Testimony of Thomas W. Cranmer[1]

Public Hearing Before the
United States Sentencing Commission

"The Sentencing Reform Act of 1984: 25 Years Later"

Chicago, Illinois
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I would like to start by thanking the Commission for holding this hearing and inviting me to testify in my capacity as a federal criminal defense attorney regarding how the federal sentencing system is working and what changes should be made to improve it. I have reviewed the remarks offered by many of my colleagues who have gone before me at the hearings held in Atlanta, Stanford, and New York and appreciate that the Commission has already heard a great deal of testimony on a wide range of topics. It came as no surprise to me that one of the issues raised by nearly everyone from the defense bar is the need to reform mandatory minimum penalties. It is that issue to which I want to add my voice because I don't think that there is a more important reform effort that can be undertaken after twenty five years of working with the Sentencing Guidelines.

The problems associated with mandatory minimums are certainly not new to the Commission. Mandatory minimums existed long before the creation of the Sentencing Guidelines and have plagued sentencing policy in this country for decades. To its credit, the Commission has never shied away from this issue and is to be commended for the earnest efforts that it has made to define and publicize the scope of the problem. Just a few years after the nationwide implementation of the first set of Guidelines, for example, the Commission prepared a report for Congress in which it evaluated the impact of mandatory minimum sentencing on the criminal justice system. That report concluded that the use of mandatory minimums "compromised" not only the "fundamental premise" of "proportionality" in punishment, but the very "honesty and truth" of the sentencing process.[2]

In spite of the longstanding recognition of the dangers posed by mandatory minimums, however, the problem has only worsened in the eighteen years since the Commission's first report to Congress. While the Commission originally catalogued approximately 100 separate federal mandatory minimum penalty provisions at the time of its initial report back in 1991, it recently presented a new statistical overview of statutory mandatory minimum sentencing to the House

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[2] Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (hereinafter, "Original Mandatory Minimum Report"), United States Sentencing Commission, August, 1991, at iii-iv.

Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security just two months ago in which it identified at least 171 such provisions in the United States Code. There is no debating the point that these statutes are having a profound impact on federal sentencing. Based upon the most recent sentencing data gathered by the Commission, more than one out of every four offenders convicted of a crime last year was convicted under a statute carrying a mandatory minimum penalty.[3]

Part of the reason for the longevity and breadth of the problem posed by mandatory minimums is that it is a difficult one to solve. Although the Guidelines have in many ways contributed to the problem by designing sentencing ranges that correlate to or even exceed mandatory minimum penalties, the issue is one that transcends the Guidelines because the Commission does not have the authority to restore balance to the system on its own. Since mandatory minimums are a product of federal statute, only Congress can effectuate the necessary reform required to abolish them. That change, in turn, requires the resolve of the general public, and it has proven very difficult for any legislator, no matter what his party affiliation, to explain to his or her constituency why it is a good idea to pursue sentencing reforms that would allow an individual convicted of crimes involving drugs, guns, or child pornography to receive a shorter prison term than he or she is required to serve under the law as it exists today. Without proper grounding or explanation, any such proposal is automatically misperceived as being soft on crime.

But the reality is that the correction of the injustice created by mandatory minimum sentencing is not only a good idea, it as an essential one to maintain the integrity of the entire criminal justice system. I want to use my brief time with the Commission to underscore four principle problems that, in my view, require greater publicity and advocacy to allow people unfamiliar with the criminal justice system to understand what practitioners working within it have seen and experienced for years. These problems are as follows: First, there is simply no rhyme or reason to the designation of offenses for mandatory minimum penalties. Mandatory minimum sentences have been enacted in piecemeal fashion without any consistent policy objective or forethought. Second, rather than enhance uniformity in sentencing by treating similarly-situated offenders alike, mandatory minimums create sentences that are patently unfair by imposing unwarranted uniformity on markedly different offenders. Third, mandatory minimums are disproportionately applied to punish underprivileged individuals in vulnerable segments of society. Fourth, mandatory minimums have been used as a vehicle to transfer the power of sentencing from an impartial judge to a prosecutor whose single-minded pursuit of convictions all-too-easily overtakes any concern for proportionality in punishment. It is only when these four problems become part of the regular national discourse that the realities of mandatory minimums can be fully understood and the tide of public opinion turned against a device that is crippling the criminal justice system.

[3] *See* Overview of Statutory Mandatory Minimum Sentencing (hereinafter, "Updated Mandatory Minimum Report"), United States Sentencing Commission, July 10, 2009, at 1 (noting that offenders were convicted of a statute carrying a mandatory minimum in 28.6% of reported cases).

A. Lack of Coherent Organizational Principles

Even a cursory look at the list of 171 mandatory minimum sentences codified by federal law reveals that the criteria for enacting these statutes were poorly conceived. Indeed the manner in which offenses have been selected for mandatory minimum penalties defies any coherent organizational principle at all. Mandatory minimums appear to have taken root solely as a consequence of political expedience based upon the intersection of criminal law with whatever topic may have captured the attention of the media of the day.[4] The offenses on the list range from prominent issues in current events – such as piracy and harboring illegal aliens – to much more obscure crimes – such as the killing of a horse official or the refusal to operate railroad lines – which, although serious, no longer create the public fervor that they may have in the past.

There are many practical illustrations of the illogical consequences provoked by such a disjointed approach to mandatory minimums. The crime of bribery offers a particularly salient example. The most often used bribery statute in the United States Code focuses on payments to public officials, and there are many other more specific bribery offenses focused on everything from banks to sporting contests to farm debt.[5] None of these crimes, however, impose a mandatory minimum punishment. In fact, of the nearly infinite variety of bribes, only two highly specific types impose a floor on the custodial sentence that must be imposed: (1) bribery of a meat inspector; and (2) bribery of a harbor inspector operating in Baltimore or New York. The mandatory minimum for these offenses are one year and six months, respectively.[6]

I will be the first to admit that I am not an expert in the field of meat inspection or harbor regulation and have not conducted or reviewed any studies analyzing the impacts of bribes in these areas. However, I am confident that there is no empirical evidence demonstrating that, under traditional principles of sentencing such as rehabilitation, deterrence, or the protection of society, it is these two varieties of bribery that have proven so insidious and challenging to overcome that judicial inquiry into the unique circumstances of the individual offender and his crime must be overridden by mandatory minimum punishments. For example, is an offender who bribes a meat inspector at a local processing facility more dangerous than one who bribes a member of the Food and Drug Administration responsible for approving a new drug for mass distribution to the public? Is an individual who bribes a harbor inspector in Baltimore or New York more likely to repeat his or her crime than someone who pays off a similar official in Miami or Los Angeles? Or, on a general deterrence theory, is it more important to punish someone who bribes any kind of inspector, no matter what his or her field of operation, than someone who bribes a high public official, such as a state or federal law maker, to avoid the imposition of legislation calling for more stringent standards in the inspection process?

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[4] Lyle J. Yurko offered a perfect example of this phenomenon in his comments before the Commission in Atlanta in which he described the link between the airing of the Dan Rather-produced documentary entitled "48 Hours on Crack Street" and the passage of legislation imposing a mandatory minimum on crack and cocaine offenses.

[5] *See* 18 U.S.C. § 201, *et seq*.

[6] *See* 21 U.S.C. § 622; 33 U.S.C. § 447.

The answers to these questions point out the lack of thought that has characterized the entire scheme of mandatory minimum sentences. The ad hoc adoption of these punishments without any cohesive attempt to analyze the justification for them has left in place an uneven, arbitrary, and irrational sentencing scheme that fails to reflect any coherent policy of criminal justice.

B. Creation of Unwarranted Uniformity between Disparate Offenders

Unfortunately, it is not just the lack of justification underlying the designation of offenses for mandatory minimum punishments that is problematic. Through their actual application, the mandatory minimums have also consistently yielded results that are patently unfair for those defendants who are unfortunate enough to fall within their scope. Specifically, by lumping together all offenders – regardless of their individual backgrounds and circumstances – simply by virtue of the fact that they have committed the same prohibited act, mandatory minimums have required uniform treatment of individuals who are markedly different from each other in ways that matter profoundly to principles of just punishment.

The best examples of the sentencing disparities bred by mandatory minimums are found in two of the most prominent crime categories in which they operate – drug and firearm offenses. With respect to drug crimes, for example, simple possession of five grams of crack cocaine requires a minimum period of five years incarceration.[7] That is the same minimum punishment required for actual distribution of 500 grams of powder cocaine.[8] The practical impact of these rules is that an individual who has purchased a personal supply of drugs solely to fuel his or her own addiction is subject to the same five year minimum term required for a dealer who profits from the sale of amounts large enough to create many more such addicts.[9]

It is important to recognize that the injustice of such a situation is driven not only by the infamous 100 to 1 ratio codified in the mandatory minimum laws for powder and crack cocaine. Instead, the ratio itself is symptomatic of a much broader problem – namely, that mandatory minimums for all drug offenses classify offenders based upon the amount of narcotics that they possess without any individualized consideration of the circumstances leading to that possession or their role in the offense. Thus, under the draconian eye of the current sentencing regime, the minimum period of incarceration for distribution of 100 grams of heroin is the same whether the offender is a single mother with no education or employment skills operating as a mule under the abusive authority of a drug kingpin in order to support her family, or a high level supplier taking

[7] *See* 21 U.S.C. § 844(a). For a repeat offender – territory which is all too common when dealing with addiction – the five year minimum is triggered by as little as one gram of crack cocaine. *See id.*

[8] *See* 21 U.S.C. § 841(b)(1)(B)(ii).

[9] There is, of course, the "safety valve" provision contained at 18 U.S.C. § 3553(f) by which certain individuals who are perceived as being the least culpable and least dangerous drug offenders may be sentenced without regard to the otherwise applicable mandatory minimums. However, this provision has proven to be an inadequate tool to offset the harsh and inequitable results bred by mandatory minimums for drug offenses for the reasons described by Michael Nachmanoff in his comments to the Commission in New York City.

the time out to make a personal delivery to a particularly important client. The only fact pertinent to the mandatory minimum laws is the weight of the drug in question.

The impact of mandatory minimums for defendants convicted of firearms offenses is equally egregious. One of the most common crimes in this category is the carrying of a firearm during the course of a drug trafficking offense or crime of violence, which carries a five year minimum prison term.[10] Despite the wide range of offenses that qualify for designation as a drug trafficking offense or crime of violence, this minimum sentence applies regardless of the severity of the underlying crime. Thus, a street level drug dealer who stores a gun for self-protection due to the dangerous nature of the neighborhoods in which he works is treated the same as an individual who carries a firearm in the event he needs a little extra muscle to carry out a carjacking.[11] In each instance, the only factor driving the imposition of the five year minimum term is whether the offender carried a gun while engaged in his or her offense. As long as that criterion is satisfied, the false presumption is that all offenders are the same.

At the time it enacted the legislation that paved the way for the Guidelines, Congress recognized that these kinds of disparities are "shameful" and simply cannot be sanctioned under any rationale scheme of sentencing.[12] Indeed one of the overarching goals of the Guidelines was to ensure uniform treatment of similarly situated offenders. Mandatory minimums have only exacerbated the distressing effects which Congress was so adamant to avoid by precluding consideration of factors which differentiate offenders of very different culpabilities.

C. Undue Influence on Unrepresented Groups

Another unfortunate impact of mandatory minimum sentences is that the individuals who pay the heaviest price are often those who have the smallest voice in the process by which the penalties are set. Study after study has demonstrated the disparate impact of mandatory minimums on minorities.[13] Once again, drug offenses are a perfect example. According to the most recent data gathered by the Commission, convictions arising under the Controlled Substances Act accounted for 82.5% of all mandatory minimum convictions last year.[14] The overwhelming majority of offenders convicted under these statutes – more than 77% – are minorities.[15]

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[10] *See* 18 U.S.C. § 924(c)(1)(A)(i).

[11] Even more illogical, the dealer who never brandishes his gun and intends to use it only defensively is subject to a mandatory minimum of thirty years if the weapon has a silencer. *See* 18 U.S.C. § 924(c)(1)(B)(ii). The carjacker, on the other hand, is subject to a mandatory minimum of ten years if he not only displays his firearm, but actually discharges it during the course of his offense. *See* 18 U.S.C. § 924(c)(1)(A)(iii).

[12] Original Mandatory Minimum Report, at 15.

[13] *See, e.g.*, *id*., at 42 (noting that 38.5% of mandatory minimum defendants were African American even though African Americans represented only 28.2% of the total population).

[14] *See* Updated Mandatory Minimum Report, at 10.

[15] *See id*., at 11.

By comparison, offenses traditionally thought of as white collar financial crimes carry no mandatory minimum penalties.[16] One of the common denominators for these offenses is that Caucasian defendants commit them more than any other ethnic or racial group. In 2008, for example, Caucasian defendants were responsible for 90% of antitrust violations, 86.6% of gambling/lottery offenses, 71% of tax offenses, 59.1% of embezzlement offenses, and 46.5% of fraud crimes.[17] The injustice of such a system is obvious. A minority drug dealer who destroys hundreds of lives through the product that he peddles is subject to a mandatory minimum sentence from which no judge may depart, while a white corporate executive who destroys just as many lives by embezzling the pension funds of his employees is exempt from any base line level of punishment and may offer extenuating circumstances to demonstrate why he is deserving of leniency.

But the disparate impact of mandatory minimums is not only apparent through demographic analysis of offender statistics. In some instances, the discriminatory application of mandatory minimum sentences is evident from the very nature of the offenses selected for these penalties. Socioeconomic status is at the top of the list. In reviewing the Commission's most recent report to Congress, I was struck by the fact that while there is no mandatory minimum sentence that applies to a wealthy financial advisor who makes millions through insider trading, the perpetration of a complex ponzi scheme, or corporate accounting fraud, a laid-off factory worker who wrongfully redeems food stamps having a value of $100 or more is subject to a mandatory minimum period of incarceration.[18] There is no rational principle of sentencing which supports such a distinction. The only appreciable difference is one attributable to politics – individuals with money have a voice in the legislative process, while the poor and unemployed do not.

D. Transfer of Sentencing Power from Judges to Prosecutors

Finally, mandatory minimums reflect a profound shift in sentencing power by removing from the hands of judges any control over principles of proportionality in punishment. Once a conviction of an offense carrying a mandatory minimum has been entered, judges are powerless to change that sentence, no matter how unjust the penalty or how pressing the need for leniency might be. The only discretion built into the system rests in the hands of the prosecutor, who is given the initial decision whether or not to charge a statute carrying a mandatory minimum penalty.

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[16] There is a ten year mandatory minimum sentence for the crime of managing a continuing financial crime enterprise. However, the threshold for triggering such a sentence is quite high – the enterprise must receive more than $5 million in gross receipts over a 24 month period. *See* 18 U.S.C. § 225. Moreover, the financial crimes qualifying for such an enterprise are limited, and none of them carry mandatory minimums on their own. It is also worth noting that the financial crime enterprise statue is rarely enforced, as demonstrated by the fact that it gave rise to no convictions in 2008. *See* Updated Mandatory Minimum Report, at Appx. B.

[17] *See* 2008 Sourcebook of Federal Sentencing Statistics, United States Sentencing Commission, at Table 4.

[18] *See* 7 U.S.C. § 2024(c).

Unfortunately, the testimony of my colleagues who have gone before me proves that prosecutors rarely make charging decisions based upon considerations of proportionality in sentencing.[19] They simply use the hammer of mandatory minimums to their advantage by promising not to charge such an offense in order to extract a guilty plea to another crime. Put another way, prosecutors use the threat of unjust punishment as a bargaining chip to force a defendant to trade his or presumption of innocence for the right to be sentenced in a fair manner by a neutral and impartial decision maker.[20]

For their part, the mandatory minimum statutes foster exactly such abuses in the charging process due to the overlap that exists between offenses which carry mandatory minimum penalties and those that do not. Prosecutors frequently have a great deal of flexibility in the charges that they can bring in connection with any given criminal act. The child pornography laws offer a good illustration. Under 18 U.S.C. § 2252(a)(2), an individual who is convicted of "receiv[ing]" a visual depiction of a minor engaging in sexually explicit conduct must serve a minimum sentence of five years incarceration. There is no mandatory minimum, however, with respect to an individual who is charged with "possess[ing]" the exact same material under 18 U.S.C. § 2252A(a)(5)(B). In the absence of any aggravating circumstances, a defendant convicted of that offense faces an entry-level Guidelines range of only 27-33 months – a range which, in the post-*Booker* regime, is obviously only advisory and can be decreased even further.[21]

Notwithstanding the enormous difference in prison time flowing from these two offenses, there is no material distinction in the substantive misconduct for which the punishment is being imposed. A defendant cannot possess a sexually explicit image of a child without first receiving it. By creating two statutes under which to charge the same salient facts – one of which imposes a mandatory minimum sentence and the other of which does not – Congress has simply left proportionality in sentencing to the whims of the prosecutor. In so doing, it has created perhaps the most offensive sentencing disparity of all by grounding punishment not on the nature of either the offender or the offense, but simply whether the defendant chooses to exercise his right to go to trial.

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In conclusion, mandatory minimums are simply unworkable. On the one hand, they fail to ensure that similarly situated offenders receive like punishment due to the uneven designation of mandatory minimum offenses throughout the federal criminal code. On the other, they impose unwarranted uniformity by classifying offenders based on one or two overly-narrow offense characteristics that mask differences between individuals and the circumstances surrounding

[19] *See, e.g.,* Joint Statement of Thomas W. Hillier II and Davina Chen, May 27, 2009, at 37-39.

[20] This practice is particularly disturbing in connection with the threatened use of recidivist statutes, which ratchet up the already inequitable mandatory minimum penalties tremendously. *See, e.g.*, 21 U.S.C. §§ 841, 851.

[21] United States Sentencing Guidelines § 2G2.2(a)(1).

their crimes. To add to these problems, there is also great social injustice in the racial and socioeconomic impact of the mandatory minimums, as well as the way that they are leveraged by front-line prosecutors to convince defendants to give up their trial rights. All of these results promote unconscionable disparities in sentencing.

The Guidelines are not the sole source of the problem, nor is the Commission in a position to render the final solution. It can, however, set the example by decoupling Guidelines ranges from mandatory minimum penalties, and then leveraging its independent role as an expert on sentencing policy to take the lead in advocating the pressing need for their abolishment. Until the gross inequities of mandatory minimums are fully publicized and understood, the promises made more than twenty-five years ago in connection with the adoption of the Sentencing Reform Act will never be fulfilled.