

**Testimony Before United States Sentencing Commission
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Thank you for inviting me to testify before the Commission today. The issue of mandatory minimums is a critical one for our criminal justice system at this time. I am honored to join two of the most respected experts in this area – Professor Stephen Schulhofer and Professor Stephen Saltzburg – to discuss this subject today.

For the last twenty years, I have been teaching criminal law courses at Loyola Law School. Prior to that, I served for eight years as an Assistant United States Attorney (“AUSA”) in Los Angeles. I have seen firsthand how mandatory sentences have been used in our federal courts and, like many others who have served in the criminal justice system, I have been deeply troubled by their application.

Newspaper headlines from across the nation make it apparent that there is overwhelming dissatisfaction with mandatory minimum sentences. Not only are they perceived as unfair, but they are, in fact, inequitable, costly and ineffectual in achieving their goals. Mandatory minimum sentences, especially with regard to drug offenses, have undermined public confidence in our federal sentencing system. When judges with lifetime tenure quit over the unfairness of sentences, when dozen of former federal prosecutors petition Congress to change such sentences,¹ and when defense lawyers

¹ Letter to Chairman Patrick Leahy, Chair of the Committee on the Judiciary, United States Senate (Support of the Fair Sentencing Act of 2009) (Mar. 10, 2010). The letter was signed by two dozen former United States Attorneys from across the nation.

inundate the Executive Branch with complaints and pleas for clemency, it is clear that the downside of such sentences eclipses their usefulness in our federal sentencing scheme.

Today, discomfort with the mandatory minimum sentencing laws goes beyond just the issue of the disparity between crack and powder cocaine offenses. With at least 171 federal mandatory minimum sentencing laws currently on the books, judges are increasingly speaking out against the injustices of mandatory minimum sentences. These judges represent the full political spectrum. They include members of our current Supreme Court² and judges who proudly wear the label of “law and order” jurists.³

Numerous studies for the last twenty years have demonstrated that mandatory minimum sentences in their current configuration do not work.⁴ Mandatory minimums do not make us safer, they do not create more equity in sentencing, and they do not create more certainty in sentencing. They are costly, have a disproportionate impact on minority defendants and force our judges to impose sentences they do not believe are appropriate in the individual case. They shift power from judges to prosecutors and they work at odds with our post-*Booker* sentencing system.

² See, e.g. Associate Justice Anthony Kennedy, *Speech at the American Bar Association Annual Meeting* (August 9, 2003). Likewise, Associate Justice Stephen G. Breyer has noted: “During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike.” *Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment).

³ See, e.g., Remarks of Chief Justice William H. Rehnquist, National Symposium on Drugs and Violence in America 9-11 (June 18, 1993).

⁴ See, e.g., ABA, *Justice Kennedy Commission, Report and Recommendations* (2004); Barbara Vincent & Paul Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (FJC 1994); United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); Families Against Mandatory Minimums: *Poll on Mandatory Minimums* (August 2008); *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, available at <http://constitutionproject.org/sentencing/article.cfm?messageID-245&categoryId=7>.

As Judge John S. Martin, Jr., said shortly after he resigned from the federal bench, mandatory minimums are “cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea.”⁵

A. Problems with Mandatory Minimum Sentences

The documented problems with mandatory minimum sentences include: (1) they are costly and ineffective; (2) they are not applied uniformly; (3) they transfer discretion from neutral judges to adversarial prosecutors; (4) they have a disparate impact on non-white offenders; (5) they create anomalies in the law of sentencing; and (6) they hamper sentencing reform.

Most importantly, mandatory minimums do not make us safer. I have seen no credible evidence, especially in the context of narcotics offenses, that mandatory minimum sentences provide any greater deterrence than sentences imposed under a discretionary sentencing scheme. There are many reasons for this, including the fact that those involved in drug offenses know that the easiest escape from a mandatory minimum sentence is to provide information to prosecutors. By doing so, we end up with a skewed system where more serious offenders are not subject to the mandatory minimum sentences, but where street level offenders are. As our federal prisons explode with prisoners, primarily non-violent drug offenders, we cannot seriously say that mandatory minimum sentences have made a positive impact in the so-called “War on Drugs.”

Mandatory minimum sentences are also not fairer. Everyone who has worked in the criminal justice system knows of cases where a defendant received a mandatory

⁵ John S. Martin, Jr., *Speech: Why Mandatory Minimums Make No Sense*, 18 N.D. J. L. ETHICS & PUB. POL'Y 311 (2004).

minimum sentence that seemed grossly excessive for the offense committed. Again, these most often include non-violent drug offenders who receive mandatory five- ten- or twenty-year sentences for first-time offenses involving a range of narcotics. Judges across the political spectrum have protested against the injustice of these sentences. As District Judge Paul G. Cassell testified in 2007, it is “simply irrational” to be sentencing a 24-year-old first-time drug offender to life imprisonment when aircraft hijackers, terrorists who detonate bombs in public places, or second-degree murderers would receive less prison time for their offenses.⁶

Likewise, mandatory minimum sentences do not create more certainty in sentencing. Studies have documented how prosecutors and judges have devised methods to circumvent the sentencing guidelines through, for example, plea bargaining or dismissal of cases. Mandatory minimum laws remain on the books for those unlucky defendants who cannot trade information with the prosecutor in order to avoid the harsh consequences of the mandatory minimums. Unfortunately, that has meant that less culpable defendants often spend more time in prison than those higher up in the echelons of a drug organization.⁷

In addition to knowing what mandatory minimums have not accomplished, we also know the harmful things they have done. First, they have overpopulated our prisons. According to the Bureau of Justice Statistics, with over 208,000 inmates, federal prisons

⁶ Judge Paul Cassell, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *reprinted in* 19 FED. SENT. REP. 344 (2007).

⁷ See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993).

are operating at 37% above their rated capacity.⁸ The costs of our current incarceration policies are exorbitant. Next year, the projected budget for the Federal Prison Bureau is \$6.1 billion, which is approximately \$6 million more than last year's budget. Inmates serving mandatory minimum sentences deplete government and correctional facility coffers of the resources that might be used more effectively to provide rehabilitation and alternative sentencing programs for inmates.

Second, mandatory minimum sentences have created two systems of justice – one for white defendants and another for inmates of color. Hispanics and African-American defendants have suffered the most because of mandatory minimum sentences, due in part to the 100:1 disparity between the mandatory sentencing provisions for crack and powder cocaine. More than 71% of the inmates in federal prison are inmates of color; 39.4% are black and 32% are Hispanic.⁹ Most of them are there for violations of federal drug offenses which, not coincidentally, are the crimes most affected by mandatory minimum sentences.¹⁰

Most significantly, mandatory minimum sentences have created a crisis of confidence in our criminal justice system. In preparing for my testimony today, I surveyed close to 100 articles, electronic and traditional, addressing mandatory minimum

⁸ U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin (2009); Pew Center Report on Federal Prison Population, available at www.pewcenteronthestates.org/prisoncount2010. The Pew Center reported that in contrast to a 0.3% drop in state prisoners, the federal prison population rose by 2,061 inmates to an all-time high of 208,118 in 2009.

⁹ See FEDERAL BUREAU OF PRISONS, QUICK FACTS ABOUT THE BUREAU OF PRISONS, INMATE POPULATION, available at <http://www.bop.gov/news/quick.jsp#1>.

¹⁰ Black and Hispanic offenders make up the overwhelming majority of individuals convicted under mandatory minimum sentences. Black offenders make up 32.9% of those convicted of a mandatory minimum sentence, and Hispanic offenders make up 38.2%. Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REP. 335, 336. Of those inmates in federal prison who were sentenced under mandatory minimum provisions, 82.9% were for drug offenses. *Id.*

sentences. These publications run close to 100 to 1 against maintaining our current approach to mandatory minimum sentences.¹¹ Prior reports cite polls in which Americans voted overwhelming to eliminate mandatory minimums for nonviolent crimes.¹² It is difficult for the public to have confidence in a criminal justice system when there is an outpouring of criticism from judges, defense lawyers and even prosecutors.

Given the evident problems with our current system of mandatory minimum sentences, the real question is what we should do to remedy this problem. To answer this question, one must consider the goals of mandatory minimums.

B. The Goals of Mandatory Minimum Sentences

In a recent article on the unintended effects of mandatory penalties, Professor Michael Tonry summarized the goals of mandatory minimums as follows: They are enacted to promote evenhandedness, transparency and crime prevention.¹³

Under our current approach, mandatory minimums do not lead to evenhandedness in the handling of sentencing. Because judges and prosecutors can circumvent the mandatory minimums, most easily by rewarding “substantial assistance” by a defendant, everyday defendants who have committed the same crimes receive very different sentences.¹⁴ If one truly wants the courts to be evenhanded, judges should be allowed to

¹¹ Records on file with author. Full survey available upon request.

¹² See, e.g., FAMM: *Poll on Mandatory Minimums*, *supra* note 4.

¹³ Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *Crime & Just.* 65 (2009).

¹⁴ See Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 *AM. J. CRIM. L.* 1 (2008).

examine all of the facts of a defendant's case and background, in the manner now allowed for sentencing under the Advisory Guidelines, in deciding what sentence to impose. Substantial assistance might be one factor, but it is not the only factor that may affect a judge's sentencing decision.

Second, from my own experience, I can tell you that the current sentencing system is anything but transparent. Knowing that their clients face potential mandatory minimums, defense lawyers are quick to make backdoor deals even before an indictment is returned. Thus, the prosecutor and defense lawyer can manipulate the charge and evade the mandatory minimums before the public or a court focuses on the case.

Finally, mandatory minimums have not been effective in crime prevention.¹⁵ While we have certainly incarcerated more defendants, any increase in overall general deterrence has been negligible. More importantly, mandatory minimums are not necessary to deter those individuals who receive lengthy sentences under them. For many young offenders, a much shorter sentence is likely to have the same deterrent effect without permanently destroying the defendant's chances at reintegration into society upon release.

Years ago, then Assistant Attorney General Robert S. Mueller, III, offered one more argument in favor of mandatory minimum sentences. He argued that mandatory minimum sentences are necessary because it is the way that "Congress [can send] a strong message that our society will not tolerate certain forms of criminal behavior."¹⁶ That message has been sent. The federal statutes and this Commission's Sentencing

¹⁵ See generally JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY (RAND Corporation Drug Policy Research Center, 1997).

¹⁶ Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT. R. 230 (1991).

Guidelines provide ample notice of the stiff penalties that await offenders of serious crimes.

Society should not tolerate criminal behavior, but mandatory minimums are a cure worse than the disease. There are more effective and fairer approaches that would be more consistent with sentencing in a post-*Booker* world in which judges' discretion is carefully guided by the U.S. Sentencing Guidelines.

C. **Proposals for Reform**

This Commission and Congress have several options for remedying the problems with mandatory minimum sentences. First, as occurred in the 1970s, Congress could simply repeal all of the mandatory penalty provisions in the U.S. Code. This would be the most principled approach. The federal system's overall approach toward sentencing is one of "guided discretion." If district judges are going to depart from the Guidelines, they must explain their decisions. Their judgment is then subject to review by an appellate court for reasonableness. While the courts use a deferential standard to determine reasonableness, extremely lenient sentences that disregard the seriousness of an offense or an offender's background are still unlikely to stand. Appellate review of sentences guarantees there will be transparency in the process.

In my experience, there is nothing to suggest that judges are looking for a way to put dangerous people back on the street.¹⁷ At most, all they want is the flexibility to

¹⁷ Statistically, there is no evidence that federal judges are imposing light sentences on dangerous offenders. Even in the Ninth Circuit, where there is perennially increased scrutiny of sentencing decisions, courts impose either Guideline sentences, or departures or variances based upon government requests and policies, in 85% of the cases. UNITED STATES SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT THROUGH MARCH 31, 2009, tbl. 2, available at http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_2nd.pdf. Moreover, as to the remaining 15% of cases, there is no evidence that those defendants pose a physical danger to the community. Additionally,

tailor sentences so that they are accurately taking into account all of the circumstances of the crime and information about the defendant who committed it.

If there is a concern that judges will not take seriously enough the nature of the offense or the actions of a repeat offender, crimes that are now governed by mandatory minimums could instead have “presumptive” sentences. These would act like “reverse safety valves.” If the case involves certain aggravating factors, the law would trigger a strong presumption that sentencing must be within the guidelines. Once the government demonstrates that the facts of the case warrant a harsh punishment, the burden would be on the district court to justify a lesser sentence and the appellate courts would not be required to give deference to the lower court’s decision. Thus, before a sentence would become permanent, four judges, not just one sentencing judge, would be conducting a careful review of the imposed sentence.

If repeal of mandatory minimum sentences is not politically feasible, Congress should narrow the categories of crimes eligible for mandatory minimum sentences. The key, of course, is finding the right criteria to use in making this determination. While challenging, I do not believe this would be an impossible task. Polls demonstrate that the public is most concerned about physical danger, especially from repeat offenders.

Therefore, if there are to be mandatory minimum sentences, they should be limited to crimes that cause serious immediate physical harm to others. If repeat offenders are to face mandatory minimum sentences, these sentences should only be triggered when the

it should be noted that the PRELIMINARY QUARTERLY DATA REPORT THROUGH DECEMBER 31, 2009, tbl2, indicates that only 13.8% of all sentences in the Ninth Circuit were below Guideline range for reasons other than substantial assistance, early disposition or other government sponsored downward departure. Throughout the circuits, the overall trend when dealing with crimes posing a risk to public safety is for the courts to impose sentences within the Guideline range or above. *Id.* at tbls. 3, 14-17.

offender poses a significant threat of physical harm to others. If this criterion is used, we would realistically eliminate the majority of mandatory sentencing laws on the books.

What this would mean is that those crimes that have created the most controversy over mandatory minimums would no longer be a problem. In particular, non-violent drug offenses, immigration offenses, identity theft, pornography offenses not involving actual contact with the child, obstruction of justice charges, food stamp charges, white collar offenses and miscellaneous other offenses (e.g., interference with civil service examinations and trespassing on federal lands) would no longer carry a mandatory minimum prison sentence. It certainly would be worthwhile to revisit the dozens of mandatory sentencing laws enacted in the Eighteenth and Nineteenth Centuries, including those, for example, that deal with bribing harbor inspectors or sentencing pirates.¹⁸

I believe that the least effective approach to dealing with mandatory minimum sentences is the piecemeal approach undertaken so far. While I agree that it is critical to reduce the disparity in sentencing for crack and powder cocaine,¹⁹ this change alone will not remedy the racial disparities in sentencing in our criminal justice system. An incremental approach, including proposals to tweak current safety valve standards, ignores the opportunities we have if we conduct a wholesale change in mandatory minimum sentencing. Mandatory minimums have been a failed strategy. The goal is to come up with sentencing strategies that actually work. The federal courts have not yet

¹⁸ 21 U.S.C. § 447 (1888); 18 U.S.C. § 1651 et seq. (1790).

¹⁹ See Fair Sentencing Act of 2009 (S. 1789); UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 99-100 (2002).

embraced alternative approaches to, for example, drug offenders. Yet, work in that area is promising.²⁰

Conclusion

Once again, let me say how much I appreciate the Commission's time and attention to these important issues. In my opinion, Congress would be missing a crucial opportunity to act on behalf of the American people to improve our sentencing system if it did not make major changes in our mandatory minimum sentencing scheme.

Throughout the decades, the sentencing pendulum has swung back and forth. When I began as a young AUSA, judges had unfettered discretion. I admit that there were some times when I was frustrated by that system. Without a Commission to monitor their sentences or national standards to guide them, judges would give wildly different sentences for the same offense. The pendulum then swung toward mandatory sentences and I became frustrated by that system as well. Prosecutors take an oath to "do justice." That is not synonymous with obtaining a lengthy sentence, especially in cases where everyone in the courtroom – judge, defense lawyer and prosecutor – knows that the mandatory minimum sentence is far more than the defendant deserves.

The current post-*Booker* sentencing scheme has achieved something that did not exist when I began as a prosecutor. The Guidelines themselves present national expectations for the range of sentence in a case. In my experience and from the studies published to date, judges do not readily ignore this information. If we are going to be

²⁰ See Stephen A. Saltzburg, *A Better Way to Sanction Bad Behavior*, 22 CRIM. JUST. 1 (Fall 2007) (elaborating on recommendations of Justice Kennedy Commission on Effective Criminal Sanctions).

consistent with Guideline sentencing, the number of mandatory minimum offenses should be drastically reduced or eliminated.

Thank you. I am happy to answer any questions you may have.