

**TESTIMONY OF STEPHEN A. SALTZBURG  
BEFORE THE UNITED STATES SENTENCING COMMISSION  
MAY 27, 2010  
WASHINGTON, D.C.**

## **Mr. Chairman and Members of the Commission:**

My name is Stephen Saltzburg, and I am the Wallace and Beverly Woodbury University Professor of Law at the George Washington University School of Law. I appear here today in my individual capacity and speak only for myself and not for my Law School or for any other individual or group. I testified before the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security on July 22, 2009 on behalf of the American Bar Association (“ABA”), and while Mr. Felman today appears on behalf of that organization, I shall make many of the same points to you that I made to the Subcommittee. I have read Mr. Felman’s testimony and believe it is consistent with my own views. This is hardly surprising since I am a past chair of the ABA Criminal Justice Section and the ABA Justice Kennedy Commission and a past co-chair of the ABA Commission on Effective Criminal Sanctions. I shall make reference to the ABA’s positions and recommendations on mandatory minimum sentences not as a representative of the organization, but because I believe those positions and recommendations are sound public policy.

## **The Growth in Federal Criminal Statutes and the Shift in Sentencing Philosophy**

In 1998, the American Bar Association's Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report entitled "The Federalization of Criminal Law." In order to describe the growth in federal criminal law, the Task Force encountered the problem of identifying the number of federal crimes enacted over periods of time. The Task Force decided, however, not to "undertake a section by section review of every printed federal statutory section," because this would have been too "massive" an undertaking given the Task Force's "limited purpose." The ABA Report did not actually count the number of crimes, but during the House Subcommittee hearing in July 2009, witnesses testified that there are approximately 4,400 federal crimes. The significance of this number is apparent when it is combined with the dramatic conclusion that the ABA Task Force drew from the available data:

*More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970.*

This era of expanding federal criminal law coincided with a profound shift in sentencing policy. For most of the twentieth century prior to the Sentencing Reform Act of 1984 (the “SRA”) and sentencing reform measures enacted in many states, the rehabilitative or “medical” model of sentencing prevailed in the federal (and state) courts. The assumption upon which sentencing rested was that, through a combination of deterrence, motivated by the unpleasant experience of incarceration, and personal renewal -- spurred by counseling, drug treatment, job training and the like -- criminal deviance could be treated like any other disorder. The system recognized, albeit grudgingly, that some defendants were, in effect, “incurable” and thus could only be quarantined through lengthy or life sentences, and that in a few cases the crime was so egregious that the public demand for retribution outweighed rehabilitative considerations.

Before the advent of guideline systems of sentencing, state and federal sentences were described as "indeterminate," a word often used to refer to two different, but related, ideas in the sentencing context. First, an indeterminate sentencing system is one in which the judge sentences a defendant either to a specified term, or to a range of years (e.g., 5- 20), but the number of years the defendant *actually* serves is determined later by an administrative body like a parole board. For most of the twentieth century, state and federal sentencing was indeterminate in this sense and still is in many states for some or all crimes.

Second, federal sentencing before the Guidelines was said to be "indeterminate" in the sense that the judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction. As long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence. There was no limitation on either the type or quality of information a judge could consider at sentencing. None of this information was subject to filtering by the rules of evidence, and the judge was not required to make findings of fact. Moreover, so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.

In the 1970s and 1980s, the rehabilitative model of sentencing fell into disfavor among some legislators and judges for a variety of reasons, including rising crime, mounting evidence that prisoners were not being rehabilitated, and increasing concern that indeterminate sentencing produced unjust disparities among similarly situated offenders. The result was the determinate sentencing revolution, which has been characterized by (a) limitations on front-end judicial sentencing discretion through passage of mandatory minimum sentences for certain offenses and sentencing guidelines that narrow the scope of unconstrained judicial sentencing discretion for all offenses, (b) elimination of or drastic limitations on parole or other forms of administrative early release authority, thus requiring defendants to serve a larger proportion of their judicially imposed sentences, and (c) in most places, increases in the statutory and guidelines penalties for most serious crimes, particularly violent crimes involving firearms and drug offenses.

### **Effect of Incarceration Rates**

The effect on sentencing decisions was enormous. Beginning in the late 1970s, the United States began to respond to concerns about rising crime by implementing an array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in prosecutions, convictions and individuals sentenced to incarceration. By mid-year 2008, the combined number of inmates in federal and state prisons and jails throughout the United States exceeded 2.3 million. This means that 1 of every 131 Americans is incarcerated in prison or jail. The average length of time spent in prison has also increased. The average time served in prison was about five years between 1992 and 2001. Between 1980 and 1992, the average time served was only 18 months. Today, prison sentences of more than ten years are commonplace.

Current rates of incarceration in the United States are not only remarkably high in terms

of this country's history, but they also are strikingly different from those seen in most of the rest of the world, particularly in comparison with other developed countries. The United States now imprisons a higher percentage of its residents than any other country, surpassing Russia, South Africa, and the states of the former Soviet Union. And the United States incarcerates its residents at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.

### **Heavy Costs of Incarceration**

The costs of the American experiment in mass incarceration have been high. Between 1982 and 2006, direct expenditures by federal, state, and local governments on corrections jumped from \$9 billion to \$68.7 billion, an increase of over 618%. During the same period, combined criminal justice expenditures (for police, judicial, and corrections activities) by federal, state, county, and municipal governments rose from \$35.7 billion in 1982 to \$214.3 billion in 2006. Moreover, the costs of an aggressive program of incarceration extend beyond the direct dollar outlays of governments on functions easily identifiable as part of the criminal justice system. Governments themselves incur a variety of collateral costs when a defendant is sent to prison or jail, including increased expenditures for the maintenance and health care of dependents of inmates, lost tax revenues from income that would have been earned or expenditures that would have been made by defendants left free in the community.

Finally, and not least, the families and communities from which inmates come suffer a wide variety of tangible and intangible harms from the absence of the inmate. These include the emotional, economic, and developmental damage to the children of incarcerated offenders, and the disenfranchisement and consequent political alienation of a significant portion of the young men in the minority communities in which both crime and punishment are most frequent. Overall, more than three percent of American adults were incarcerated or under criminal justice supervision in 2002. The likelihood of an American going to prison sometime in his or her life more than tripled to 6.6 percent between 1974 and 2001. For an African American male born in 2004, the likelihood of being incarcerated sometime during his lifetime is 32.2 percent.

### **Mandatory Minimum Sentences**

The ABA has devoted significant time and interest to the broad subject of federal sentencing reform and has done so with a sense of urgency in recent years particularly through the work of the three entities that I have chaired or co-chaired: the Section of Criminal Justice, the ABA Justice Kennedy Commission and the Commission on Effective Criminal Sanctions.

At the ABA's August 2003 Annual Meeting in San Francisco, United States Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I

can neither accept the necessity nor the wisdom of federal mandatory minimum sentences.” He continued that “[i]n too many cases, mandatory minimum sentences are unwise or unjust.”

In response to Justice Kennedy’s concerns, the ABA established the ABA Justice Kennedy Commission to investigate the state of sentencing and corrections in the United States and to make recommendations on how to ameliorate or correct the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121 A, approved August 9, 2004, urged all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.” The same resolution calls upon Congress to “[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently.”

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. Mr. Felman’s testimony addresses the ABA Criminal Justice Standards on Sentencing, so I need not describe them in my testimony.

Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with both commands of just sentencing. Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on “offense characteristics” and ignore “offender characteristics.” Consider, for example, an individual who sells narcotics to feed a habit. She may be subject to a mandatory minimum term of incarceration even though drug treatment might be less expensive and more likely to prevent recidivism.

In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that they shift sentencing discretion away from judges toward prosecutors. This is because it is the prosecutor who chooses to charge a crime with a mandatory minimum sentence. If the prosecutor chooses to do so, the judge’s hands are tied upon conviction no matter how unjust a judge believes a particular sentence might be. And these decisions can exacerbate the problem of sentencing disparity because these decisions of prosecutors are hidden from public view and are not subject to appellate review.

At great cost to taxpayers, mandatory minimums have forced judges to sentence

thousands of first-time, non-violent drug offenders to unconscionably long prison terms. The Judicial Conferences of all 12 federal circuits have urged the repeal of mandatory minimum sentences, after concluding that they are unfair and ineffective. Commenting on a minor, first-time drug offender sentenced to life imprisonment, Supreme Court Chief Justice William Rehnquist called mandatory drug sentencing a “good example of the law of unintended consequences.” Numerous studies, including those by the Department of Justice and the U.S. Sentencing Commission, indicate that mandatory minimum sentencing is not an effective instrument for deterring crime, and a RAND Corporation study found that drug treatment is seven times more cost-effective than mandatory minimum sentencing for a large majority of offenders.

It is clear to me that state and local prosecutors have been far ahead of the federal government in recognizing that drug treatment programs can be cost-effective, reduce incarceration rates, save taxpayer money, and *promote public safety by reducing the cycle of recidivism and the number of people who will be victims of crime.*

### **Two Important and Often Overlooked Points About Mandatory Minimums**

There are two important and often overlooked points about mandatory minimum sentences. First, this Commission has recognized from the outset of its work, including the years that spent as an Ex Officio representative of the Attorney General, that mandatory minimums establish the equivalent of sentencing “cliffs.” An individual who has 4.9 grams of crack cocaine gets no mandatory minimum sentence and could receive probation whereas an individual with 5.0 grams might get a mandatory minimum sentence of five years. These “cliffs” are clearly arbitrary, unfair and unnecessary.

Second, there is little doubt that mandatory minimum sentences reflect a distrust of judges. Without that distrust, there would be no reason to deny judges sentencing discretion. I am prepared to assume that there were a few federal judges, outliers in my opinion, who imposed sentences that some members of Congress would have deemed shockingly low. Although I think that this was a rarity, the undeniable fact is that we now have a sentencing system in which (a) judges have guidelines and are bound to calculate a “guideline sentence” before finally imposing an actual sentence upon a convicted defendant, and (b) sentences are subject to appellate review. Thus the system provides guidance to judges and produces what can accurately be described as “guided discretion.” Judges who impose unreasonable sentences, low or high, may be reversed by a higher court. Thus, today there is no reason to fear guided judicial discretion with the backup of appellate review and to adhere to a system with the kind of “cliffs” that I have described.

Some individuals deserve to be locked up for long periods of time. No other penalty would appropriately recognize the nature of their crimes and adequately protect the community. The ABA Kennedy Commission recognized this as one of its “Ten Basic Principles”: “For offenders who commit the most serious criminal acts, particularly acts of violence against others,

lengthy terms of incarceration are generally warranted to recognize the magnitude of the antisocial act (or as retribution or ‘just desserts’), incapacitate the offender for the safety of the community, and send a deterrent signal to others.”

But, not every offender needs to be incarcerated. State prosecutors in many jurisdictions have decided that locking up as many people as possible makes little sense and does not reduce crime. They have supported drug courts, drug treatment, mental health courts, homeless courts, and are innovating with concepts like a veterans’ court. The goal of a criminal justice system ought to be to reduce crime by appropriately dealing with those who break the law. The ABA Justice Kennedy Commission offered basic principles that are relevant to today’s discussion, and participants in criminal justice from across the political spectrum should be able to support them all, including the first principle:

There is no universally accepted view of what the goal or purpose of punishment is, but there is something of a growing consensus that (a) while incarceration is an appropriate punishment for many crimes, it is not the only punishment option that should be available in a comprehensive sentencing system; (b) when incarceration is imposed as all or part of a sentence, society and offenders benefit when offenders are prepared to reenter society upon release from incarceration; (c) while there is a place for harsh punishment in a sentencing system, there also is a place for rehabilitation of offenders; and (d) community-based treatment alternatives to prison may be both cost-effective and conducive to safer communities.

One need only look at the innovative programs developed by prosecutors like Charles J. Hynes of Brooklyn who now chairs the ABA Section of Criminal Justice to see how successful treatment programs can be.

### **Mandatory Minimum Cocaine Sentences**

Justice Kennedy’s 2003 address to the ABA specifically noted the harsh consequences of mandatory minimum cocaine sentences:

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D.C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

\*\*\*Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a

transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

The 2004 Report accompany ABA Resolution 121A emphasized the dangers of shifting sentencing authority from judges to prosecutors and the special danger that sentencing of minority offenders will be disproportionately harsh:

Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months. In 2001, the average federal drug trafficking sentence was 72.7 months, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.

These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony. (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.

The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders



were African-American, and in 2000, 84.7% were African- American. The disproportionate penalties for crack offenses obviously have a great impact on African-American defendants in federal prosecutions. (Footnotes omitted)

### **The Extra-Effect of Drug Mandatory Minimums**

When I had the honor serving as the Attorney General's ex officio representative on the United States Sentencing Commission in 1989-1990, I had first-hand familiarity with the rationales for decisions made by the Commission that have had a continuing effect over the years.

There is no doubt that when Congress enacted the mandatory minimum drug sentences in 1986, they had an overall impact on increasing federal sentences virtually across the board. By imposing penalties higher than the penalties that had been imposed by federal courts over many years, Congress impelled the Commission to increase many sentences to maintain some consistency in the Guidelines. Had Congress not enacted mandatory minimum penalties in 1986, it is clear, I believe, that the sentencing guidelines overall would have been less harsh and offenders would have received lower sentences in many cases.

Thus, the effect of the mandatory minimums is not simply to incarcerate individuals who receive these sentences longer than a judge would have regarded as necessary. It is to incarcerate many individuals who do not receive mandatory minimum sentences for longer than necessary as a result of the impact that the mandatory minimum sentences have had on the federal sentencing guidelines.

### **Increased Use of Alternatives to Incarceration**

The federal sentencing system could greatly benefit from increased use of effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, diversionary programs, home confinement, GPS monitoring, and probation. Incarceration does not always rehabilitate – and sometimes has the opposite effect. Many state criminal justice systems derive great benefit from a variety of alternatives to incarceration, but ever since the advent of the sentencing guidelines the federal system has focused almost exclusively on imprisonment. Prior to the guidelines, more than 30% of federal defendants were sentenced to probation without any term of imprisonment. By 2007, that figure had dwindled to a mere 7.7%, as 92.3% of offenders were sentenced to imprisonment. The data reflects a marked and consistent trend away from the use of alternatives to incarceration. This dramatic curtailment of alternatives to incarceration was not dictated by the Sentencing Reform Act of 1984. Indeed, 28 U.S.C. § 994(j) provides that “[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense ....” In view of this statute, as well as the purposes of sentencing set forth in 18

U.S.C. Section 3553(a), it is not necessary to imprison 92.3% of defendants. In addition to the direct costs associated with these sentences, the negative impact on defendants' prospects for rehabilitation is significant. Even a brief period of incarceration often causes the defendant to suffer loss of employment and family support, the two factors most likely to promote rehabilitation and prevent recidivism. Federal sentencing policy would greatly benefit from a renewed commitment to alternatives to imprisonment, particularly if coupled with careful data collection and analysis to determine those alternatives that work best for given categories of offenses and offenders. Federal sentencing could take a lesson from the states.

## **Conclusion**

I believe that there is overwhelming evidence that in the United States we have over-criminalized federal law, incarcerated too many individuals for too long, created unacceptable racial disparities in sentencing and seen clearly the crucial contributing role of federal mandatory minimum sentencing laws to these problems. I support the repeal of mandatory minimum laws and urge the Commission to recommend their repeal to Congress.