TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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MANDATORY MINIMUM SENTENCING STATUTES

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BEFORE THE

UNITED STATES SENTENCING COMMISSION

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INTRODUCTION

Mr. Chairman and Members of the Commission—

Thank you for the opportunity to testify on behalf of the Obama Administration, the Department of Justice, and federal prosecutors across the country on the topic of mandatory minimum sentencing statutes. We applaud the Commission for its leadership over the last 20 years on this critical issue and so many others that impact federal sentencing. We look forward to working with you over the next several months on a comprehensive assessment of mandatory minimum sentencing laws. We hope the assessment will look not only at the data surrounding mandatory minimum sentencing laws, but also their place in achieving the goals of sentencing and improving public safety, their evolving role in light of the post-*Booker* advisory sentencing guidelines system, their severity levels, any racial and ethnic disparities that result from these laws, and the impact of mandatory minimum sentencing statutes on the federal prison population.

My testimony today is offered in the context of an ongoing study at the Department of Justice that began soon after Attorney General Holder took office. In the spring of last year, the Attorney General created the Sentencing and Corrections Working Group within the Department of Justice. The Working Group is chaired by the Acting Deputy Attorney General and has involved over 100 different prosecutors, policy analysts, statisticians, researchers, prison officials, and others across the Department. The Attorney General's charge to the Working Group is to review federal sentencing and corrections policy in light of the series of constitutional rulings issued by the Supreme Court in *Booker* and subsequent decisions, the unsustainable growth of the federal inmate population, and criticism of federal sentencing policy by many judges, academics, members of Congress, and practicing attorneys. This criticism surrounds the structure of federal sentencing – which includes mandatory minimum sentencing statutes and advisory sentencing guidelines – perceived racial and ethnic disparities in sentencing, and various other aspects of federal sentencing and correction practice and policy.

The Sentencing and Corrections Working Group is conducting the most comprehensive review of federal sentencing and corrections in the Executive Branch since at least the passage of the Sentencing Reform Act. It is studying the structure of federal sentencing – including mandatory minimum sentencing statutes – federal cocaine sentencing policy, other perceived racial and ethnic disparities in sentencing, prisoner reentry, alternatives to incarceration, the Department's own charging and sentencing policies, and much more. In its work, the Working Group is reaching out beyond the

Department of Justice, meeting with law enforcement officials, federal judges, defense attorneys, probation officers, victim advocacy groups, civil rights organizations, academics, outside researchers, and many others. The Working Group is researching the history of U.S. sentencing and corrections policy, examining the available research on what works in sentencing and corrections, and looking closely at various state sentencing and corrections laws and policies. The Group visited several federal prisons, spoke with incarcerated men and women, and attended the Bureau of Prisons residential drug treatment program, a Federal Prison Industries work site, and other prison programming.

The results of the Working Group are guiding the Department's policies regarding sentencing. To begin, the Administration has been working hard with Members of Congress to see the enactment this year of legislation to address the current disparity in sentencing between crack and powder cocaine offenses, including the existing 100-to-1 quantity ratio. In addition, last week, the Attorney General issued a new Department policy on charging and sentencing in a memorandum to all federal prosecutors. This new policy recognizes the reality of post-*Booker* sentencing and the need for an appropriate balance of consistency and flexibility to maximize the crime-fighting impact of federal law enforcement. We are also working on new ways to examine racial and ethnic disparities in sentencing beyond federal cocaine sentencing policy to determine if disparities are the result of race-neutral application of statutes and charging decisions and otherwise justified; and we are working on initiatives to promote more effective prisoner reentry. These and other measures will be announced shortly.

MANDATORY MINIMUMS AND THE STRUCTURE OF FEDERAL SENTENCING

Our work on the structure of federal sentencing began with a review of historical sentencing practices and policies in the United States, which reveals that judicial sentencing discretion has never been absolute. In the history of our country, in the federal criminal justice system and in every state criminal justice system, judicial discretion in sentencing has always been limited as a matter of law. Sentencing discretion is constrained by the Constitution, by maximum penalties set by the legislature, in many circumstances by minimum penalties set by the legislature, and often by minimum and maximum presumptive sentences set by a sentencing commission. As Justice Kennedy recently wrote, "[f]ew, perhaps no, judicial responsibilities are more difficult than sentencing. The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society. The case-by-case approach to sentencing must, however, be confined by some boundaries." *Graham v. Florida*, ___ U.S. __, slip opinion at 26-27 (2010). It has been common practice in our country's history, in federal and state criminal justice systems, for the criminal law to mandate a minimum sentence for murder, rape, drunk driving, and a host of other serious crimes.

As you know, the current federal sentencing structure includes both mandatory minimum sentencing statutes and sentencing guidelines that have been advisory for about the last five years. Before the 1980s, the number of mandatory minimum sentencing laws in the federal criminal justice system was very small. Beginning as early as the 1960s,

though, a movement to establish more mandatory minimum penalties began to sweep across the country as a result of an historic increase in crime and illegal drug use in the United States. In an attempt to slow the growing drug trade, combat an overall crime rate that had grown five-fold, attack a violent crime rate that had quadrupled, and address criticisms that courts were both being inappropriately lenient and imposing disproportionately longer sentences in the cases of minority defendants, many states, by the 1970s, adopted statutory mandatory sentences. This was part of the larger sentencing reform movement towards determinate sentencing and away from indeterminate sentencing.

After the 1984 passage of the Sentencing Reform Act, the federal government – committed to replacing its system of indeterminate sentencing with a fairer, more predictable, more uniform determinate sentencing system – adopted a new sentencing system, the key features of which included the creation of the Sentencing Commission, the development and implementation of sentencing guidelines that would carry the force of law, the abolition of parole, the creation of "truth-in-sentencing" practices, and the enactment of severe mandatory minimum sentencing laws for certain serious crimes – primarily, drug and firearm offenses – and recidivist offenders. In 1986, through the 1990s, and into the 21st Century, Congress enacted mandatory minimum sentencing statutes to work together with the federal sentencing guidelines.

As a result of these sentencing reforms, many other criminal justice reforms, and larger cultural changes in society, crime rates have been reduced dramatically across the

country in the last 20 years. Researchers have found that a significant part of the reduction in crime has been the result of changes to sentencing and corrections policies. Moreover, the experience of law enforcement reinforces this research and shows that there are tangible benefits to law enforcement and public safety from mandatory sentencing laws. Mandatory sentencing laws increase deterrence and cooperation by those involved in crime. It is not surprising, then, that every Administration and Congress since 1984 has supported, in one way or another, determinate sentencing and mandatory minimum sentencing statutes for serious crimes. Mandatory minimum sentencing statutes are supported by most law enforcement organizations and most rank and file law enforcement officers across the country.

EXCESSES AND GAPS IN MANDATORY MINIMUM SENTENCING LAWS

Even our preliminary assessment of the Working Group's efforts reveals, though, that mandatory sentencing laws have come with a heavy price. Mandatory minimum sentencing statutes in the federal system now apply to a significant array of serious crimes; and they also, by and large, mandate very severe imprisonment terms. The federal prison population, which was about 25,000 when the Sentencing Reform Act was enacted into law, is now over 210,000. And it continues to grow. Much of that growth is the result of long mandatory sentences for drug trafficking offenders. While these and other mandatory sentences have been important factors in bringing down crime rates, we also believe there are real and significant excesses in terms of the imprisonment meted out for some offenders under existing mandatory sentencing laws, especially for some

non-violent offenders. Moreover, the Federal Bureau of Prisons is now significantly overcapacity, which has real and detrimental consequences for the safety of prisoners and guards, effective prisoner reentry, and ultimately, public safety.

At the same time, since the Supreme Court's decision in *Booker*, Sentencing Commission research and data – and the experience of our prosecutors – have shown increasing disparities in sentencing. We are concerned by, and continue to evaluate, research and data that indicate sentencing practices (particularly those resulting in lengthier incarcerations) are correlated with the demographics of offenders. Further, with more and more sentences becoming unhinged from the sentencing guidelines, undue leniency has become more common for certain offenders convicted of certain crime types. For example, for some white collar offenses – including high loss white collar offenses – and some child exploitation offenses, sentences have become increasingly inconsistent. The federal sentencing guidelines, which were originally intended to carry the force of law, no longer do. Thus, for these offenses for which there are no mandatory minimums, sentencing decisions have become largely unconstrained as a matter of law, except for the applicable statutory maximum penalty. Predictably, this has led to greater variation in sentencing. This in turn undermines the goals of sentencing to treat like offenders alike, eliminate unwarranted disparities in sentencing, and promote deterrence through predictability in sentencing.

WE SUPPORT THE LIMITED AND JUDICIOUS USE OF MANDATORY MINIMUM SENTENCING STATUTES AND A REEXAMINATION OF EXISTING MANDATORIES AND THEIR SEVERITY LEVELS

Our study has led us to the conclusion that in an era of advisory guidelines, mandatory minimum sentencing statutes remain important to promote the goals of sentencing and public safety. At the same time, we recognize that some reforms of existing mandatory minimum sentencing statutes are needed and that consideration of some new modest mandatory minimum sentencing statutes is appropriate.

Federal prosecutors do *not* support mandatory minimum penalties for *all* crimes; and this is not our position. Rather, acknowledging our current *advisory* guidelines system and recognizing that mandatory minimum penalties provide critical tools for combating serious crimes, we support mandatory minimum sentencing statutes now for *serious* crimes.

As we have stated before, since *Booker v. United States*, we are seeing decreasing uniformity and increasing disparity in the imposition of federal sentences. Because predictability in sentencing has been diminished, the deterrent value of federal sentencing similarly is beginning to erode. Moreover, we believe increasing inconsistency in sentencing will chip away at public confidence in the sentencing system, and that the goals of sentencing will be short-changed.

In the past, the Sentencing Commission has taken the position that mandatory minimum sentencing statutes were not needed, in part because the sentencing guidelines

were themselves mandatory. This position was also put forward for many years by advocacy groups such as the American Bar Association and Families Against Mandatory Minimums as well as by federal public defenders. However, in our review of federal sentencing over the last year, we have found little support from these groups, in Congress, or the Federal Judiciary for reinstating the presumptive nature of the sentencing guidelines. In the absence of such a change to the federal sentencing structure that might return presumptive sentencing guidelines (an overhaul that we are *not* now recommending), we believe that mandatory minimum sentencing statutes must go hand in hand with advisory sentencing guidelines.

In the post-*Booker* landscape of advisory guidelines, a mandatory minimum penalty scheme is reasonable and needed as it will retain an essential law enforcement tool, increase public safety, ensure that paths for achieving the goals of sentencing continue to exist, and help promote public confidence in the sentencing system by providing predictability, certainty, and uniformity in sentencing for serious crimes.

While we recognize that mandatory minimum sentences are a critical tool in removing dangerous offenders from society and in gaining cooperation from members of violent street gangs and drug distribution networks, we simultaneously recognize that mandatory minimum penalties should be used judiciously and only for serious offenses and should be set at severity levels that are not excessive. Many states are now reexamining their mandatory minimum sentencing statutes. As I stated earlier, we believe there has been excess in the promulgation of federal mandatory minimums.

Thus, reforms of some of the current mandatory minimums are needed to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population.

We believe the Commission should undertake, in its review of mandatory minimums, to identify where mandatory minimum statutes are unjustified and thus can be eliminated or where the applicable severity level of a mandatory minimum might be reduced with no adverse impact on public safety. We also believe the Commission should identify crimes where there are excessive sentencing disparities and where a new mandatory minimum sentence would significantly address this disparity and assist a law enforcement program and public safety. We believe that no new mandatory minimum should be proposed unless there is substantial evidence that such a minimum would rectify a genuine problem with imposition of sentences below the advisory guidelines; would not have an unwarranted adverse impact on any racial or ethnic group; and would not substantially exacerbate prison crowding.

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The current structure of federal sentencing – with its advisory guidelines and mandatory minimum sentencing statutes – was not designed but rather evolved over time as a result of actions of various Congresses and decisions of the United States Supreme Court. We believe the Commission should continue the review of the current sentencing structure that it began with its regional hearings last year. We think it should explore

various options for structural reform. At this time, though, we see little support in Congress or across the federal criminal justice system for structural change of federal sentencing. In light of this, we support the continued but judicious use of mandatory minimum sentencing statutes. We urge the Commission to engage in a review of existing mandatory minimum statutes to identify those that are unnecessarily severe and also to identify crimes for which the goals of sentencing and public safety suggest a new statutory minimum term may be appropriate.

We thank you for the opportunity to share the views of the Administration with the Commission. We look forward to continuing our work together to improve federal sentencing and to bring greater justice to all.