supreme Court Justice William J. Brennan, Jr. as a living memorial to his belief that the Constitution is the genius of American law and politics, and the test of our institutions is how they treat the most vulnerable among us. Affiliated with New York University School of Law, the Brennan Center has emerged as a national leader on issues of democracy and justice. Currently, the organization has three priority areas: advancing voting rights, reforming money in politics and reducing mass incarceration.

The Brennan Center is committed to reducing mass incarceration to ensure that the lives of millions of Americans, their families, and their communities are improved. We seek reforms that meet the twin goals of reducing the criminal justice system's size and severity while improving public safety. We applaud the Committee for holding a hearing on penalties in the federal system. This testimony urges the Committee to change current sentencing structures as part of an effort to ensure our systems of democracy and justice are working efficiently and effectively.

I. THE CURRENT STATE OF THE FEDERAL PRISON SYSTEM

With more than 2.2 million people behind bars, the United States incarcerates more people than any other nation. The federal government is the largest incarcerator in the country, with more inmates than any single state. Since 1980, the federal prison population has increased by almost 800 percent.[1] Even as several states have implemented innovative sentencing reforms to alleviate the pressures of incarceration, the federal prison population continues to grow.[2] In 2013, the Inspector General of the Department of Justice bluntly rated the federal Bureau of Prisons

[1] NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES AND OPTIONS 51 (2013) (noting "a nearly 790% increase in the federal prison population" since FY 1980).

[2] E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012 – ADVANCED COUNTS 1 (July 2013) (noting that the total U.S. prison population declined three consecutive years in a row). However, this decrease is entirely on account of state reform efforts, particularly in California. *See* Inimai Chettiar, Letter to the Editor, *The Decline of the Prison Population*, N.Y. TIMES, Aug. 2, 2013, *available* at http://www.nytimes.com/2013/08/03/opinion/the-decline-of-the-prison-population.html?_r=1&. During this period, the federal prison population continued to grow. CARSON & GOLINELLI, *supra* note 4.

("BOP") outlook as "bleak," and projected "system-wide crowding to exceed 45 percent over rated capacity through 2018."[3]

Over incarceration has placed intense and untenable pressures on the criminal justice system. Currently, the BOP operates at 32 percent above rated capacity system-wide and 51 percent over rated capacity in high security facilities.[4] The BOP budget has doubled in the past decade. The Department of Justice requested $8.4 billion for the BOP in FY 2015, which amounts to approximately one quarter of the overall Department of Justice budget.[5] This amount only captures federal spending on corrections.

Policy makers, researchers, executive branch officials, elected officials, and policy advocates have all asserted that changes must be made to our current system.

A. Mandatory Minimums Generally Contribute to the Growing Prison Population

While there are many different factors contribute to the current overcrowded criminal justice system, the volume of admissions and specifically the length of time served are key drivers of the increasing prison population. The BOP population from 1998 to 2010 confirmed that the time served in prison for drug offenses was the largest determinant of population growth.[6]

According to the U.S. Sentencing Commission, beginning in the 1950s, Congress changed its use of mandatory minimum penalties in three significant ways. First, Congress created more mandatory minimum penalties. In 1991, 98 mandatory minimum penalties existed; by 2011 that number increased to 195.[7] Second, Congress expanded the types of offenses which carry mandatory minimum penalties. Prior to 1951, mandatory minimum penalties were attached to crimes that were considered most serious in society, including treason, murder, piracy, rape and slave trafficking.[8] Since 1951, mandatory minimum penalties have been enacted to punish a broader scope of crimes, including drug offenses, firearm offenses and identity theft.[9]

These penalties apply regardless of the individualized characteristics of the offender, and take little account of the manner in which the offense was undertaken. Though these laws were enacted to respond to the genuine concerns of Congress that certain offenses should be punished more severely, the price the federal system bears for such decisions are now being brought to bear.

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[3] *Oversight of the Department of Justice: Hearing Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies*, Statement of Michael E. Horowitz, Inspector General, U.S. Dep't of Justice 9 (March 14, 2013), *available at* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf.
[4] BOP Salaries & Expenses, FY 2015 Budget and Performance Summary (2014), available at http://www.justice.gov/jmd/2015justification/pdf/bop-se-justification.pdf.
[5] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T, FISCAL YEAR 2015 (2014), *available at* http://www.whitehouse.gov/omb/budget/Overview.
[6] Mallik-Kane, Parthasarathy, and Adam (2012).
[7] UNITED STATES SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE
SYSTEM 71-74 (2011)
[8] *Id.* at 22.
[9] *Id.*

B. Section 841(b)(1) Motions Specifically Impact the Federal Prison Population

There is one specific statutory provision that has also impacted the length of time served by drug defendants. Under 21 U.S.C. § 841(b)(1), a prior felony conviction can increase a mandatory minimum sentence significantly. These are only trigged if a prosecutor chooses to alert the court, and are usually used to ensure a plea is taken. When asserted, a defendant's sentence can be doubled if they have one prior felony drug conviction. If a defendant has two prior felony drug convictions, and the defendant is already facing a ten year mandatory minimum sentence, his or her sentence will increase to mandatory life imprisonment.

Congress created section 841(b)(1) to target large drug kingpins not low level drug offenders; yet we know that 93.4% of federal drug defendants were in the lower or middle tiers of the drug business.[10] In addition, the use of this enhancement is not consistent and there is no requirement for prosecutors to explain to the court why this enhancement is necessary to the offense. Judge Mark Bennett of the Northern District of Iowa has described this provision's application as "stunningly arbitrary."[11] According to Sentencing Commission data, the use of section 841 motions for eligible defendants ranged the entire spectrum – from 87 percent in the Northern District of Florida to 1.5 percent in the Southern District of California and the Northern District of Texas.[12]

II. LEGISLATIVE EFFORTS TO IMPROVE THE CRIMINAL JUSTICE SYSTEM

This above-discussed data makes clear that any attempt to truly address the unsustainable federal prison population must address mandatory minimums. As we explain in the following section,

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[10] Percentage calculated on basis of whether the defendants received an aggravating role adjustment under the guidelines 2012 Sourcebook. USSC, 2012 Sourcebook, "Table 37: Criminal History Category of Drug Offenders in Each Drug Type, Fiscal Year 2012."
http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table37.pdf (accessed October 1, 2013). See USSC, "2012 Guidelines Manual," November 1, 2012,
http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf (accessed October 1, 2013). section 3B1.1 for an explanation of aggravated role sentence adjustment.

[11] United States v. Young, No. CR-12-4107-MWB, 2013 U.S. District LEXIS 116042, 2 (N.D. Iowa 2013)

[12] The United States Sentencing Commission analyzed a sample group of cases for 13,935 drug defendants from three fiscal years (FY 2006, 2008, and 2009) to determine eligibility for an §851 enhancement because of prior qualifying convictions and to determine in how many of the cases the enhancement was applied. At the request of Federal District Judge Mark Bennett, the Sentencing Commission provided him with the number and percentage of defendants in the sample who were eligible for the §851 penalty enhancement for each of the 94 federal districts and the number and percentage of the defendants against whom the §851 was applied. Judge Bennett kindly provided the data to Human Rights Watch. The data does not tell us the number or percentage of cases in which the §851 was filed and then withdrawn as part of a plea agreement, which may happen quite frequently, as we discuss below. Nor does it tell us whether a defendant had two prior convictions, but the §851 was filed based on only one prior conviction. See also, USSC, "Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System," October 2011,
http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm, §851 Analysis, pp. 252-260. See Judge Bennett's decision in *United States v. Young*, No. CR-12-4107-MWB, 2013 U.S. Dist. LEXIS 116042 (N.D. Iowa 2013) for detailed examination of application of §851 enhancements based on Sentencing Commission data.

Congress has recognized this need in recent years. We urge this Committee to continue supporting efforts to reign in the federal prison population through reforms to legislation triggering severe mandatory minimum penalties.

A. The Fair Sentencing Act Modestly Addressed Harsh Mandatory Minimum Penalties

Congress has taken steps to improve the current problems facing the criminal justice system. In 2010, Congress passed the Fair Sentencing Act which reduced the disparate drug weights necessary to trigger mandatory penalties for crack versus powder cocaine offenses from a 100:1 to 18:1 ratio. The bill also eliminated the five year mandatory minimum for simple possession of crack cocaine. These changes resulted in sentence reductions for thousands of inmates suffering from long sentences under an outdated sentencing structure.[13]

B. The Smarter Sentencing Act Would Build on Previous Congressional Reform Efforts

Today, Congress has the opportunity to pass the Smarter Sentencing Act, a bi-partisan bill, introduced by Senator Durbin (D-IL) and Senator Lee (R-UT), which would reduce mandatory minimum penalties for all drug offenders. More specifically, the bill has three main parts. First, the bill will modestly expand the existing federal "safety valve", 18 U.S. C. §3553(f), for drug offenses. Second, the bill will reduce, not repeal, mandatory minimum drug sentences. Third, the bill will allow courts to review cases for 8,800 federal prisoners who are sentenced under old crack cocaine laws, and this would bring them in line with the Fair Sentencing Act. This legislation has broad support amongst policy makers and advocates, including law enforcement, faith leaders, conservatives, progressives and civil rights leaders.

III. CONCLUSION

The Brennan Center thanks the taskforce for holding a hearing to discuss the issue of penalties in our criminal justice system. We thank the Taskforce for the opportunity to submit written testimony on this issue. We strongly urge the Taskforce to recommend changes to the current mandatory minimum sentencing structure. Lastly, we implore the Taskforce to move beyond political reluctance and party politics and instead toward fixing an unsustainable criminal justice system. The Taskforce has a key role to play in helping pass comprehensive and meaningful legislation to address these issues. We urge you to do so.

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[13] *See* USSG App. C, amend. 748 & 750 (applying Fair Sentencing Act into the guidelines). According to Sentencing Commission data, 7,460 applications for reduced sentences based upon application of the Fair Sentencing Act's amendment to crack cocaine penalties. U.S. SENT'G COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT TBL. 5 (Jan. 2014), *available at* http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2014-01_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

May 27, 2014

Honorable Robert C. "Bobby" Scott
Ranking Minority Member
Over-Criminalization Task Force of 2014
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Representative Scott:

We are pleased that the House Committee on the Judiciary Over-Criminalization Task Force of 2014 will hold a hearing on May 30, 2014, regarding criminal penalties in the federal criminal justice system. By letter dated March 26, 2014, I described the Judicial Conference's opposition to the over-federalization of criminal law, and I reiterated our willingness to assist the Task Force in considering these important issues. I write today to share the Conference's positions with regard to criminal penalties. Specifically, the Conference has long opposed mandatory minimum sentences and supported legislation that would help avoid the fiscal and social costs associated with mandatory minimum sentences. Federal judges, perhaps more than some other officials in the federal criminal justice system, perceive the unjustly excessive fiscal and social costs of mandatory minimum sentences. The Judicial Conference also endorses an amendment to 18 U.S.C. § 924(c) to preclude the "stacking" of counts and to make clear that additional penalties apply only when, prior to the commission of such an offense, one or more prior convictions of such person have become final. Passage of this amendment would, in our view, serve to mitigate certain unjust effects of mandatory minimum sentences.

I. Judicial Conference's Opposition to Mandatory Minimum Sentences

For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.[1] Though the Conference favors the full repeal of mandatory minimum penalties, it also supports incremental steps that would ameliorate the negative effects of these statutory provisions.

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[1] JCUS-SEP 53, p. 29; JCUS-SEP 61, pp. 98-99; JCUS-MAR 62, pp. 20-21; JCUS-MAR 65, p. 20; JCUS-SEP 67, pp. 79-80; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45,56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17; JCUS-SEP 13, p. 17.

The Conference has had considerable company in its opposition to mandatory minimum sentences. As Judge William W. Wilkins testified:

> It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion . . . [T]he spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system.[2]

Judges routinely perform tasks in which the individual judge has no or very little discretion, faithfully applying standards and procedures established by Congress.[3] But the Judicial Conference does not advocate for the repeal of these legislative mandates. This belies the claim that judges are motivated by a parochial desire to increase their own power in sentencing. Rather, the Conference's opposition to mandatory minimums derives from a recognition, gained through years of experience, that they are wasteful of taxpayer dollars, produce unjust results, are incompatible with the concept of guideline sentencing, and could undermine confidence in the judicial system.

Though mandatory minimums have been criticized on numerous grounds,[4] there are three objections I wish to reiterate. First, statutory minimums impose a needless burden on taxpayers, as they create unnecessary prison and supervised release costs. Second, they impair the efforts of the Sentencing Commission to fashion guidelines in accordance with the principles of the Sentencing Reform Act, including the careful calibration of sentences proportionate to the severity of the offense and the research-based development of a rational and coherent set of punishments. Finally, mandatory minimums are inherently rigid and often lead to inconsistent and disproportionately severe sentences.

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[2] *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66 (1993) [hereinafter *1993 Hearing*] (statement of Judge William W. Wilkins, Jr., Chair, United States Sentencing Commission).

[3] "In fact, much of a judge's daily activity is consumed with executing 'mandatory' tasks, using a decision-making process that is 'mandated' by some other entity. Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge's possible disagreement with some of these instructions. Myriad other examples abound." *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 39 (2009) [hereinafter *2009 Hearing*] (statement of Chief Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States).

[4] *See, e.g.*, U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), at 90-103, *available at*: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_05.pdf. (reviewing policy views against mandatory minimum penalties, including that: they are applied inconsistently; they are ineffective as a deterrent or as a law enforcement tool to induce pleas and cooperation; they are indicative of the "overfederalization" of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government; and they unfairly impact racial minorities and the economically disadvantaged).

A. Mandatory Minimum Sentences Unnecessarily Increase the Cost of Prison and Community Supervision

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, a proliferation of mandatory minimum penalties has occurred over the past 20 years. Between 1991 and 2011, the number of mandatory minimum penalties more than doubled from 98 to 195.[5] There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the federal prison population.[6] This growth "is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates."[7] Although this trend may be slowing, it has not yet been reversed.

Longer prison sentences also mean longer terms of supervised release. Legislation ameliorating the effects of mandatory minimums can save taxpayer dollars, not only through a reduction in the prison population, but by lowering supervised release caseloads. It has been suggested that "persons who serve the longer terms of imprisonment that have resulted from mandatory minimum sentences and the sentencing guidelines may present greater problems in supervision simply by virtue of the longer periods of incarceration."[8] In a 2010 report, the Sentencing Commission noted that the average term of supervised release for an offender subject to a mandatory minimum was 52 months, which compared to 35 months for an offender who was not subject to a mandatory minimum—a difference of 17 months.[9] Based on fiscal year 2012 cost data, the cost of supervising an offender for one month is approximately $279. If the Judiciary were called upon to play a role in reducing prison over-crowding (which is a direct result of mandatory minimums) through legislative or executive action transferring inmates to supervision by probation officers, then the Judiciary certainly would require increased appropriations to carry this new burden.

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[5] *Id.* at 71.

[6] Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (January 2013), at 51, *available at:* http://www.fas.org/sgp/crs/misc/R42937.pdf.

[7] *Id.*; *see also* U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 63 ("Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system . . . that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. [T]he changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.").

[8] David Adair, *Revocation of Supervised Release - A Judicial Function*, 6 FEDERAL SENTENCING REPORTER 190, 191 (1994).

[9] U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010), at 51-52, *available at:* http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf.

B. Mandatory Minimum Sentences are Incompatible with the Sentencing Reform Act

Mandatory minimum statutes are incompatible with guideline sentencing and impair the efforts of the Sentencing Commission to fashion Sentencing guidelines in accordance with the principles of the Sentencing Reform Act. In 1984, Congress passed the Sentencing Reform Act after years of consideration and debate. The Act created the Sentencing Commission and charged it with the responsibility to create a comprehensive system of guideline sentencing.

But mandatory minimum sentences have severely hampered the Commission in its task of establishing fair, certain, rational, and proportional guidelines. They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy. Since the Commission has embodied within its Guidelines the mandatory minimum sentences,[10] the Guidelines have been skewed out of proportion and upward by the inclusion of sentencing ranges which have not been empirically constructed.[11] Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses and offenders.

As the Commission explained in its 1991 report to Congress on mandatory minimums, the simultaneous existence of mandatory sentences and Sentencing Guidelines skews the "finely calibrated . . . smooth continuum" of the Guidelines, and prevents the Commission from

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[10] The Sentencing Commission has taken the position that minimum sentences mandated by statute require the Sentencing Guidelines faithfully to reflect that mandate. The Commission has accordingly reflected those mandatory minimums at or near the lowest point of the Sentencing Guideline ranges. The Criminal Law Committee has expressed its concerns to the Commission about the subversion of the Sentencing Guideline scheme caused by mandatory minimum sentences. The Committee believes that setting the Sentencing Guidelines' base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing what are essentially two competing approaches to criminal sentencing. *See, e.g.,* Letter from Judge Irene Keeley, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Patti Saris, Chair, U.S. Sentencing Commission (March 11, 2014) (on file with the AO); Letter from Judge Sim Lake, Chair, Committee on Criminal Law, Judicial Conference of the United States, to members of the U.S. Sentencing Commission (Mar. 8, 2004) (on file with the AO); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Mar. 16, 2007) (on file with the AO); *see also United States v. Leitch*, No. 11-CR-00609(JG), 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013) ("[T]he Commission can fix this problem by delinking the Guidelines ranges from the mandatory minimum sentences and crafting lower ranges based on empirical data, expertise, and more than 25 years of application experience demonstrating that the current ranges are not the 'heartlands' the Commission hoped they would become.").

[11] *1993 Hearing*, *supra* note 2, at 108 (statement of Judge Vincent L. Broderick) ("This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward . . . As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.").

maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[12] The Commission concluded that the two systems are "structurally and functionally at odds."[13] Similarly, in 1993 Chief Justice William Rehnquist stated that "one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."[14] Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.[15]

C. Mandatory Minimum Sentences Cause Disproportionality in Sentencing

Mandatory minimum statutes are structurally flawed and often result in disproportionately severe sentences. There is an inherent difficulty in crafting a statutory minimum that can apply to every case. The Sentencing Guidelines are applied by judges on a case-by-case basis, allowing a consideration of multiple factors that relate to the culpability and dangerousness of the offender. By contrast, mandatory minimums "treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important offense or offender-related facts."[16] Such an approach means that any offender who is convicted of the particular statute, but whose conduct has been extenuated in ways not taken into account, will necessarily be given a sentence that is excessive. This reduces proportionality and creates unwarranted uniformity in treatment of disparate offenders. In short, as two former Criminal Law Committee chairs have put it, mandatory minimum penalties "mean one-size-fits-all injustice"[17] and are "blunt and inflexible tool[s]."[18]

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[12] U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991), *available at*: http://www.ussc.gov/Legislative_and_ http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm.

[13] *Id.*

[14] Chief Justice William H. Rehnquist, *Luncheon Address* (June 18, 1993), *in* U.S. Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).

[15] Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993).

[16] *1993 Hearing*, *supra* note 2, at 67 (statement of Judge William W. Wilkins, Jr.).

[17] *Mandatory Minimum Sentencing Laws - The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 46 (2007) [hereinafter *2007 Hearing*] (statement of Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States) ("Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases.")

[18] *2009 Hearing*, *supra* note 3, at 42 (statement of Chief Judge Julie E. Carnes). *See also* U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 346 ("For . . . a sentence to be reasonable in every case, the factors triggering the mandatory minimum penalty must *always* warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender. This cannot necessarily be said for all cases subject to certain mandatory minimum penalties.") (emphasis in original).

Mandatory minimum sentences often are adopted out of a well-intentioned desire to express outrage at certain crimes or in reaction to a particular case where the sentence seemed too lenient. And in some cases, of course, the mandatory penalty will seem appropriate and reasonable. When that happens, judges are not concerned that the sentence was also called for by a mandatory sentencing provision because the sentence is fair. Given the severity of many of the mandatory sentences that are most frequently utilized in our system, however, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the particular crime the judge has just examined and terribly cruel to the human being standing before the judge for sentencing.

This is frequently the case with drug distribution cases, where the only considerations are the type and amount of drugs.[19] Former Criminal Law Committee Chair Judge Vincent Broderick testified two decades ago that mandatory minimums for drug distribution offenses are often unfair and result in sentences disproportionate to the level of culpability because they: (1) are based on the amount of drugs involved[20]; (2) are based on the weight of drugs regardless of purity[21]; (3) apply conspiracy principles to drug sentences[22]; and (4) may be avoided only by the most culpable offenders who are able to cooperate with prosecutors due to their greater knowledge of the drug conspiracy than lower-level offenders.[23]

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[19] In its recent report to Congress, the Sentencing Commission reported, based on fiscal year 2010 data, that over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses. U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 146.

[20] *1993 Hearing*, *supra* note 2, at 106 (statement of Judge Vincent L. Broderick) ("Use of the amounts of drugs by weight in setting mandatory minimum sentences raises issues of fairness because the amount of drugs in the offense is more often than not totally unrelated to the role of the offender in the drug enterprise. Individuals operating at the top levels of drug enterprises routinely insulate themselves from possession of the drugs and participation in the smuggling or transfer functions of the business. It is the participants at the lower levels – those that transport, sell, or possess the drugs – that are caught with large quantities. These individuals make up the endless supply of low paid mules, runners, and street traders, many of them aliens.")

[21] *Id.* ("The weight of inert substances used to dilute the drugs or the weight of a carrier medium (the paper or sugar cube that contains LSD or the weight of a suitcase in which drugs have been ingeniously imbedded in the construction materials of the suitcase) is added to the total weight of the drug to determine whether a mandatory sentence applies. A defendant in possession of a quantity of pure heroin may face a lighter sentence than another defendant in possession of a smaller quantity of heroin of substantially less purity, but more weight because of the diluting substance. Since the relation of the carrier medium to the drug increases as the drug is diluted in movement to the retail level, the unfairness of imposing automatic sentences based on amount without regard to role in the offense is compounded by failure to take purity into account.").

[22] *Id.* ("Another significant factor of unwarranted unfairness in mandatory minimum sentencing is the application of conspiracy principles to quantity-driven drug crimes . . . [A]ecomplices with minor roles may be held accountable for the foreseeable acts of other conspirators in furtherance of the conspiracy. A low-level conspirator is subject to the same penalty as the kingpin . . . despite the fact that [he or she] ha[s] little knowledge of the nature [or amount of the drugs involved].").

[23] *Id.* at 107 ("Who is in a position to give such 'substantial assistance'? Not the mule who knows nothing more about the distribution scheme than his own role and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer . . . There are few federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.")

In her congressional testimony over four years ago, then Criminal Law Committee Chair Judge Julie Carnes provided a specific example of how disproportionately severe sentences may result from the mandatory minimum structure governing drug-related offenses.[24] Title 21 U.S.C. § 841(b)(1)(A) provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of 10 years imprisonment—e.g., 5 kilograms of cocaine—the defendant's 10-year mandatory sentence shall be doubled to a 20-year sentence if he or she has been previously convicted of a drug distribution-type offense. If the defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a 20-year sentence may be just. The amount of drugs may be a valid indicator of market share, and thus of culpability, for leaders of drug manufacturing, importing, or distributing organizations. But kingpins are, by definition, few in number, and they are not the drug defendant that judges see most frequently in federal court.

Most drug defendants subject to this mandatory minimum are low-level participants, such as one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving in a boat. The quantity of drugs in the boat will easily qualify for a 10-year mandatory sentence. This is so even for employees of these organizations or others on the periphery of the crime, even though the amount of drugs with which they are involved is often fortuitous. A courier, unloader, or watchman may receive a fixed fee for his work, and not be fully aware of the type or amount of drugs involved. A low-level member of a conspiracy may have little awareness and no control over the actions of other members. But if this low-level defendant has one prior conviction for distributing a small quantity of marijuana for which he served no time in prison, he will be subject to a 20-year mandatory minimum sentence. A judge must impose this minimum sentence even if the defendant had led a law-abiding life (since his one marijuana conviction) until he lost his job and made the poor decision to offload this drug shipment in order to help support his wife and children. It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.[25]

Lastly, mandatory minimums transfer sentencing discretion from judges, who are life-tenured members of a non-partisan branch and whose decisions are a matter of public record and reviewable on appeal, to prosecutors.[26] The Sentencing Commission's own empirical

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[24] *2009 Hearing, supra* note 3, at 43 (statement of Chief Judge Julie E. Carnes).

[25] *See, e.g., Leitch, supra* note 10, at *2 ("[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimum sentences that Congress explicitly created only for the leaders and managers of drug operations.").

[26] As sentencing scholars have noted, prosecutors often are advocates at an early stage of their careers, whose decisions are made behind closed doors and are not explained, placed on the record, or subject to review. Judges, on the other hand, are neutral arbiters selected for high levels of professional attainment, who are required to work in open court and explain their decisions on the record. Those decisions may be reviewed by appellate courts. The goals of a sentencing system are best furthered by vesting sentencing discretion in visible, accountable actors who have primary responsibility to further systemic goals as opposed to the interests of particular parties. *See* Albert Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POLICY 389 (1998).

research has found that mandatory minimum penalties are charged inconsistently, are often disproportionately severe, and result in disparity that can not be accounted for by existing data and therefore may be unwarranted.[27]

II. Stacking of Firearms Counts Exacerbates the Injustices of Mandatory Minimums

Consistent with its long-standing opposition to mandatory minimums, the Judicial Conference endorses an amendment to 18 U.S.C. § 924(c) to preclude the "stacking" of counts and to clarify that additional penalties apply only when one or more convictions of such person have become final prior to the commission of such offense.[28]

Section 924(c) provides for enhanced punishments for the use or carrying of a firearm during the commission of a crime of violence or a drug trafficking offense. Specifically, depending on whether the gun was carried, brandished, or discharged, the defendant must be sentenced to at least 5, 7, or 10 years, respectively, and that sentence must be made to run consecutively to any other sentence imposed.[29] The same statute provides that, "[i]n the case of a second or subsequent conviction under this subsection," the defendant shall be sentenced to a term of not less than 25 years, which again must run consecutively to any other sentence imposed.[30]

Congress did not define the term "second or subsequent conviction" when it enacted Section 924(c). Ambiguity about the meaning of this phrase led to litigation about whether conviction on two counts charged in one indictment would render the second count "a second or subsequent conviction" that would trigger the 25-year enhancement. The Supreme Court determined that each Section 924(c) count for which a defendant is convicted constitutes a conviction subject to the enhanced penalties provided for in Section 924(c).[31] The Court's holding therefore permits the "stacking" of mandatory Section 924 (c) sentences based on one judgment for an indictment containing multiple Section 924(c) counts.

The injustice of stacking mandatory minimum sentences is well illustrated by the case of *United States v. Angelos*, in which a first offender who had carried a gun to several marijuana transactions, received a 55-year prison sentence.[32] Because he was convicted of distributing marijuana and related offenses, the prosecution and the defense agreed that Mr. Angelos, a 24-year-old with two young children, should serve about 6½ years in prison. But Mr. Angelos was also subject to three Section 924(c) offenses. Two of those offenses occurred when

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[27] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, pp. 89-91; U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 1991.

[28] JCUS-MAR 09, pp. 16-17.

[29] 18 U.S.C. § 924(c)(1)(A) and (D)(ii).

[30] § 924(c)(1)(C)(i).

[31] *Deal v. United States*, 508 U.S. 129 (1993).

[32] *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

Mr. Angelos carried a handgun to two $350 marijuana transactions; the third occurred when police found several additional handguns at his home when they executed a search warrant. The government recommended a prison term of no less than 61½ years: 6½ years for drug distribution followed by 55 years for three counts of possessing a firearm in connection with a drug offense. The judge concluded that a sentence of 660 months (55 years) was adequate, and that he did not need to punish Mr. Angelos with an additional 78 months. Accordingly, he used his authority under 18 U.S.C. § 3553(a) and imposed a 55-year sentence.

Because Section 924(c) penalties are mandatory minimums, the sentencing judge in *Angelos* was unable to impose a lesser punishment proportionate to the crimes. The judge later denounced the situation as "irrational."[33] The same day that this judge imposed a 660-month sentence upon Mr. Angelos, he followed the prosecution's recommendation and sentenced the second-degree murderer of an elderly woman to 262 months (22 years).[34] To put this in perspective, *Mr. Angelos' sentence was 2½ times longer than the second-degree murderer's* and more than double the sentence of many other serious offenders convicted in the federal courts. For example, an aircraft hijacker received 293 months (24 years),[35] a terrorist who detonated a bomb in a public place received 235 months (20 years),[36] a racist who attacked a minority with the intent to kill and inflicted permanent or life-threatening injuries received 210 months (18 years),[37] a second-degree murderer received 168 months (14 years),[38] and a rapist received 87 months (7 years).[39]

The Judicial Conference recommends that Section 924(c) be amended to make it consistent with 21 U.S.C. § 962(b). Section 962(a) sets forth the penalty for second or subsequent offenses under subchapter II of Title 21 but, unlike Section 924(c), defines the phrase "second or subsequent offense" in Section 962(b). Section 962(b) provides that "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of such person for a felony drug offense have become final." Should the Judicial Conference's recommendation be adopted, an offender would only be subject to an enhanced 25-year sentence if he or she had been convicted in the past of a Section 924(c) offense and, following that conviction, committed and was again convicted of another Section 924(c) offense.

All mandatory minimum sentences can produce results contrary to the interests of justice, but the impact of Section 924(c) is particularly egregious. Stacked mandatory sentences (counts), even more so than most mandatory terms, may produce sentences that undermine confidence in

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[33] *United States v. Booker: One Year Later–Chaos or Status Quo? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 62 (2006) (statement of Judge Paul G. Cassell, Chair, Committee on Criminal Law).

[34] *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005).

[35] U.S.S.G. § 2A5.1 (2003) (base offense level 38). All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I, under the 2003 Sentencing Guidelines.

[36] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[37] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[38] U.S.S.G. § 2A1.2 (base offense level 33).

[39] U.S.S.G. § 2A3.1 (base offense level 27).

the administration of justice. The Conference recommends that 18 U.S.C. § 924(c) be amended to preclude stacking so that additional penalties apply only for true repeat offenders.

Conclusion

The Judicial Conference supports the Task Force's efforts to review criminal penalties and strongly urges it to oppose mandatory minimum sentences. Good intentions notwithstanding,[40] mandatory minimum sentencing statutes have created what Chief Justice Rehnquist aptly identified as "unintended consequences."[41] These unintended consequences waste valuable taxpayer dollars, create tremendous injustice, undermine guideline sentencing, and foster disrespect for the criminal justice system. We hope Congress will act swiftly to reform federal mandatory minimum sentencing.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

John D. Bates
Secretary

cc: Honorable John Conyers, Jr.
Honorable Steve Cohen
Honorable Henry C. "Hank" Johnson, Jr.
Honorable Karen Bass
Honorable Hakeem S. Jeffries

Identical letter sent to: Honorable F. James Sensenbrenner, Jr.

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[40] *2009 Hearing*, *supra* note 3, at 37 (statement of Chief Judge Julie E. Carnes) ("I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimums sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws.").

[41] Chief Justice William H. Rehnquist, *Luncheon Address*, *supra* note 14 (suggesting that federal mandatory minimum sentencing statutes are "perhaps a good example of the law of unintended consequences").

Written Statement of Jamie Fellner
Senior Advisor, US Program
Human Rights Watch

to

United States House of Representatives, Committee on the Judiciary

Over-Criminalization Task Force Hearing on Penalties

May 30, 2014

Chairman Sensenbrenner, Ranking Member Scott, and members of the Task Force, thank you for the opportunity to provide a written statement for the record for today's hearing on Penalties.

Americans pride themselves on being a pragmatic and fair people. That pride has been shaken by three decades of punitive sentencing laws that impose disproportionately severe punishment. The laws have given the United States the world's highest rate of incarceration and have spawned widespread and wholly warranted public doubts about the fairness of the US criminal justice system. Once hailed internationally as the land of the free, the United States has become a nation of prisons.

Congress is rightfully concerned about the soaring federal prison population – and the role mandatory minimum sentencing laws for drug offenders have played in its growth. Since 1980, the number of incarcerated federal drug defendants has increased an astonishing 2,024 percent[1] and as of April of this year, just under half of all federal prisoners were convicted of federal drug crimes.[2] In fiscal year 2013, some sixty percent of federal drug defendants were convicted of charges carrying mandatory minimums – and this figure does not include the unknown number who originally faced a mandatory minimum sentence but avoided it through a plea agreement.[3]

The critics of mandatory minimums are legion – and their arguments are compelling and grounded in facts, a keen appreciation for the harm unduly long sentences for drug offenses cause individuals, communities, and the country, and by the realization that the country cannot incarcerate its way out of drugs. Human Rights Watch agrees that the elimination of all disproportionately severe sentences or at the very least major reform to federal drug laws is imperative. In this testimony we want to draw attention to how mandatory minimum drug sentencing laws permit federal prosecutors to strong-arm drug defendants into pleading guilty. This coercion blights the federal criminal justice system, and cannot be squared with respect for the right to liberty and to a fair trial. Our statement draws heavily from a Human Rights Watch report released last December, *An Offer You Can't Refuse*, which was the result of dozens of interviews with federal prosecutors, defense attorneys, and judges, the review of hundreds of legal cases and academic articles, and an analysis of United States Sentencing Commission sentencing data.

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[1] The Sentencing Project, "The Expanding Federal Prison Population," March 2011, http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2011.pdf (accessed May 27, 2014), p. 2; and Federal Bureau of Prisons, "Offenses," April 26, 2014, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2014).

[2] Federal Bureau of Prisons, "Population Statistics," April 26, 2014, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2014); and Federal Bureau of Prisons, "Offenses," April 26, 2014, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2014).

[3] United States Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013 (accessed May 27, 2014), Table 43: Drug Offenders Receiving Mandatory Minimums in Each Drug Type.

Mandatory Sentencing Provisions for Federal Drug Defendants

Prosecutors are able to coerce plea bargains by threatening defendants with: mandatory minimum sentences based on drug quantity; mandatory sentencing enhancements for drug offenders with one or more prior convictions; and mandatory sentences consecutive to the drug sentences when a firearm was involved in the drug offense. Prosecutors offer defendants shorter prison terms if they plead guilty. Defendants who refuse to plead guilty are punished with mandatory sentences that judges – who have been legally bound to impose them – have described as "shockingly harsh,"[4] "so excessively severe they take your breath away,"[5] and "unconscionable."[6]

The willingness of prosecutors to inflict draconian sentences on even low-level drug defendants is illustrated by Sandra Avery's case.

> Sandra Avery was a survivor of childhood sexual abuse who served in the army and the army reserves, earned a college degree, overcame an addiction to crack, became a born-again Christian, and worked as an accountant. But in her early forties, her life spun out of control: she became addicted to crack cocaine again, lost her job, and started delivering and selling small amounts of crack for her husband, a crack dealer.
>
> In 2005, Avery was arrested and indicted by a federal grand jury for possessing 50 grams of crack with intent to deliver, an offense then carrying a mandatory minimum sentence of 10 years. That sentence was itself remarkably long for a low-level drug dealer. But worse was to come. Avery refused to accept a plea agreement that left the 10-year minimum unchanged. Because she would not plead, the government decided to trigger a mandatory sentencing enhancement based on Avery's earlier convictions for possessing small amounts of crack for her own use. Because of that decision by the prosecutors, when Avery was convicted after trial, the judge had no choice but to enhance her sentence from 10 years to life.[7]

Congress might rightly ask how prosecutors who thought a 10-year minimum sentence was appropriate for Avery could then seek a life without parole sentence. When we asked one of Avery's prosecutors whether he thought the life sentence was just, he refused to comment.

Mandatory Sentences Based on Weight of Drugs

Most federal drug defendants are prosecuted under laws which key five- and ten-year minimum sentences to the weight of the drugs involved in the offense, regardless of the defendant's role or culpability. While Congress apparently intended the five- and ten-years to be minimum sentences

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[4] *United States v. Washington*, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004).
[5] Statement of Reasons, *United States v. Kupa*, 2013 U.S. Dist. LEXIS 146922, 9-10 (E.D.N.Y. 2013).
[6] *United States v. Washington*, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004).
[7] Information on the case of Sandra Avery obtained from documents filed in *United States v. Avery*, United States District Court for the Middle District of Florida, Case No. 8:05-CR-389, which are available on PACER; from Human Rights Watch correspondence with Avery; and from Human Rights Watch telephone interview with James Preston, federal prosecutor, Middle District of Florida, August 6, 2013.

for mid- and senior-level figures in the drug business, prosecutors routinely seek them for low-level players as well.

Take, for example, Jamel Dossie, a 20-year-old small-time street-level drug dealer's assistant who earned about $140 for acting as a go-between in four hand-to-hand sales totaling 88 grams of crack. Prosecutors charged him with an offense carrying a five-year mandatory minimum.[8] Depending on how prosecutors choose to exercise their charging discretion, someone hired to drive a box of drugs across town, for example, can face the same mandatory sentence as the major trafficker who orchestrated the delivery and was caught with the box. A defendant involved in a multi-member drug conspiracy can face a mandatory sentence based on the amount of drugs handled by all the co-conspirators, even if the defendant had only a minor role and personally distributed only a small amount of drugs or none at all. For example, Natacha Pizarro Campos was charged as part of a meth selling conspiracy involving between 1.5 and 5 kilograms. She personally sold a little more than 400 grams in five transactions. She pled guilty to the conspiracy to distribute 500 grams or more, for which she was sentenced to 10 years, the mandatory minimum.[9]

In fiscal year 2013, 62 percent of convicted federal drug defendants received mandatory minimum sentences based on drug weight.[10]

We do not know how many drug defendants were originally charged with offenses carrying a 10-year mandatory minimum but had the minimum reduced to five years or no mandatory minimum through plea agreements. But our interviews with judges, defense attorneys, and prosecutors made clear that this is a common practice. And it is common practice that if defendants do not agree to plead, they will face the higher charge, even if prosecutors believe it is higher than the defendant deserves. Thus, for example, Anthony Bowens was part of a multi-year 43-person crack conspiracy in a public housing project. He collected money from customers and provided them with the cocaine they purchased according to arrangements made by his bosses. The indictment included only one act involving Bowens, the sale of 63 vials of crack. As a member of a conspiracy that allegedly distributed 50 grams or more of crack, he faced a 10-year mandatory minimum sentence. Prosecutors offered to let him plead guilty to a single count to distribute crack carrying a five-year mandatory sentence under the then-existing law. Because he chose to go to trial, the prosecutors tried him under the original conspiracy charge carrying a ten-year minimum sentence. The judge sentenced him to 15 years, a sentence subsequently reduced to 12 years following the retroactive changes in 2010 to the guidelines for crack cocaine offenses.[11]

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[8] *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

[9] Information on the case of Natacha Jihad Pizarro-Campos obtained from documents filed in *United States v. Campos*, United States District Court for the Middle District of Florida, Case No. 6:2010-cr-00191, which are available on PACER.

[10] United States Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013 (accessed May 27, 2014), Table 43: Drug Offenders Receiving Mandatory Minimums in Each Drug Type.

[11] Information on the case of Anthony Bowens obtained from court documents filed in *United States v. Bowens*, District Court for the Southern District of New York, Case No. 1:04-cr-00048, which are available on PACER and from Human Rights Watch interview with Melinda Sarafa, Anthony Bowens' defense counsel, New York, New York, February 23, 2013.

Mandatory Sentences for Prior Convictions

The provision requiring mandatory sentences for prior convictions is the one that doomed Sandra Avery to die behind bars. Often referred to as a prior felony enhancement, it increases the mandatory minimum based on drug weight when a drug defendant has prior felony drug convictions. The increase is not automatic; prosecutors have complete discretion whether to seek the increased sentence. If they choose to seek an enhancement based on one prior conviction, the defendant's sentence will be doubled, e.g. from ten years to twenty. But if a defendant facing a 10-year mandatory minimum based on the quantity of drugs in his case has two prior convictions, the prosecutor can choose to have the sentence raised to life without parole.

Congress apparently intended the prior felony enhancements to ensure truly hardened, professional traffickers with long records received sufficient punishment. But the statute only requires that the prior convictions were punishable by one year or more – the defendant may never have served any time. And it does not require the prior offenses to be serious. In one recent case prosecutors sought to enhance a defendant's sentence because he had a state conviction for simple possession of marijuana.[12] Moreover, the prior convictions could have happened decades ago: in another recent case, prosecutors sought to enhance a cocaine dealer's sentence based on a marijuana selling conviction that was more than 25 years old.[13] Surely this is not what Congress intended or wants to see happen today.

According to Judge Mark Bennett, the prior felony sentencing enhancement law has created a situation like a "Wheel of Misfortune:" similarly situated defendants receive dramatically different sentences based solely on a prosecutor's unreviewable decision whether to seek an enhancement for eligible defendants.[14] This arbitrariness and disparity in sentences would be reason enough to eliminate the provision. But even worse, Judge John Gleeson has said, the provision that might be justified if used "against the worst of the worst drug trafficking defendants has instead become a tool to prevent all recidivist drug trafficking defendants from exercising their Sixth Amendment right to trial by jury."[15] Our analysis of Sentencing Commission data indicates that among defendants eligible for the enhancement based on prior convictions, those who went to trial were 8.4 times more likely to receive the enhancement than those who pled guilty.[16] Prosecutors readily acknowledged to us that they use these enhancements for plea bargaining purposes.

Last year, Human Rights Watch attended the sentencing hearing of a federal drug defendant in a multi-defendant cocaine trafficking conspiracy who had refused to plead guilty despite various sentencing inducements. Shortly before trial, the government upped his minimum sentence from 10

[12] Information on the case of Bill Oscar Lee obtained from court documents filed in, *United States v. Lee*, United States District Court for the Northern District of Alabama, Case No. 5:10-CR-00313, which are available on PACER.
[13] *United States v. Berry*, 701 F.3d 374 (11th Cir.2012).
[14] *United States v. Young*, No. CR-12-4107-MWB, 2013 U.S. Dist. LEXIS 116042, 22 (N.D. Iowa 2013)
[15] *United States v. Kupa*, No. 11-CR-345, 2013 U.S. Dist. LEXIS 146922, 44 (E.D.N.Y. 2013).
[16] Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, December 2013, http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse, p. 52.

years to life by filing a prior felony information with the court based on the defendant's two prior marijuana convictions. The government offered to withdraw the prior felony information if the defendant would plead. Not surprisingly, he did. As the judge noted, the defendant "buckled under [the] pressure and agreed to forgo a trial."[17]

Mandatory Sentences for Weapon Involvement

A third mandatory sentencing provision, referred to as 924(c), permits prosecutors to obtain additional consecutive sentences for a drug defendant if a weapon was involved in the drug offense. "Involved" is a term of art – the weapon need not have been carried or fired in connection with a drug crime; if the offender owned the gun, prosecutors will argue he or she did in connection with the drug business, qualifying it for a 924(c) charge. The first 924(c) conviction carries a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime; second and subsequent convictions each carry 25-year consecutive sentences—resulting in grotesquely long sentences for drug defendants when prosecutors "stack" the charges. For example, Marnail Washington, a 22-year-old with no criminal history, was sentenced to 40 years for conviction of possession with intent to distribute crack cocaine and two 924(c) counts.[18] The judge who was required to impose this "shockingly harsh" mandatory sentence said it was "the worst and most unconscionable" he had given in 23 years on the federal bench.[19]

Prosecutors have complete discretion whether or not to pursue 924(c) charges. If they do not file the charges and a weapon was involved, the defendant may receive an increased sentence under the sentencing guidelines. The increase under the sentencing guidelines is not as great as that under 924(c) – hence the threat to file 924(c) charges is a powerful way to secure a plea, and to punish those who refuse to plead.

> Mary Beth Looney, a Texan who told us she had owned guns all her life, refused a plea offer of 17 years for possessing methamphetamine with intent to distribute and possessing three guns in furtherance of drug trafficking. She went to trial on those charges and on additional charges for conspiracy to possess and for possession of a firearm in connection with that conspiracy. She was sentenced to 45 years in prison – 188 months for the drugs and 360 months for the guns.[20] As the court of appeals said there was no evidence that the defendant "brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house. ...[T]he prosecutor exercised his discretion – rather poorly we think – to charge her with counts that would provide for what is, in effect, a life sentence."[21] (Looney was 52 at time of sentencing.)

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[17] *United States v. Kupa*, No. 11-CR-345, 2013 U.S. Dist. LEXIS 146922, 56 (E.D.N.Y. 2013).
[18] *United States v. Washington*, 301 F. Supp. 2d 1306 (M.D. Ala. 2004).
[19] Ibid at 1309.
[20] Information on the case of Mary Beth Looney obtained from documents filed in *United States v. Looney*, United States District Court for the Northern District of Texas, Case No. 7:05-CR-005-R, which are available on PACER; Human Rights Watch interview with Jason Hawkins, federal public defender, Dallas, Texas, April 10, 2013; and from Human Rights Watch email correspondence with Looney.
[21] *United States v. Looney*, 532 F. 3d 392, 397-398 (5th Cir. 2008).

> In Utah, Weldon Angelos, was offered a plea of 15 years (ten years for drugs and five for one gun count) for dealing marijuana. Prosecutors told him if he did not accept that offer, they would issue a superseding indictment with multiple gun counts – a threat they made good on when Angelos went to trial. He was convicted of three 924(c) gun counts for a total sentence of 55 years to run consecutive to whatever sentence would be imposed for the drug charges. Distraught because of the 55-year mandatory gun sentence, the judge sentenced Angelos to just one day on the drug counts.[22]

The Trial Penalty

Mary Pat Brown, a former federal prosecutor and senior official in the Justice Department told us that the higher sentences a defendant faces if convicted after going to trial puts "enormous pressure [on defendants] to plea."[23] Once a choice to consider, plea agreements have become an offer drug defendants dare not refuse. Only three percent of federal drug defendants are willing to risk the "trial penalty" by exercising their right to put the government to its proof. In 1985, before the mandatory minimum drug sentencing laws were enacted, 20 percent of defendants went to trial. [24]

Using sentencing data from individual cases collected by the United States Sentencing Commission, Human Rights Watch developed statistics that shed light on the size of the trial penalty. We recognize that each case contains a unique mix of factors that result in the final sentence, but our findings nonetheless offer deeply troubling evidence of the high price federal drug defendants pay if they refuse to plead.

Our findings include the following:

- Among all federal drug defendants, the average sentence for those who went to trial was three times longer than for those who pled guilty (16 years versus 5 years, 4 months).
- Among federal drug defendants convicted of offenses carrying mandatory minimum sentences, those who went to trial received sentences that were on average 11 years longer than those who pled guilty (215 months versus 82.5 months).
- The trial penalty exists even for first-time drug offenders with no weapon involved in their offense and who had the same offense level under the sentencing guidelines: those who went to trial had almost twice the sentence length of those who pled guilty (117.6 months versus 59.5 months).[25]

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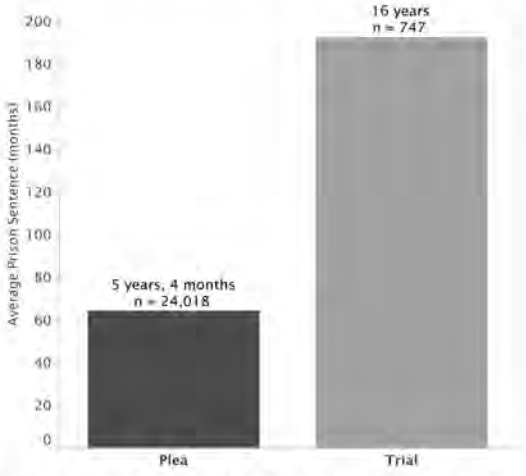
[22] Information on the case of Weldon Angelos obtained from documents filed in *United States v. Angelos*, United States District Court for the District of Utah, Case No. 2:02-cr-00708, which are available on PACER.
[23] Human Rights Watch telephone interview with Mary Pat Brown, former prosecutor and senior Department of Justice official, Washington, D.C., June 5, 2013.
[24] Ronald F. Wright, "Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background," Wake Forest University Legal Studies Paper (2005), accessed May 27, 2014, http://dx.doi.org/10.2139/ssrn.809124, appendix 4.
[25] Human Rights Watch, *An Offer You Can't Refuse*, p. 7-8.

Figure 1: Average Sentence for Federal Drug Defendants by Plea/Trial (FY 2012)



Source: Human Rights Watch analysis of United States Sentencing Commission FY 2012 Individual Datafiles. <http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm>

The Need for Reform

Attorney General Holder has told federal prosecutors that they should avoid charging offenses carrying mandatory minimums for certain low-level nonviolent offenders and that they should also avoid seeking mandatory sentencing enhancements based on prior convictions when the severe sentences are not warranted. His directives are welcome, but they contain easily-exploited loopholes. More importantly, they do not carry the force of law; there is no remedy if a prosecutor chooses to ignore the Attorney General's directives. Judges must still apply mandatory minimum sentencing laws to convicted defendants if prosecutors choose to pursue them.

Although it was not Congress' intent, one of the most dramatic effects of federal mandatory minimum sentencing laws has been to transfer sentencing from an independent federal judiciary with no personal stake in the outcome of a case to representatives of the executive branch with personal as well as institutional interests at stake. While all prosecutors are in a powerful position vis-a-vis criminal defendants, the power of federal prosecutors in drug cases has been strengthened immeasurably by mandatory sentencing laws. Judges cannot sentence lower than the applicable

minimum no matter how egregiously disproportionate that sentence might be to the defendant's role in the offense or conduct. They cannot sentence lower than the minimum even if the prosecutor sought that minimum solely because the defendant refused to plead guilty.

The impact of mandatory minimum sentencing laws on defendants' rights to justice is also deeply troubling. The current sentencing regime has given prosecutors a coercive power that cannot be squared with basic human rights. Most people would agree that a defendant presented with the choice of pleading to a 10-year sentence or receiving a life sentence if convicted after trial is not facing a real "choice." The Supreme Court has ruled that it is constitutionally permissible for prosecutors to confront defendants with far harsher sentences if they refuse to plead. But that doesn't justify threats of hugely disproportionate punishment, nor does it make the practice acceptable under universal norms of fairness and justice. The right to trial is a sham if it can only be exercised at the risk of far higher sentences.

In general, prosecutors seek convictions; they do not seek the lowest sentence that serves the goals of punishment or that is commensurate with the defendant's conduct. When asked about the fairness of sentences that may result from their charging and plea bargaining decisions in individual cases, they place responsibility for sentencing on Congress or the courts. We agree that Congress is responsible for placing mandatory minimum sentencing laws in the hands of prosecutors. But prosecutors are wrong to place responsibility for sentencing outcomes on the courts, since current laws preclude judges from exercising that quintessential judicial role.

Mandatory minimums permit prosecutors to punish defendants with sentences that are grossly disproportionate to the gravity of the offense and that greatly exceed what is needed to satisfy the purposes of punishment. Prosecutors do not believe it is their job to ensure proportionate sentences. There are of course many prosecutors who try to avoid unjust results by seeking fair sentences, but they do so in the context of plea agreements. If the defendant insists on going to trial, all bets are off. At the very least he will be tried on the original charges – even if the prosecutors had brought the charges for bargaining purposes. Worse, many prosecutors threaten to seek even higher sentences – based on prior convictions or gun charges – if the defendant does not plead. They make good on those threats because they do not want to develop a reputation for bluffing; they want their threats to be effective in future cases. The end result are sentences that no one may think fair – but that are inevitable given the toxic mix of plea bargaining and mandatory minimum sentencing laws.

Our criticism of plea bargaining within the context of mandatory minimum sentencing laws has focused on the injustice to individual defendants that can follow. We wish to emphasize that there is nothing inherently wrong with resolving cases through pleas – it reduces the many burdens of trial preparation and the trial itself on all parties involved and the courts. If prosecutors offered modest sentence reductions from proportionate sentences to reward defendants who choose to plead guilty, such a discount would not offend human rights. But prosecutors should not be able to force

defendants to plead to avoid grotesquely long sentences or to punish defendants who go to trial with such sentences.

We would be remiss not to also tell Congress that we believe there is something deeply wrong with a criminal justice system in which almost all cases are resolved with plea agreements. When only three percent of cases go to trial, we have lost the checks and balances that guarantee the system its integrity. There is no independent assessment of the strength of the government's case and scant pressure on prosecutors to ensure cases are based on strong and legally obtained evidence. Absent scrutiny by judge and juries, it is easy for the government to become sloppy and to cut corners.

Recommendations

If Congress wants fair sentences and public faith in the quality of justice in federal drug cases, it must return sentencing discretion to the federal judiciary. It should abolish federal mandatory minimums for drug offenders based on the quantity of the drug involved, the number and nature of prior convictions, or the possession of weapons in furtherance of their drug business. By eliminating these mandatory sentencing laws, Congress would restore to federal judges the authority to ensure drug sentences satisfy the requirements of justice in individual cases – i.e., the sentences are consistent with the gravity of the offense and the purposes of punishment . Prosecutors could still argue for high sentences. But the power of prosecutorial threats and ability to punish defendants who choose to go to trial would be markedly diminished.

Some prosecutors and law enforcement agents argue against reform of mandatory sentencing laws. They claim that the laws provide them leverage to secure cooperation from defendants. But "leverage" is a euphemism for the ability to strong-arm defendants into giving up their right to trial. Getting rid of mandatory minimum sentences would not leave prosecutors devoid of ways to encourage cooperation. The sentencing guidelines offer strong inducements to defendants to plead and to cooperate with the government. In addition, even without mandatory minimum sentences, prosecutors could encourage defendants to plead by making agreements regarding various factors in the guidelines that can raise or lower sentences. We note, finally, that a preponderance of defendants pled guilty before there were mandatory minimums. No doubt they would continue to do so if those laws no longer existed.

Conclusion

We welcome the growing national recognition that excessively harsh laws are not needed to keep communities safe or to hold offenders accountable for their crimes. We are encouraged by the growing number of officials and members of the public who recognize community well-being is best served by fair laws and just sentences, by the appropriate use of alternatives to incarceration, and by restraint – as well as common sense –in the exercise of the governments' penal powers.

We hope this Committee will recognize that any objective assessment of the costs and benefits of the federal mandatory minimum sentencing laws would conclude they have cost too much with little to show for it but bulging prison populations. The United States cannot incarcerate its way out of drug use and abuse. Long mandatory sentences for drug offenders have done far too much harm to individuals, communities, and the federal criminal justice system. We have learned much over the three decades since those laws were enacted. It is time for Congress to act on those lessons.

THE HILL

May 27, 2014, 11:00 am

Last stand for the drug warriors

By Jeremy Haile

Three decades ago, in announcing an initiative to curtail drug abuse, President Reagan compared the enforcement of drug laws to the Battle of Verdun -- one of the costliest and deadliest battles of World War I. Six years later, Congress had passed laws imposing across-the-board mandatory minimum penalties for drug offenses, authorizing billions of dollars for enforcement, and establishing a national policy to create a "Drug-Free America."

Thus the modern "War on Drugs" was born. It has not aged well.

In the past three decades, the number of people in federal prison has increased nearly 800 percent, primarily driven by mandatory minimum sentences for drug offenses. Today, half of all federal prisoners are serving time on a drug charge. Nearly three quarters of people imprisoned for a drug trafficking offense are black or Latino, even though people of all races use and sell drugs at roughly the same rates.

Though federal drug penalties were aimed at breaking up drug cartels, they have largely missed their target. Instead of punishing kingpins, mandatory minimums have resulted in long sentences for low-level operators. Nearly half of those serving time in federal prison for a drug offense are mules, couriers, brokers, or street-level dealers, many struggling with drug abuse problems of their own.

Meanwhile, despite tens of billions spent incarcerating federal drug offenders, there is little evidence that either drug crime or the availability of narcotics has been reduced. Research over many years has shown that mandatory penalties are limited because they address the severity of punishment, not certainty. Because most offenders do not expect to get caught, few think about the penalties they will face if convicted. And while it's debatable whether lengthy incarceration reduces crime, drug offenses are particularly immune to being affected by more and longer sentences. As long as there is a demand for illegal drugs, there will be a ready supply of sellers.

In the face of mounting evidence that our drug policy is failing, Congress has finally taken steps in recent months to revisit the federal drug sentencing regime. In January, the Senate Judiciary Committee approved the Smarter Sentencing Act, a bipartisan bill that would take several incremental steps toward reforming mandatory minimum penalties for nonviolent drug offenses. Co-authored by Republican Sen. Mike Lee (Utah) -- a former federal prosecutor -- and backed by a number of conservative Republicans, including Sens. Ted Cruz of Texas, Jeff Flake of Arizona and Rand Paul of Kentucky, the bill is aimed at ensuring that federal criminal justice resources are not wasted locking up nonviolent drug offenders.

Given budget pressures and severe overcrowding in federal prisons, many hoped the Smarter Sentencing Act might reach the Senate floor before Memorial Day. But those hopes were dashed in May as a trio of Senate Republicans announced their opposition to the bill. In a letter to colleagues, Sens. John Cornyn (R-Texas), Chuck Grassley (R-Iowa) and Jeff Sessions (R-Ala.) wrote that the legislation "would benefit some of the most serious and dangerous offenders in the federal system." The senators raised the specter of a violent crime wave if minimum penalties for nonviolent drug offenses are reduced.

Describing the Smarter Sentencing Act as a sort of "get out of jail free card" for dangerous criminals is highly misleading. The bill would not eliminate a single mandatory minimum, nor would it reduce any maximum penalties. Instead, it would allow judges greater discretion in low-level cases, while preserving long sentences for the most serious offenders. According to sentencing expert Doug Berman, the measure would likely benefit only "true first-offenders who deal only a few ounces" of illegal narcotics. That would free up resources for treatment, crime prevention, and programs to reduce recidivism.

That's why the Smarter Sentencing Act has the backing not only of prison reform advocates and civil libertarians, but also of law enforcement. More than 100 former Assistant United States Attorneys and judges have endorsed the bill, as has the Association of Prosecuting Attorneys and groups representing 100,000 rank-and-file police officers and nearly 30,000 prison guards.

Unfortunately, some longtime drug warriors seem intent on throwing cold water on the sentencing reform movement just as it is heating up. Michele Leonhart, head of the Drug Enforcement Agency, recently testified that rather than unwinding the drug war, "we should be redoubling our efforts." A number of former federal law enforcement officials have argued that current drug sentencing penalties should be preserved.

But we have tried incarcerating our way to a drug-free America, and that approach has failed. Three decades later, evidence is mounting that federal drug laws have led to skyrocketing prison populations without making communities safer. Meanwhile, illegal narcotics are as pure and as readily available as ever.

Rather than caving in to the "tough on crime" rhetoric of another era, Congress should seize a rare opportunity for reform. State after state has reduced drug sentencing penalties without jeopardizing public safety. Polls show that Americans, Republican and Democrat, favor treatment over prison for nonviolent offenders.

The old playbook on crime and punishment is worn out. It's time to take a new approach to nonviolent drug sentencing.

Haile is federal advocacy officer at The Sentencing Project.

Mr. GOHMERT. And, again, if you have additional materials—any of you—that you feel would be helpful to this Task Force, we will welcome those. And the record will be open for 5 days.

Mr. Cohen.

Mr. COHEN. If I could just ask one other question. Would you mind?

Mr. GOHMERT. Without objection.

Mr. COHEN. Thank you.

I am just guessing. I haven't seen—Mr. Otis, I think you have got the most experience here. I think you are maybe the only person here older than me. I think 1968 is when you graduated.

Mr. OTIS. You look like a youngster to me. More and more people do these days.

Mr. COHEN. I know. It is all relative.

You have been doing this for a long time, and you were at DEA. If I am wrong in my opinion, tell me. But from what I see, the drug war over all those years hasn't changed at all as far as the American appetite for drugs, the American appetite for marijuana, for crack, cocaine, meth, whatever, Ecstasy, Oxycontin, whatever.

And our process has been the same, arrest people, mandatory minimums, flip them, put them in jail, put them in jail for a long time. It hasn't worked.

Is the system basically in the same place it has been? Do you feel like a rat going along in a cylinder there? Don't you think we ought to just kind of come out of it and go, "In 40 years, don't we need a new theory or a new way to do this?"

Mr. OTIS. What the statistics show is that drug crimes are intimately related with other kinds of crimes, with property crimes and with crimes of violence.

And we know from the statistics that those crimes have gone down substantially; so, I don't think it is correct to say that it hasn't worked.

In addition to that, in order to know whether specifically drug laws have worked, we would need to know what the state of play would be if they had not been enforced.

And the great likelihood—because the drug business, I think, has been misapprehended in some of what is going on today. The drug business—unlike other kinds of crime, the drug business is consensual. So there is not a crime scene and a victim in the same sense that there is in other kinds of crime.

We have talked a lot today and you have talked—and correctly so—about violence and whether we have seen an increase or decrease in violence when some States have released drug defendants early. But violence is not the only thing we need to care about when we are talking about drugs.

We need to care also about harmfulness. Because the drug business is consensual—for example, the actor Philip Seymour Hoffman who recently died of an overdose, he died as a result of a consensual drug transaction, as almost all drug transactions are.

But he and the other 13,000 heroin addicts who die each year are equally dead, whether it is consensual or whether there has been violence.

We need to stomp out the harm that comes from the drug trade, a harm that is one of most destructive, particularly in minority communities, that is going on in the United States today.

Mr. LEVIN. Would you mind if I added one thing?

Mr. GOHMERT. Go ahead.

Mr. LEVIN. With regard to heroin, since 1990, the purity has gone up 60 percent. The price has dropped 81 percent. So it does indicate what we are doing with regard heroin is tragically not working.

And I think we—obviously, those who—particularly kingpins dealing heroin and other hard drugs should go to prison.

But what we need to do is, as I said, take a broader approach—there is pharmaceutical advances that are treating heroin addiction—and, also, recognize prescription drugs.

Even with the increase in heroin recently, prescription drug abuse is far more common than heroin abuse. And so I hope we can also focus on that as well.

Mr. COHEN. Mr. Chairman, thank you.

I think what I got out of that is that what we need to do is—Huey Lewis probably had the answer about a new drug. We need to find a drug that is not addictive and not harmful, but still pleasurable, and we need to put the NIH to work on it tomorrow.

Mr. GOHMERT. Well, I always thought that was what we called glazed doughnuts.

Mr. Bachus, you asked unanimous consent.

Mr. BACHUS. Thank you.

Unanimous consent. And Professor Otis sort of reminded me of this. I had it. But this is a crime scene, and this is in Alabama.

These are two young people that overdosed on a synthetic drug earlier this year. So it is a different crime scene. But it looks pretty violent, I am sure, to their parents and their friends.

I would also like to introduce——

Mr. GOHMERT. Are you offering that for the——

Mr. BACHUS. Yes.

Mr. GOHMERT. All right. Without objection.

[The information referred to follows:]

Mr. BACHUS. I would also like to introduce a copy of the Attorney General's memorandum to U.S. attorneys and I particularly highlighted where the cooperation is no longer included.

But, third, I—you know, Mr. Stevenson said something that I think we need to at least have one panel of people, and that is health care approach and things that we can do in drug diversion treatment, addiction, addressing it both as a criminal problem and a health care problem.

And I would think the U.S. attorneys would probably welcome that more than any one group because I have had U.S. attorneys and DAs that have expressed to me that they wish more was done on addictions and rehabilitation, because they are really the ones that see it every day.

Mr. SCOTT. Mr. Chairman.

Mr. GOHMERT. Without objection.

[The information referred to follows:]

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

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[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Ronald T. Hosko
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

Mr. SCOTT. I just want to make it clear that I think we share the common goal of reducing drug use in America. The question is what the strategy will be.

Mr. Levin and Mr. Stevenson pointed out that there is a better, more cost-effective way of actually reducing drug use in America. Others suggested the war on drugs is working.

I think the war on drugs has been shown to be a complete failure. It has wasted money, it hasn't reduced drugs, and there are more cost-effective ways of doing it. And that is what the debate is all about.

Mr. GOHMERT. Thank you. You are right.

We all agree on that, that we want to reduce the usage of drugs. And there have been data provided that indicate that in some ways it is working.

To explain to each of you, we had anticipated having to go vote around 10 a.m. And so we started out under that—that is what we were told by the mortal gods, with a little "g," from the House floor.

While we were proceeding, we got word that the vote that we were told to anticipate around 10 was voice-voted—thankfully, some cooperation on the Floor—and that allowed us to finish without interrupting you or taking more of your time than necessary. So we do thank you.

And, with that, we are adjourned.

[Whereupon, at 10:54 a.m., the Task Force was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

**Supplemental Material submitted by Eric Evenson,
National Association of Assistant United States Attorneys**

National Association of Assistant United States Attorneys
12427 Hedges Run Dr. • Suite 104
Lake Ridge • VA • 22192-1715
Phone: 800-455-5661 • Fax: 800-528-3492 • Email: staff@naausa.org
www.naausa.org

June 12, 2014

The Honorable Jim Sensenbrenner
Chairman
Task Force on Over-Criminalization
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Bobby Scott
Ranking Member
Task Force on Over-Criminalization
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Sensenbrenner and Ranking Member Scott:

Thank you again for the opportunity to testify before the Task Force on May 30 in connection with the hearing on criminal penalties and mandatory minimum sentences.

During my testimony, I referenced the powerful statements of Assistant United States Attorneys (AUSAs) in support of mandatory minimums, as received by the National Association of Assistant United States Attorneys during its November 2013 survey of AUSA attitudes about mandatory minimums. I have attached a sampling of those statements by AUSAs, as published in the January-February 2014 issue of the Association's newsletter, *NAAUSA News*. These expressions of concern by front-line federal prosecutors eloquently reflect their widespread concern about the adverse impact upon public safety by current legislative proposals diminishing mandatory minimums.

I ask that this submission be included in the hearing record as a supplement to my hearing testimony. Thank you for your action upon this request.

Sincerely,

Eric Evenson
Eric Evenson

Attachment: Statements by Assistant United States Attorneys Regarding Mandatory Minimum Sentences

STATEMENTS BY ASSISTANT UNITED STATES ATTORNEYS REGARDING MANDATORY MINIMUM SENTENCES

Thank you to all AUSAs who participated in the NAAUSA survey on mandatory minimum sentences conducted in November. Your views have been of considerable assistance to NAAUSA and its Board of Directors in questioning Congressional proposals to substantially weaken mandatory minimum sentencing laws.

Numerous AUSAs participated in the NAAUSA survey also took the opportunity to provide additional comments about the merits and fairness of mandatory minimums. Some of the anonymous comments received are reprinted below.

"We need mandatory minimums. They classify the most serious crimes, give us leverage to seek cooperation, protect society, and establish uniform sentences between Judges and Districts. The current movement has no real statistical support for revising the mandatorys."

"Long mandatory minimum sentences are vital to the prosecution of the most serious drug traffickers and they are entirely race neutral as they should be. Without long and mandatory sentences, many defendants would never cooperate and we would not be able to successfully prosecute many of the top-level or most violent drug traffickers. Without mandatory minimum sentences and the cooperating defendants they generate, there will be more disparities in sentencing and many of the most culpable and most violent will not be prosecuted at all. The great majority of drug trafficking defendants can avoid mandatory sentencing through cooperation. If they choose not to cooperate, they also choose the mandatory sentence. The claim that we are prosecuting any substantial percentage of low-level drug dealers or users in federal court and sticking them with mandatory minimum sentences is absolutely false. Most of the drug traffickers we prosecute are not drug addicts and are not drug users beyond recreational marijuana, even though they claim to be drug addicts to unjustifiably qualify for the BOP RDAP program and the corresponding sentence reduction. These claims of drug addiction or heavy use are often ridiculously and pathetically false."

"Mandatory minimums prevent some Judges from imposing no jail time, or greatly disparate sentences, for serious offenders. I prosecuted cases for more than 17 years and for most of that time the Sentencing Guidelines were pretty regularly manipulated by at least one Judge in my Court. The only way to reduce the effect of that manipulation was mandatory minimums. That being said, I have never understood why someone who steals/defrauds tens of millions of dollars is not seen as someone who needs to go to jail."

"There is no perfect system. If you give judges unlimited discretion, it results in significant sentencing disparity (inconsistency) based on the views of each individual judge. If you put more of the responsibility on charging decisions by prosecutors, there is less disparity within each district—but still disparity between districts. A mandatory guideline system (like that which existed from 1988 until Booker worked best at decreasing disparity, but still allowed for upward and downward departures as warranted in individual cases. Mandatory minimums are very useful to mitigate against those judges that have personal views that result in their sentences of drug defendants to be consistently below (sometimes substantially below) sentences by other judges in the Courthouse. [Every district has one or two.] Giving the U.S. Attorney's Office discretion in charging (and plea negotiations) on drug cases with mandatory minimum sentences generally solves much of the perceived unfairness. Bottom line, if you take away the mandatory minimums it will merely substitute one problem for another."

"Without mandatory minimums, most drug defendants will not cooperate. The idea that low level drug possessors are getting draconian sentences is a myth."

"The elimination of mandatory minimums would have a dramatic negative effect on AUSAs' ability to prosecute serious drug crimes. It would negatively impact many defendants' willingness to cooperate in order to receive a 5K1.1 motion in order to be sentenced below the mandatory minimum. It would also greatly hamper our ability to resolve cases through plea agreements. Leaving the sentencing entirely up to the judges would result in widely disparate sentences not just between districts, but within districts. In our district, we regularly see wide variances between the sentences defendants who have committed the same crime with similar criminal histories, depending upon which judge they are in front of. The elimination of mandatory minimums would only further widen these disparities. The bills should be strongly opposed. Their enactment would frankly be a disaster in terms of AUSAs' ability to prosecute serious drug offenses. Without defendants having an incentive to cooperate or to plead guilty, agents will be unable to investigate as many crimes and AUSAs will be unable to prosecute as many defendants."

"Since Booker, the percentage of defendants who cooperate has been drastically lower, and the final goal of dismantling a drug conspiracy has been much more difficult to achieve. The drop in cooperation rates obviously has been detrimental to our ability to solve cold-case murders. The knowledge that many of the judges here will deviate downward even if a defendant does not accept responsibility also plays a role in how we approach an investigation since we cannot gamble on whether a particular defendant will cooperate as we once were able to do—successfully. This—as well as other institutional factors in various agencies—has also led to an increase in wiretap investigations which cost much more in terms of investigative personnel and even discovery and trial preparation. The administration's and politicians' statements that we have been successful in battling violent crime—which then serves as their prelude to reduced sentences and increasing judicial "discretion" is particularly galling."

"If we take away the incentive to cooperate, we will rarely be able to reach the high level targets we seek. Mandatory minimums, while sometimes higher than necessary, usually lead to cooperation. This

is good for the offender because s/he no longer is subject to said man min and it helps law enforcement reach higher offenders. If offenders do what they should and/or have no criminal record, the man min doesn't apply anyway. By eliminating mandatory minimums, you will simply be rewarding the most egregious of offender."

"The current safety valve provision provides adequate relief from mandatory minimums for those who deserve a break. If you cannot qualify under the current safety valve, that is a good indication you do not deserve leniency. Judicial sentencing discretion is insufficiently checked under a system with lifetime appointments and deferential appellate review."

"Mandatory minimums give the US Attorney and law enforcement the needed leverage to obtain the cooperation of lower level offenders. Without this leverage, no low level organized crime/drug trafficker will ever cooperate against the "big fish." Why would they? Without this leverage, the justice system will only be able to prosecute low level offenders. For far too long, we have not effectively communicated why tough sentences are needed to dismantle drug organizations. If we are unable to explain this "leverage" principle, congresspersons will never understand why mandatory minimums are vital to public safety."

"In the real world, most defendants who are "safety valve" eligible do, in fact, take advantage of this and in the end are not subject to any mandatory minimum sentence. This is especially true for lower-level conspirators with less involvement. These lower-level conspirators are generally younger. If a study is done on national level comparing indictments charging mandatory minimum violations and sentencings of those defendants to less than the mandatory minimum, I'm certain you will find a high percentage where the sentence was actually below the mandatory minimum. Those defendants took advantage of "safety valve" and "5K." Also, in my experience, a "5K" incentive has many, many times served as a tool to develop cases against other higher level persons who would otherwise go unprosecuted."

"As a narcotics and violent crime prosecutor with 20 years of experience, it is my opinion that mandatory minimum sentences are our best tool to encourage cooperation, and to expand meaningful prosecution of other dealers higher up the "food chain."

"I handle child exploitation cases almost exclusively. Those who do so in our office are constantly grateful for the statutory minimums in child exploitation cases. In our opinion, at least half of our bench minimizes—if not outright scorns—our child pornography cases, undercover sting operations, and sex offenses against minors over the age of 12. If not for the statutory minimums, we would not obtain just sentences in these cases before these judges."

"Longer prison sentences keep habitual criminals from committing even more crimes—and also deter crime in the first instance. The "crack epidemic," for instance, was solved by federal law enforcement and prosecution. Today, there is a meth epidemic. Is it going to be ignored? Statutory sentencing standards are—by far—the best (and maybe the only) method of achieving fairness and uniformity in sentencing. The alternative, what is being called judicial "discretion," inevitably means judicial "arbitrariness" based on the philosophical and political opinions of individual judges."

"The outcry against mandatory minimums is the product of a few academics and crusaders. I have not heard one career prosecutor (except for, I guess, the Attorney General of the United States) advocate the abolition of mandatory minimum sentences. Also, for every story that can be developed about a drug dealer stuck in prison for 5 to 10 years on a mandatory minimum sentence, you could do 1000 on the devastation that crack, heroin, meth and other drugs have visited on our communities. I wholly support the robust punishment of people that distribute this position in our communities. This is an undemocratic, myopic crusade."

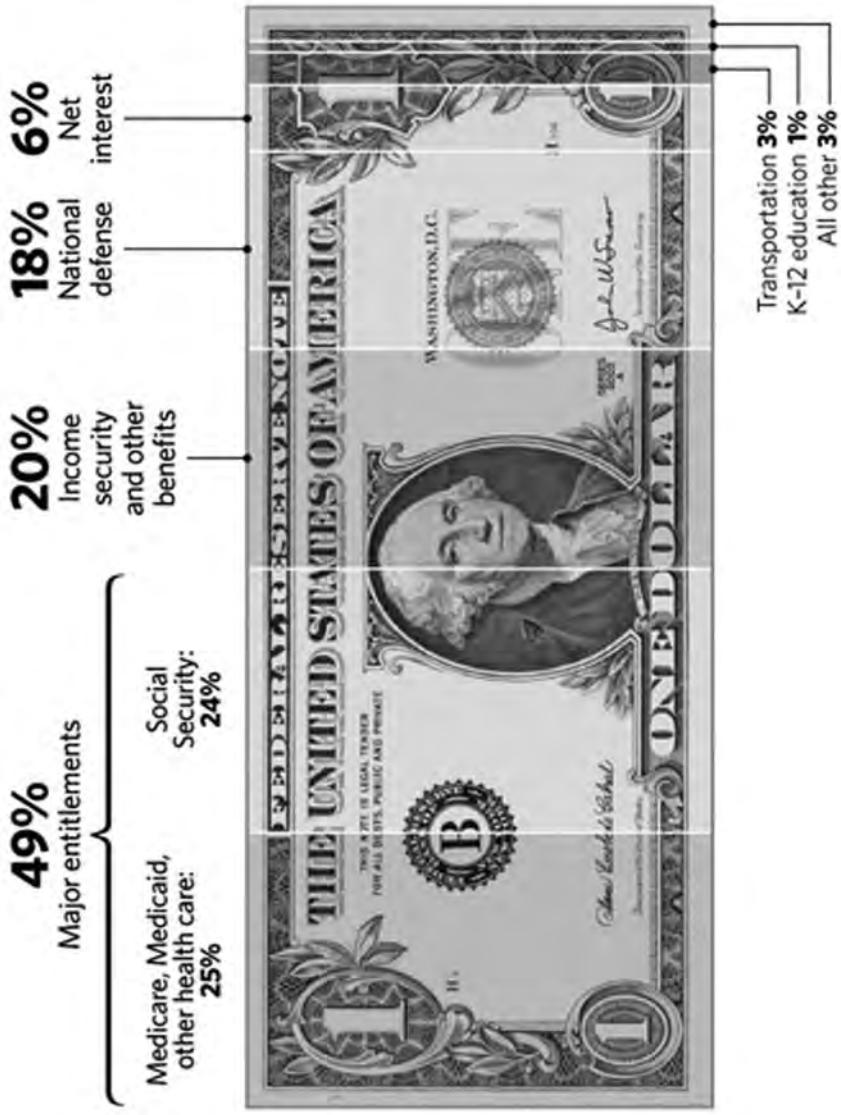
"Mandatory minimum sentences for drug offenses are the single greatest crime reduction method ever implemented. The only deterring factor we have in this country for drug dealers is the tough sentencing methods at the federal level state systems are a joke. We never learn our lesson on crime."

"Mandatory minimum sentences are essential to prosecutors and agents in order to effectively dismantle entire drug trafficking organizations. If Congress does away with or reduces mandatory minimum sentences, they may as well fold the tent on drug prosecution as a whole. The passage of either one of these would be one more major blow to the United States and a major victory for drug trafficking organizations/groups."

"We need to take a stand on this issue. Mandatory minimums provide more certainty in sentencing. Post-Booker, the current system depends much more on the judge you draw then on the charge you face."

"Violent crime levels are at historic lows largely because of minimum mandatory sentences and aggressive prosecutions. I believe the Holder memo, and the proposed legislation above, will have an extremely negative affect on our ability to fight crime. I couldn't be more annoyed/disheartened/mortified. I implore NAAUSA to come out strongly against this soft on crime nonsense!!!!!!! (and, for the record, I'm a lifelong democrat)."

"Reforming (or eliminating) the current mandatory minimum sentencing structure would severely disable my ability to prosecute high-level drug traffickers and drug trafficking organizations. Mandatory minimums have enabled me to obtain the necessary cooperation from co-conspirators. This cooperation from coconspirators is required to investigate, indict, and successfully prosecute the leaders and organizers of high level drug trafficking organizations. I strongly encourage NAAUSA to unequivocally oppose both of these bills."


49%
Major entitlements
Medicare, Medicaid, other health care: 25%
Social Security: 24%
20%
Income security and other benefits
18%
National defense
6%
Net interest
Transportation 3%
K-12 education 1%
All other 3%
THE UNITED STATES OF AMERICA
WASHINGTON, D.C.
ONE DOLLAR

May 12, 2014

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

Re: Federal Criminal Sentencing Reform

Dear Majority Leader Reid and Minority Leader McConnell:

As former government officials who served in the war on drugs, we care deeply about our nation's system of justice. During our tenure, we labored to see that justice was well served, the guilty punished and the innocent protected. We recognize the ongoing need to continue to improve how the nation deals with crime.

Significant components of our statutory framework for sentencing lie at the heart of our nation's success in confronting crime. Collectively, these sentencing measures have helped substantially to reduce crime throughout our nation over the past thirty years. A series of laws, beginning with the Sentencing Reform Act of 1984, have dramatically lessened the financial and human toll of crime on Americans. Critical to these laws has been the role of mandatory minimum sentencing and the exercise by Congress of its Constitutional prerogative to establish the minimum of years of detention served by a federal offender. While federal judges are properly entrusted with great discretion, strong mandatory minimums are needed to insure both that there is a degree of consistency from judge to judge, and that differing judicial ideologies and temperaments do not produce excessively lenient sentences. In addition, and of central importance, prosecutors use strong mandatory minimums, along with safety-valves built into the current system, to induce cooperation from so-called "smaller fish," to build cases against kingpins and leaders of criminal organizations.

Because the Senate is now considering revisiting the subject of mandatory minimum penalties for federal drug trafficking offenses, we take this opportunity to express our personal concerns over pending legislative proposals. We are concerned specifically by proposals that would slash current mandatory minimum penalties over federal drug trafficking offenses -- by as much as fifty percent. We are deeply concerned about the impact of sentencing reductions of this magnitude on public safety. We believe the American people will be ill-served by the significant reduction of sentences for federal drug trafficking crimes that involve the sale and distribution of dangerous drugs like heroin, methamphetamines and PCP. We are aware of little public support for lowering the minimum required sentences for these extremely dangerous and sometimes lethal drugs. In addition, we fear that lowering the minimums will make it harder for prosecutors to build cases against the leaders of narcotics organizations and gangs -- leaders who often direct violent and socially destructive organizations that harm people throughout the United States.

Many of us once served on the front lines of justice. We have witnessed the focus of federal law enforcement upon drug trafficking – not drug possession offenses – and the value of mandatory minimum sentences aimed at drug trafficking offenses.

Existing law already provides escape hatches for deserving defendants facing a mandatory minimum sentence. Often, they can plea bargain their way to a lesser charge; such bargaining is overwhelmingly the way federal cases are resolved. Even if convicted under a mandatory minimum charge, however, the judge on his own can sidestep the sentence if the defendant has a minor criminal history, has not engaged in violence, was not a big-time player, and cooperates with federal authorities. This "safety valve," as it's known, has been in the law for almost 20 years. Prosecutors correctly regard this as an essential tool in encouraging cooperation and, thus, breaking down drug conspiracies, large criminal organizations and violent gangs.

We believe our current sentencing regimen strikes the right balance between Congressional direction in the establishment of sentencing levels, due regard for appropriate judicial direction, and the preservation of public safety. We have made great gains in reducing crime. Our current sentencing framework has kept us safe and should be preserved.

Sincerely yours,

William P. Barr
Former United States Attorney General

Michael B. Mukasey
Former United States Attorney General

Samuel K. Skinner
Former White House Chief of Staff and Former United States Attorney, Northern District, Illinois

William Bennett
Former Director of the White House Office of National Drug Control Policy

John P. Walters
Former Director of the White House Office of National Drug Control Policy

Mark Filip
Former United States Deputy Attorney General

Paul J. McNulty
Former United States Deputy Attorney General and Former United States Attorney, Eastern District, Virginia

George J. Terwilliger III
Former United States Deputy Attorney General and Former United States Attorney, District of Vermont

Larry D. Thompson
Former United States Deputy Attorney General and Former United States Attorney, Northern District, Georgia

Peter Bensinger
Former Administrator, Drug Enforcement Administration

Jack Lawn
Former Administrator, Drug Enforcement Administration

Karen Tandy
Former Administrator, Drug Enforcement Administration

Greg Brower
Former United States Attorney, District of Nevada

A. Bates Butler III
Former United States Attorney, District of Arizona

Richard Cullen
Former United States Attorney, Eastern District, Virginia

James R. "Russ" Dedrick, Former United States Attorney, Eastern District, Tennessee and Eastern District, North Carolina

Troy A. Eid
Former United States Attorney, District of Colorado

Gregory J. Fouratt
Former United States Attorney, District of New Mexico

John W. Gill, Jr.
Former United States Attorney, Eastern District, Tennessee

John F. Hoehner
Former United States Attorney, Northern District, Indiana

Tim Johnson
Former United States Attorney, Southern District, Texas

Gregory G. Lockhart
Former United States Attorney, Southern District, Ohio

Alice H. Martin
Former United States Attorney, Northern District, Alabama

James A. McDevitt
Former United States Attorney, Eastern District of Washington

Patrick Molloy
Former United States Attorney, Eastern District, Kentucky

A. John Pappalardo
Former United States Attorney, Massachusetts

Wayne A. Rich. Jr
Former United States Attorney, Southern District, West Virginia

Kenneth W. Sukhia
Former United States Attorney, Northern District of Florida

Ronald Woods
Former United States Attorney, Southern District, Texas

QUESTIONS FOR BILL OTIS

1. If it's true that mandatory minimums are necessary to get people to plead guilty, how do you explain the fact that guilty plea rates are even higher for numerous federal crimes that do not carry mandatory minimums?:
    - 96.8% of people pled guilty in FY2013 to drug trafficking offenses, BUT
    - 98.4% pled to manslaughter (no MM)
    - 98.1% pled to forgery/counterfeiting (no MM)
    - 97.7% pled to robbery (no MM)
    - 97.9% pled to embezzlement (no MM)
    - 98.1% pled to larceny (no MM)
    - 93.4% pled to fraud (no MM).[1]

2. If it's true that mandatory minimums are necessary to get low-level offenders to "flip" and help prosecutors move "up the food chain," how do you explain the fact that the people who "flip" the least are

low-level offenders like mules, couriers, and street-level dealers because they simply do not have any information to give---due to the cartel's deliberate decision to keep them in the dark? How is this sentencing inversion fair?

3. You contend that mandatory minimums are necessary to incapacitate offenders. Doesn't that disregard the fact that there is a ready and ever-available supply of those who can take the place of those incarcerated? Doesn't that undermine that point?

4. If it's true that mandatory minimums are necessary to incarcerate "major" and "serious" drug traffickers, how do you explain the fact that those offenders are the most likely to avoid a mandatory minimum sentence by "flipping" and providing "substantial assistance" to the government?

- The "major" and "serious" traffickers escape mandatory minimums the most by "flipping." In FY2010,

- Less than half of all high-level suppliers/importers received mandatory minimums; 32% were relieved because they provided "substantial assistance"
- 55% of organizers/leaders received mandatory minimums; 40% were relieved by providing "substantial assistance"
- 52% of drug wholesalers received mandatory minimums; one third were relieved through "substantial assistance"
- Only 42% of managers received mandatory minimums; half were relieved through "substantial assistance"
- 47% of supervisors received mandatory minimums; 37% were relieved through "substantial assistance."[2]

5. Doesn't the "replacement effect" (i.e. the ability of others to easily replace low-level offenders in the chain) undermine your argument that lengthy terms of incarceration will result in reduced instances of crime since these low-level individuals are fungible?

6. Isn't it true that under the Smarter Sentencing Act, not a single mandatory minimum sentence is eliminated? How, exactly, does this bill remove the leverage you say prosecutors need to secure guilty pleas and "substantial assistance"?

7. Do you have any hard evidence that 2-, 5-, or 10-year mandatory minimums in the Smarter Sentencing Act will be less effective at securing guilty pleas or gaining "substantial assistance" than the current drug mandatory minimums?

8. How long has it been since you prosecuted cases for the United States?

9. Law enforcement officers decide which neighborhoods and crimes to focus on. That's a decision they make in terms of their priorities. That decision affects which cases are presented for prosecution and charging. It also affects which population of individuals are potentially subject to high mandatory minimums,

enhancements, and consecutive counts. Often, in reverse stings, agents decide on the quantity of drugs (often those triggering mandatory penalties instead of lower amounts) that their confidential informant will negotiate with suspects about. When the case is then presented to the Assistant United States Attorney, he or she has discretion as to whether to charge these higher penalties based upon the factual situations that the agents have created. Do you agree that it's possible that bias, unconscious or not, can seep into the process during these stages?

10. You contend that mandatory minimums are the reason that the crime rate has decreased in the last 20 years. However, during the past decade all 17 states that cut their imprisonment rates also experienced a decline in crime rates according to a 2012 Pew Study. How do you explain this?

11. The Bureau of Prisons federal appropriations have increased by $6.544 billion since FY1980, from $330 million to $6.874 in

FY 2014. Adjusted for inflation, FY1980 spending is the equivalent of $940 million, which still accounts for a 630% increase. What factors are responsible for this over sixfold inflation-adjusted increase? Are the current funding levels for the Department of Justice for federal prisons necessary and appropriate? If prison populations continue to increase, should federal funding for prisons also be increased?

12. Federal prisons are operating now at 140 percent capacity. Is your answer to continue building new prisons to house the ever-increasing number of inmates?

13. Isn't it true that the "substantial assistance" safety valve option is really only available to those offenders who have enough information on those up the food chain to trade for lower sentences? What about the low-level sellers that lack the information necessary for this?

14. Do you think it is a wiser use of federal resources to continue funding prison expansion instead of investing in evidence-based prevention, reentry, and victim services programs?

15. As the statistics have shown us, the triggering amounts for drug mandatory minimums sweep in an overwhelming number of low-level couriers and mules. Can you agree that drug quantity is a poor proxy for an individual's culpability/role and the seriousness of the crime? For example, it punishes someone with a kilo of cocaine at 10% purity, who is likely a decoy, equally as someone with a kilo of cocaine at 90% purity, who is importing it for distribution. Or should someone who is a lookout for a two kilo drug deal be punished more harshly than someone who actually organized a one kilo drug deal?

QUESTIONS FOR ERIC EVANSON

1. What is your official position at NAAUSA? How long have you held this position?

2. Isn't it true that NAAUSA represents less than one third of all federal prosecutors? How can it then claim to speak for all federal prosecutors, especially when the Attorney General and the administration support sentencing reform and the Smarter Sentencing Act?

3. Whether to charge a person with an offense that carries a mandatory minimum sentence is entirely up to prosecutors. How do we create uniformity in sentencing when the 94 U.S. Attorney offices around the country have different charging policies and practices?

4. African-American men have a 1 in 3 chance of being incarcerated in some form during their lifetime. In contrast, white men have a 1

in 17 chance of being incarcerated in some form during their lifetime. What accounts for this disparity?

5. What are your thoughts on state efforts like New Jersey that place first-time non-violent drug offenders into treatment programs instead of prison? Governor Christie pointed to the cost difference between treatment and imprisonment as a big reason for the change ($49,000 for a year in prison, $24,000 for an inpatient treatment facility). And what about the outcomes for each strategy?

6. Should non-violent offenders face the same penalties as those that commit violent crimes? (i.e. life in prison mandatory minimums for previous offenses, etc.)

7. Over half of all convicted drug offenders have little or no criminal record and only 6% play some type of organizational leadership role. The offender most likely to receive a mandatory minimum is

not a kingpin, but a street-level dealer. Can you agree that our country has been applying these harsh penalties to those for whom it was never intended?

8. As the statistics have shown us, the triggering amounts for drug mandatory minimums sweep in an overwhelming number of low-level couriers and mules. Can you agree that drug quantity is a poor proxy for an individual's culpability/role and the seriousness of the crime? After all, it punishes someone with a kilo of cocaine at 10% purity, who is likely a decoy, equally as someone with a kilo of cocaine at 90% purity, who is importing it for distribution.

9. How long has it been since you prosecuted cases for the United States? What was your position in the office? Not the head of the office. So you didn't set charging policy.

QUESTIONS FOR MARC LEVIN

1. Proponents of mandatory minimums point to the uniformity of sentencing as a reason for its effectiveness. Is there really uniformity in sentencing?

2. Does Texas have mandatory minimum prison sentences for drug offenses?

3. In your experience, has the lack of mandatory minimum prison sentences for drug offenses enabled Texas to use alternatives like drug courts and intensive probation programs? What is the general effectiveness and cost of those programs in comparison with incarceration?

4. How has the lack of mandatory minimum prison sentences helped Texas close prisons and manage its prison population?

5. In the experience of states that have eliminated or reduced mandatory penalties, has that had an effect on the rate of guilty pleas and cooperation by offenders? How about the crime rate?

6. In states that have reduced their mandatory minimum penalties, what has been the impact on crime? What do you anticipate will be the impact on crime if a bill like the Smarter Sentencing Act is enacted?

7. Based on your research, what kinds of sentencing policies or alternatives to incarceration have been most effective in reducing recidivism in the states? Do any of those alternatives or policies currently exist in the federal system? Is it your recommendation that the federal system move in that direction?

8. Can you describe whether the current "safety valve" is sufficient for non-violent federal drug offenders?

9. Do you believe that mandatory minimums are essential to encourage guilty pleas by offenders?

10. Is the ever-increasing budget for the Bureau of Prisons as a share of the DOJ budget sustainable?

QUESTIONS FOR BRYAN STEVENSON

1. How do our criminal justice policies in the context of our history shape our identity as a nation, as compared with other nations and their awareness of their history?

2. How do the criminal justice policies of the United States compare with other developed nations and democracies in the world? For example, can you speak about the death penalty, life without parole, and prosecuting juveniles as adults?

3. Historically, how have communities of color been impacted by federal charging and sentencing policy?

4. Mandatory minimums are supposed to produce uniformity. Is there sentencing disparity among similarly-situated offenders?

5. Proponents of mandatory minimums point to the uniformity of sentencing as a reason for its effectiveness. Is there really uniformity in sentencing?

6. Are increased federal penalties and mandatory minimums responsible for a reduction in crime?

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[1] U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 11 (2013), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table11.pdf

[2] U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 171, Fig. 8-11 (2011), http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

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