Appendix G

SUMMARIES OF THE ORAL AND WRITTEN REMARKS OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING – THURSDAY, MAY 27, 2010
8:30 a.m. – 5:30 p.m.
WASHINGTON, D.C.

I. Executive Branch

United States Department of Justice

Sally Quillian Yates, United States Attorney for the Northern District of Georgia

On behalf of the United States Department of Justice, Ms. Yates testified that "in an era of advisory guidelines, mandatory minimum sentencing statutes remain important to promote the goals of sentencing and public safety." Ms. Yates further testified that current mandatory minimum statutes have produced "real and significant excesses in terms of the imprisonment meted out for some offenders," while there also gaps in mandatory minimum sentencing statutes have resulted in disparate and unduly lenient sentences for other offenders. Thus, she asserted, "some reforms of existing mandatory minimum sentencing statutes are needed and . . . consideration of some new modest mandatory minimum sentencing statutes is appropriate."

Ms. Yates first explained that her testimony should be viewed in the context of an ongoing Department of Justice study of federal sentencing and corrections policy. The study's purpose is to evaluate the structure of federal sentencing, including mandatory minimum sentencing statutes, in light of *Booker* and other decisions, the unsustainable growth of the federal prisoner population, and criticisms of federal sentencing policy generally. Ms. Yates testified that the results of the study's working group have begun to guide Department of Justice policy on sentencing and corrections issues.

Ms. Yates asserted that a reform movement in the late 20th century in favor of determinate sentencing, along with other criminal justice reforms and changes in society generally, reduced crimes rates "dramatically across the country." She testified that researchers "have found that a significant part of the reductions in crime has been the result of changes to sentencing and corrections policies," and that the experience of law enforcement officials has shown that mandatory minimum penalties deter crime and increase cooperation.

Despite these benefits, Ms. Yates explained that "mandatory sentencing laws have come with a heavy price," and she specifically noted excessive terms of imprisonment given to some offenders and overcapacity in the federal prisoner system. But, at the same time, according to Ms. Yates, under the advisory guidelines system, "undue leniency has become more common for certain offenders convicted of certain crimes," including some white collar and child exploitation

offenses. For these offenses, she claimed the lack of mandatory minimum sentences has led to greater variation in sentences, which in turn undermines uniformity and predictability in sentencing.

Ms. Yates articulated the Department of Justice's position that mandatory minimum sentences "must go hand in hand with advisory sentencing guidelines," as they are an essential law enforcement tool and promote public confidence in the sentencing system. Ms. Yates explained, however, "that mandatory minimum penalties should be used judiciously and only for serious offenses and should be set at severity levels that are not excessive." "We believe there has been excess in the promulgation of federal mandatory minimums" and "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."

Ms. Yates concluded her testimony by urging the Commission, as part of its study of mandatory minimum penalties, 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."

II. Sentencing Practitioners

Federal Public and Community Defenders
Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia

Mr. Nachmanoff testified that mandatory minimum sentences "continue to be the most serious obstacle to fair, effective, and efficient sentencing today." He argued that the guideline system has improved since *Booker*, and that the now-advisory guidelines system does not call for the Commission to "back away from its principled stance against mandatory minimums." "Advisory guidelines do not reduce the problems created by mandatory minimums, nor do they make mandatory minimums any more necessary," he explained. Mr. Nachmanoff reasoned that while there is no evidence that judges would impose unduly lenient sentences but for a statutory minimum penalty, "[t]here is . . . overwhelming evidence that mandatory minimums require excessive sentences for tens of thousands of less serious offenders who are not dangerous."

Mr. Nachmanoff testified that mandatory minimum penalties undermine the purposes of sentencing by producing unjust sentences and unwarranted uniformity. This result flows, he argued, from mandatory minimums' "focus on extreme examples rather than the most mitigated case," when they "should be set for the least harmful offense that could be committed by the least culpable offender under the statute." And, because mandatory minimum sentences provide a starting point for the sentencing guidelines, "the more serious offenders for whom the mandatory minimums were intended are subject to guidelines ranges even higher than the mandatory minimum."

Mr. Nachmanoff further testified that, rather than deterring or reducing crime, mandatory minimums may actually increase crime. He noted that the "scholarly verdict" is that mandatory minimum penalties do not have significant deterrent effects. Additionally, he argued that

mandatory minimum penalties have little deterrent effect because "potential offenders do not know the law, and even if they did, they could not know what the sentence would be. Sentence length is determined by prosecutors through charging decisions, bargaining decisions, and substantial assistance departure recommendations." Mandatory minimum sentences, he claimed, may increase crime by subjecting nonviolent, low-level offenders to long prison sentences that are likely to increase recidivism. He also noted that mandatory minimums disproportionately affect racial minorities and are the primary cause of the increased prisoner population.

Next, he stated that mandatory minimums transfer sentencing discretion from the judge to the prosecutor, who uses them for tactical advantage and to discourage the exercise of constitutional rights. Mr. Nachmanoff viewed this as "the inevitable result of mandatory minimums. They exist as a potent tool in the hands of prosecutors" who "may be motivated by a wide variety of factors." Finally, he explained that mandatory minimum sentences interfere with the "robust feedback made possible by advisory guidelines" and require the imposition of sentences with unwarranted disparities, contrary to the goals of the advisory guidelines system.

Mr. Nachmanoff made six policy recommendations:

> (1) The Commission should urge the repeal of all mandatory minimum statutes;
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> (2) that, in the event Congress will not completely repeal all mandatory minimums, the Commission should emphasize the need to repeal those statutes that produce the "most egregiously severe sentences";
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> (3) that the Commission should "review the guidelines presently linked to mandatory minimums and set guideline levels based on data and research";
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> (4) that the Commission "should reduce the drug guidelines by two levels across the board";
>
> (5) that the Commission should broaden the scope of the "safety valve" because it "excludes many low-level offenders who deserve relief"; and
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> (6) that "the Commission should encourage Congress to participate in sentencing policy through directive to study and amend if necessary, and to permit the Commission to function as an independent expert body."

Practitioners Advisory Group to the U.S. Sentencing Commission
Jeffrey B. Steinback

Mr. Steinback testified in favor of the "abrogation of the vast majority of the mandatory minimum sentences now on the books" and urged the Commission, "in the strongest terms, to continue its long-standing opposition to mandatory minimum sentences."

Mr. Steinback asserted that the existence of these mandatory minimum drug statutes sometimes makes it impossible for a judge to impose a just and reasonable sentence. Using illustrative cases from his own practice, he argued that mandatory minimum sentences "are inflexible, unresponsive to individual circumstances, and far too often produce unnecessarily harsh punishment." Mr. Steinback observed that in drug conspiracies the most culpable parties often have information with which to bargain for a light sentence, while far less culpable parties who have nothing to "sell" receive grossly disproportionate sentences – a frustration of Congress's intention to more severely punish the most culpable offenders. Thus, Mr. Steinback argued, we have a "sentencing inversion" that "allow[s] the big fish to swim away relatively unscathed, while leaving the so-called 'small fry' to suffer draconian penalties."

Mr. Steinback concluded by opining that the sentencing distributions produced by harsh mandatory minimum penalties have resulted in a regime that compromises truth and honesty in sentencing, pressures low-level defendants to provide "false cooperation" in which they "conjure up stories" to make it appear that they have meaningful information, and even tempts trial judges to ignore the law in the interest of rendering justice.

American Bar Association (the "ABA")
James E. Felman

Mr. Felman testified that the ABA "strongly supports the Commission's long-standing opposition to the use of mandatory minimum sentences." He believes that "[s]entencing by mandatory minimums is the antithesis of rational sentencing policy" and "is uniformly indifferent to the valuation of whether the result furthers all or even any of the purposes of punishment." He urged the Commission to "continue its unwavering opposition to mandatory minimums and to report the many and serious flaws of such statutes to Congress."

Mr. Felman recounted the ways in which mandatory minimum sentences are inconsistent with the goals that sentences be "both uniform among similarly situated offenders and proportional to the crime that is the basis of the conviction." First, he explained that mandatory minimums result in excessively severe sentences, even in cases in which there is no mandatory minimum because mandatory minimum statutes cause "the Sentencing Commission to increase many sentences to maintain some consistency in the Guidelines." Second, according to Mr. Felman, mandatory minimum statutes produce arbitrary sentences by shifting sentencing considerations from "the traditional wide focus on both the crime itself and 'offender characters' to an exclusive focus on a single fact – typically drug quantity or the presence of a firearm." Third, rather than reducing sentencing disparities, they actually increase them by determining sentences based on the prosecutor's charging decisions, and because the sentencing statutes do not lend themselves to certain and consistent application. Finally, Mr. Felman testified, mandatory minimum sentencing improperly shifts sentencing determinations from judges to prosecutors "who do not have the incentive, training, or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of the case." Mr. Felman also refuted the claim that mandatory minimum sentences induce cooperation as lacking a "sound empirical basis"; in any event, he testified, "the ABA rejects the very premise that the inducement of cooperation is a legitimate aim of sentencing policy."

Mr. Felman also noted the "widespread" opposition to mandatory minimums, including criticisms of mandatory minimums made by the Judicial Conference of the United States, jurists, lawmakers, and others – leading him to conclude that "mandatory minimums are so patently irrational as a sentencing policy that virtually no one lauds them after the day of their enactment."

National Association of Criminal Defense Lawyers (the "NACDL")
Cynthia Hujar Orr, President

Ms. Orr testified that the NACDL is very concerned about the rate of imprisonment and overall prison population, both of which she directly attributes to overly harsh penalties for non-violent drug offenses that carry mandatory minimum penalties. She cited Federal Bureau of Investigation statistics that demonstrate that the prison population continues to grow despite a decrease in the national crime rate, and she observed that the current federal prison population is 37% above the rated capacity of U.S. Bureau of Prison facilities. She concluded that "a civilized society must find alternatives to imprisonment to deal with conduct that it wishes to prevent, particularly in the case of non-violent offenses."

Ms. Orr asserted that mandatory minimum sentences "have produced systematic disparity that is incongruous with the goals of the Sentencing Reform Act of 1984" and that the disparities are greatest in the context of drug offenses. She explained that mandatory minimum sentences produce three types of disparities: (1) offender disparity; (2) racial disparity; and (3) gender disparity due to the disparate effect of mandatory minimums on women, which in turn affect their children, who are "collateral victims" of their mothers' incarceration.

Ms. Orr also explained that mandatory minimums interfere with judicial discretion by "stand[ing] in the way of the grant of appropriate variance" without a reasonable justification for doing so. Additionally, mandatory minimum sentences transfer "discretion, authority, and responsibility" from federal judges to prosecutors, "who are caught up in an adversarial role." She also testified that mandatory minimum sentences "effectively preclude[]" defendants from exercising their Sixth Amendment right to a trial, given prosecutors' "unlimited discretion over charging decisions." "[E]ven if a defendant has minimal culpability or a strong defense, faced with a mandatory minimum sentence of ten or more years, a defendant will almost always forego his right to a trial." Finally, Ms. Orr testified that with increased guilty pleas, "the manner in which [plea] agreements are established and executed should be transparent," but that federal prosecutors have actually exercised their power in a "very secretive and effectively unreviewable manner."

In conclusion, she urged the Commission to oppose mandatory minimums and "to take an active role in educating members of Congress, particularly those who have introduced mandatory minimum legislation, about the negative effects of mandatory minimums and the unique role of the Sentencing Commission in formulating rational and consistent sentencing policies."

Ms. Orr also urged the Commission to recommend that Congress make only general directives regarding amendments to the Sentencing Guidelines, and that Congress refer any pending bill that adds or alters criminal offenses and penalties to the relevant judiciary committee.

III. Law Enforcement

National Organization of Black Law Enforcement Executives
Jiles H. Ship, Second Vice President

Mr. Ship testified that although mandatory minimum sentences were established "with good intent," they have not served their purpose. Specifically, Mr. Ship explained that mandatory minimum sentences deprive the trier of fact with discretion in the sentencing process, and prevent the consideration of aggravating and mitigating factors. He asserted that the "most efficient and effective way for the Congress to exercise its powers to direct sentencing policies is through the established process of Sentencing Guidelines, permitting the sophistication of the Guidelines structure to work, rather than through mandatory minimums."

National Fraternal Order of Police
David Hiller, National Vice President

Mr. Hiller testified that Congress and the states have used mandatory minimum sentences for three reasons: "to deter future offenders, to provide a defined period of separation of the offender from society, and to ensure consistency through the criminal justice system so that individuals convicted of specific crimes receive similar sentences."

First, he testified that although the "effectiveness of deterrence is difficult to quantify," the purpose of establishing specific and harsh penalties for serious crime is to deter persons from committing those crimes in the future, resulting in a reduction of crime. He also credited mandatory minimums with deterring crime by encouraging offenders to "provide evidence and information about other members of their illegal operations in exchange for reduced time or dropping certain charges." Mr. Hiller asserted that this effect makes mandatory minimum sentences "a powerful investigatory and prosecutorial weapon against criminal organizations and conspiracies."

Second, Mr. Hiller testified that by providing sentences of a specific length, mandatory minimum sentences protect the public and function "as an absolute deterrent against that particular individual during the time of his incarceration." He pointed to the use of mandatory minimum sentences as "crucial to eliminating gun violence," and as a reflection of the seriousness of using firearms to commit crimes.

Finally, Mr. Hiller testified that the "third rationale for mandatory minimums is to ensure fairness, consistency, and uniformity so that offenders receive similar sentences through the criminal justice system for committing similar crimes." He credited mandatory minimum sentences, particularly those enacted in the 1980s and early 1990s, as helping to achieve historically low crime rates.

Mr. Hiller countered arguments that mandatory minimum sentences cause non-violent, first time offenders to receive lengthy prison terms. He testified that this argument is "inconsistent with the available data," and noted that the statutory safety valve, 18 U.S.C. § 3553(f), "provides for additional protection for non-violent, first-time offenders. "These individuals are not and should not be the targets of our nation's crime-fighting strategy, of which the use of mandatory minimums is an integral part."

National Center for Rural Law Enforcement
Maxwell V. Jackson, Chief of Police, Harrisville City, Utah

Chief Maxwell focused his testimony on the problems that methamphetamine abuse cause in rural communities, and particularly on the role of mandatory minimums in the effort to combat this abuse and related crime. Methamphetamine, he explained, disproportionately affects rural communities, damages children whose family members are involved with methamphetamine, and leads to millions of dollars per year in property theft committed by those seeking equipment to manufacture the drug or cash to purchase it.

He noted that state courts deal with the majority of rural methamphetamine prosecutions, utilizing drug courts that require rehabilitation in lieu of incarceration for some offenders (often "common abusers") or jail for repeat offenders. The initiation of federal prosecutions, he explained, usually turns on the quantity of drug involved and whether a firearm was used in the commission of the offense. As a result, "federal drug prosecutions in rural America are rare," and "are usually reserved for the 'worst of the worst' offenders."

Chief Maxwell cited two major advantages stemming from prosecuting offenders in federal court. The first advantage is incapacitation because mandatory sentences "remove these most extreme offenders from society for long periods of time." The second advantage, according to Chief Maxwell, is that the threat of mandatory minimum sentences leads to plea bargain agreements and cooperation at the state level that "can lead law enforcement up the 'food chain' to higher level, and even international organized crime figures." "These are the people who truly need to be prosecuted and incarcerated under federal minimum mandatory guidelines," he stated.

IV. Academia

Professor Laurie L. Levenson
Loyola Law School Los Angeles

Professor Levenson testified that "[m]andatory minimums do not make us safer, they do not create more equity in sentencing, and they do not create more certainty in sentencing." Instead, she asserted, "[t]hey are costly, have 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."

Professor Levenson first testified on the problems associated with mandatory minimum sentences. She explained that there is no empirical evidence that they "provide any greater deterrence than sentences impose under a discretionary sentencing scheme," particularly because the worst offenders know they can "escape" mandatory minimum sentences by providing information to prosecutors. She also testified that mandatory minimums are not fairer than discretionary sentencing, and do not increase certainty in sentencing due to disparities in the application of substantial-assistance benefits. Thus, she contended, "[m]andatory 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." Professor Levenson also testified that mandatory minimums have had harmful effects; have led to overpopulated prisons; "have created two systems of justice – one for white defendants and another for inmates of color"; and "have created a crisis of confidence in our criminal justice system."

Professor Levenson presented a number of proposals for reform. First, she argued that eliminating all mandatory penalty provisions in the United States Code "would be the most principled approach." She specifically reasoned that the current system of "guided discretion" in which judges must explain their departures from the guidelines and sentences must withstand appellate review gives sentencing judges "the flexibility to tailor sentences so that they are accurately taking in to account all of the circumstances of the crime and information about the defendant who committed it." But, if there is concern that judges "will not take seriously enough the nature of the offense or the actions of a repeat offender," Professor Levenson proposed that crimes currently carrying a mandatory minimum sentence could have "presumptive" sentences, in which district courts carry the burden of justifying a lower sentence and to which the appellate court would not be required to give deference.

Alternatively, in the event that repealing mandatory minimum sentences is not feasible, Professor Levenson advocated for narrowing the categories of crimes eligible for mandatory minimum penalties. In particular, she argued for limiting mandatory minimums sentences "to crimes that case serious immediate physical harm to others." Under this approach, according to Professor Levenson, "those crimes that have created the most controversy over mandatory minimums would no longer be a problem," including non-violent drug offenses, immigration offenses, identity theft, and pornography offenses not involving actual contact with a child.

Professor Levenson finally noted that the piecemeal approach to mandatory minimum sentences undertaken so far has been the least effective approach. She testified that "[m]andatory minimums have been a failed strategy," and "[t]he goal is to come up with sentencing strategies that actually work." She concluded that "[i]f we are going to be consistent with Guideline sentencing, the number of mandatory minimum offenses should be drastically reduced or eliminated."

Professor Stephen A. Saltzburg
George Washington University School of Law

Professor Saltzburg first testified that federal criminal law has expanded significantly since 1970, a trend that coincided with a "profound shift in sentencing policy." This shift, according to Professor Saltzburg, was a movement away from the rehabilitative model of sentencing. "The result was the determinate sentencing revolution," which Professor Saltzburg stated was characterized by limitations on judicial discretion through the use of mandatory minimum sentences or sentencing guidelines that narrowed discretion; the elimination or "drastic limitation" of parole and similar devices; and increases in the statutory and guidelines penalties for the most serious crimes, particularly firearms and drug offenses.

After recounting the effect of mandatory minimum sentences on incarceration rates and the "heavy" costs of incarceration, Professor Saltzburg asserted that mandatory minimum sentences "raise serious issues of public policy," and are "inconsistent" with the commands that sentence be uniform among similarly situated offenders and proportional to the crime committed. He testified that mandatory minimum sentences are a "one-way ratchet upward" because they create a "mandatory floor for sentencing," and they are arbitrary because the sentence is based solely on offense characteristics and disregard offender characteristics. Finally, mandatory minimum sentences increase disparities because they shift discretion to prosecutors and away from judges.

Professor Saltzburg made two additional "overlooked points" regarding mandatory minimum sentences. First, he explained that mandatory minimum penalties create sentencing "cliffs," whereby offenders with very similar conduct are treated arbitrarily differently because of the specific facts required to trigger the mandatory minimum sentence. Second, he testified that mandatory minimum sentences "reflect a distrust of judges," which is unwarranted under the current system of guided discretion in which sentences are subject to appellate review.

Professor Saltzburg testified that he supports the repeal of mandatory minimum laws and urged the Commission to recommend their repeal to Congress. He also advocated for the increased use of "effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, diversionary programs, home confinement, GPS monitoring, and probation."

Professor Stephen J. Schulhofer
New York University School of Law

Professor Schulhofer testified that mandatory minimum sentences not only fail to achieve, but in fact undermine, the goals that Congress sought to further by enacting them.

Professor Schulhofer asserted that mandatory minimum sentences are not really mandatory at all. Rather, they are discretionary punishments "with many of the very worst consequences that sentencing discretion can imply." According to Professor Schulhofer, these "mandatory" punishments result from discretion wielded by prosecutors through their charging decisions, which lack transparency and are subject to only modest oversight, rather than by judges in their traditional sentencing role. He stated that these features make "the very idea of a 'mandatory

minimum sentence' a cruel fiction." And, as a result, so-called mandatory minimum sentences do not comport with Congress's own "truth in sentencing" policy.

Professor Schulhofer identified sentencing cliffs, "misplaced equality," and the "cooperation paradox" as some of the negative effects of mandatory minimum sentences. Sentencing cliffs produce dramatically different sentencing outcomes when an offender's actions barely bring him within the conduct that triggers a mandatory minimum sentence. Cliff effects, he explained, are "especially dramatic in drug cases" where "small quantities have enormous importance, while many other factors bearing on culpability and dangerousness have no importance at all." "Misplaced equality" results from the excessive uniformity demanded by mandatory minimum sentences, whereby "low-level offenders receive the same stringent punishment" as "[d]rug lords and other very serious offenders." He described this excessive uniformity as the product of "two inherent features of statutory sentencing mandates: their oversimplified culpability metrics and the severity mismatch on which they are invariably based." Finally, the "cooperation paradox" results in the most culpable offenders in a criminal organization receiving substantial sentencing reductions because they have the knowledge necessary to "negotiate a big sentencing break" while the people they controlled or directed, who lack such knowledge, receive disproportionately long sentences.

Professor Schulhofer also addressed the argument that mandatory minimum sentences encourage cooperation. He testified that "this seemingly straightforward benefit is in part illusory" because the guidelines-based sentencing reduction at USSG §5K1.1 "offers an alternative that achieves this advantage almost as effectively and in a much more flexible manner." Additionally, any gains from offender cooperation, he explained, "can be offset by increased difficulty in getting cooperation from others; when sentencing practices are viewed as overly severe, many citizens become reluctant to assist law enforcement."

Professor Schulhofer urged the Commission to recommend that Congress pass a "Truth in Sentencing Act of 2010," his proposed theoretical statute, which "would provide that all statutory minimum sentences would become mandates to the Sentencing Commission to set the minimum of the guideline range at a level no lower than that specified by the statute." This, he believes, would further the fundamental congressional objective of achieving "truth in sentencing." If, under this proposal, Congress were concerned about a lack of control over downward departures, it could mandate that departures below the guideline range would be subject to the limitations that were in place before *Booker*. Alternatively, Professor Schulhofer testified that Congress could alter mandatory minimum statutes to, for example, ensure that *Pinkerton*'s "reasonable foreseeability" standard and accomplice liability (in the absence of a leadership role) cannot be used to trigger a mandatory minimum sentence. He also recommended that the Commission amend the relevant conduct guideline (USSG §1B1.3) to limit accomplice and co-conspirator liability in cases that involve a mandatory minimum conviction. Additionally, he recommended that the Commission, with regard to quantity-based guidelines, "set its Guidelines to the congressionally set minimum without being obliged to extrapolate beyond the congressionally set level when the applicable quantities are greater" and the Commission should "regard the statutory benchmark as exhausting the normal relevance of quantity alone."

V. Public Policy Analysis

Cory L. Andrews
Washington Legal Foundation, Senior Litigation Counsel

Mr. Andrews testified that mandatory minimum sentences are a "symptom" of the larger problem of the "over-federalization of criminal law in the United States." This emphasis on federal crimes, he testified, "in part undermines the careful balance that our system struck with Federalism." This is problematic, according to Mr. Andrews, because the states are "often more flexible, more creative, and more responsive than the Federal government," can tailor criminal laws to local needs, and function as "laboratories of democracy and experimentation."

Mr. Andrews testified that district judges should be given more statutory tools that would allow them to sentence offenders below mandatory minimum sentences for nonviolent offenses. He stated that the statutory safety valve should be expanded "to all nonviolent first-time offenders with a Criminal History Category I," and that permitting district judges to impose a sentence below the mandatory minimum for nonviolent offenses if the court finds that doing so is required under 18 U.S.C. § 3553(a) is an "idea worth considering." This latter proposal would allow the sentencing court, according to Mr. Andrews, to consider the offense and offender characteristics while also "obligat[ing] the judge to articulate why the minimum mandatory sentence in [the] case violates § 3553(a)." Mr. Andrews also testified that his organization supports "unstacking" penalties under 18 U.S.C. § 924(c) "to permit the statute to operate as a true recidivist statute." Stacking under § 924(c), he explained, "is an especially harsh result in those instances where the offender merely 'carries' but does not brandish or otherwise 'use' the firearm to accomplish the crime – in other words, nonviolent offenders."

With respect to changing mandatory minimum sentences themselves, Mr. Andrews testified against "the sweeping elimination of mandatory minimum penalties in all cases." Rather, he explained, "[w]e believe that repeat offenders and hardened criminals who fail to learn from sentences and who are true recidivists should receive harsher sentences." Similarly, "and most importantly, we believe that some crimes are so serious and pose such a pervasive threat to the nascent citizenry that a tough mandatory minimum sentence is entirely appropriate." Mr. Andrews specifically cited treason and terrorism as examples of offenses that are sufficiently serious to warrant a mandatory penalty.

David B. Mulhausen
The Heritage Foundation, Senior Policy Analyst

Dr. Mulhausen testified, first, that Congress and the Commission "need to place a special emphasis on just deserts and proportionality when considering the use of mandatory minimum statutes." Specifically, he explained that the moral gravity of the offense should be used to determine the proportionality of punishment, with less emphasis on the utilitarian goal of lowering crime through deterrence and incapacitation. Under this approach, mandatory minimum penalties "should be justified based on the nature of the crime," and he explained that factors such as the inherent wrongfulness, depravity of the crime, harmfulness to the victim, and

dangers to society "should serve as a guide in setting mandatory minimum sentence lengths." Dr. Mulhausen asserted that offenses such as forcible rape and premeditated murder should carry mandatory minimum penalties, but that mandatory minimum sentences are "largely incompatible with crimes where the relative severity of the particular acts, and the relative culpability of the individual offenders are difficult to assess."

Dr. Mulhausen further testified that mandatory minimum sentences are "generally incompatible with the operation of the Sentencing Guidelines," which have, as one of their core purposes, the creation of a sentencing system characterized by finely calibrated, proportionate sentences. Because of the inability to deviate from mandatory minimum sentences and sentencing cliff effects, mandatory minimum sentences frustrate the guidelines' goal of proportionate sentences that reflect the relative culpability of offenders.

Mr. Muhlhausen advocated that the Commission and Congress work in concert to ensure that mandatory sentences be imposed only when they reflect the public perception of the offender's "just deserts." In keeping with this objective, Mr. Muhlhausen recommended that the Commission conduct a study to determine whether the public's understanding of just sentencing comports with the sentences actually imposed under the guidelines and specific mandatory minimum statutes.

Professor Eric Luna
Cato Institute, Adjunct Scholar
Washington and Lee University School of Law

Professor Luna testified that he opposes mandatory minimum sentencing for multiple reasons. He asserted that mandatory minimum sentences do not fulfill goals of retribution because they render "case-specific information about the offense and the offender irrelevant" and are therefore "indifferent to proportionality concerns." He also testified that mandatory minimum sentences fail to deter crime because potential offenders do not know what punishment might result from their offense and, in any event, are not rational actors with a clear idea about their likelihood of being caught. Similarly, according to Professor Luna, mandatory minimum sentences do not effectively incapacitate offenders because they are overly long and incarcerate defendants past the point when they would "typically age out of the criminal lifestyle," and affect offenders who can be replaced within the criminal organization.

Professor Luna also described what he called a "trial tax" that mandatory minimum sentences place on defendants who proceed to trial: "the tax being the mandatory minimum sentence" that would not have been imposed had the defendant provided information to the government and pleaded guilty. Relatedly, as Professor Luna stated, "the mechanical nature of mandatory minimums can entangle all criminal justice actors in an oxymoronic process where facts are bargainable, from the amount of drugs to the existence of a gun." These problems "tend to generate different punishments among otherwise similarly situated offenders."

Professor Luna identified that transfer of discretion inherent in mandatory minimum sentencing from trial judges to prosecutors as the "source" of this problem. He described this shift in power

as both misguided and an infringement on the separation of powers.

Professor Luna asserted that mandatory minimum sentences also implicate federalism concerns because they "represent a federal encroachment on state prerogatives and the implementation of policies that appear to conflict with local choice." He also explained that mandatory minimum sentences can "overwhelm" pluralistic decisionmaking and local choice on criminal justice issues, "effectively and powerfully nullifying state and local judgments." Professor Luna conveyed his concern "that law enforcement considers vast sentencing differentials between state and federal systems as some type of unmitigated good, essentially treating the states as the junior varsity."

Mr. Luna concluded by recommending that federal lawmakers "eliminate mandatory minimums in one-fell swoop." As an alternative, he advocated that Congress give the Commission authority to de-link mandatory minimum sentences from the guideline ranges and for the creation of broader "safety valve" provisions to afford judges the discretion to avoid mandatory minimums in a wider spectrum of cases. He also described other potential changes "that could build upon a successful minimalist reform," such as the elimination of "stacking" for purposes of 18 U.S.C. § 924(c) and a "limited revival of the U.S. Parole Commission to review sentences for inmates serving extremely long prison terms."

VI. Advocacy Groups

The Sentencing Project
Marc Mauer, Executive Director

Mr. Mauer first testified that "there is virtually no data" that demonstrates a direct link between mandatory penalties and declining crime rates. He further stated that there is a "broad range of evidence which suggests that it is unlikely that mandatory penalties for drug offenses have a significant impact on enhancing public safety." Mr. Mauer attributed this inefficacy to a number of factors, including: that deterrence is a function of the certainty, not the severity, of punishment and mandatory minimums make apprehension and punishment no more certain; that mandatory minimums in the drug context primarily affect low and mid-level offenders who are replaceable within the drug trade; that mandatory minimums adversely affect recidivism because of the long sentences they require; and the lengthier prison terms required by mandatory minimums increase the challenges for successful offender reentry.

Mr. Mauer also explained that mandatory minimum sentences "serve to exacerbate racial disparities within the criminal justice system." He cited multiple reasons for this result. First, Mr. Mauer testified that mandatory minimums in the federal system most often apply to drug offenses, and "the drug war has had extremely disproportionate effects on African American communities." Second, according to Mr. Mauer, many mandatory minimum penalties "provide increasingly harsh punishments to offenders based on prior convictions" and "defendants of color are more likely to have a prior record than . . . white defendants." These lengthier criminal histories also make it less likely that the offender will benefit from safety valve provisions.

In conclusion, Mr. Mauer noted the broad consensus that mandatory sentencing policies "are counterproductive to a fair and effective system of justice" and argued that "[e]liminating mandatory sentencing from the federal court system would represent a significant step toward developing a more rational and fair system of sentencing."

Families Against Mandatory Minimums
Julie Stewart, President

Ms. Stewart testified that Congress never would have enacted the "safety valve" but for the Commission's 1991 mandatory minimum report. She expressed her hope that the Commission's impending report on mandatory minimum sentences "will be as bold and uncompromising" as the 1991 report. She characterized the Commission as having "the bully pulpit" and urged the Commission to express the view that mandatory minimum sentences are just as wrong now under an advisory guidelines system as they were before *Booker*.

Ms. Stewart spoke about several cases to illustrate her content that mandatory minimums produce sentences that undermine respect for the law. In each of these cases, according to Ms. Stewart, the sentencing judges felt obliged to speak against the unjust sentences they were forced to impose. She explained, "Mandatory minimums do not simply result in sentences that are too long. They don't just wreak havoc on individuals and their families. They destroy faith in the criminal justice system, one sentencing hearing at a time."

She took issue with the argument that mandatory minimum sentences are necessary under an advisory guidelines system to ensure uniformity of sentences. Ms. Stewart argued that mandatory minimum sentences actually undermine the congressional goal "that sentences should be sufficient but not greater than necessary to ensure the purposes of sentencing" because they too often produce similar sentences for offenders whose relative culpability is starkly different. She concluded her testimony by urging the Commission to recommend that Congress enact a broader safety valve statute and to recognize that variance sentences are not necessarily examples of "wayward judging," but often constitute a "healthy rejection" of unwarranted uniformity.

American Civil Liberties Union (the "ACLU")
Jay Rorty, Director, ACLU Drug Law Reform Project

Mr. Rorty testified that the "flaws with mandatory minimums are well-known and well-documented," and "[i]t is unsurprising, therefore, that a majority of Americans oppose mandatory minimums." He also explained that mandatory minimum sentences are antithetical to the emphasis on judicial discretion in sentencing expressed in *Booker* and subsequent cases. "Today, in the wake of *Booker*, mandatory minimums are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation."

Mr. Rorty expressed the ACLU's position that the Commission should recommend in its report that Congress abolish all federal mandatory minimum sentences. Recognizing that "Congress may not yet be prepared to abolish all federal mandatory minimums," he proposed several steps

short of abolition that "Congress and the Commission could take to ameliorate the injustices caused by mandatory minimums."

He testified, first, that short of repealing mandatory minimum sentences "the best way to fix" them is to lower the sentences. Mr. Rorty proposed that all five-year mandatory penalties could become on year, ten years could become two, and 20 years can become five. He also proposed eliminating stacking under 18 U.S.C. § 924(c) and, either in addition or alternatively to lower sentences, eliminating mandatory minimums for drug offenses. Second, he advocated for the expansion of the "safety valve" by broadening the eligibility criteria, including the types of offenses to which it applies, and the amount of "automatic reduction awarded to those who qualify." This reform, he explained, "would increase judicial flexibility and fairness by contracting the universe of cases to which mandatory minimums would apply." Fourth, he argued that both Congress and the Commission could move away from the importance of drug quantities in trigger mandatory minimum sentences and setting the offense level under the guidelines. Instead, according to Mr. Rorty, "[d]rug sentences should be more closely tied to individuals' roles and the harms they cause." Finally, he urged the Commission to "eliminate the ripple effects of mandatory minimums throughout the guideline system by abandoning offense levels that are calibrated to mandatory minimums."

In closing, he asked the Commission to recommend that Congress "eliminate mandatory minimum sentences entirely" and, short of such a result, "recommend a series of corrective measures . . . that would produce substantial and positive change."

The Constitution Project
Thomas W. Hillier

Mr. Hillier testified that his organization formed an ideologically diverse group to study the effect of mandatory minimum sentences. That group came to a consensus that "mandatory minimum sentences are generally incompatible with the operation of a guideline system" and that they should be available only in extraordinary circumstances.

He explained that, in addition to the concerns expressed by others, "the role mandatory minimum statutes play in inappropriately skewing the balance of power in the sentencing system offers the most compelling reason to forcefully recommend their repeal." Mr. Hillier stated that although *Booker* and subsequent cases "had the desirable effect of lessening the degree of power government attorneys wield in the sentencing process," the application of mandatory minimums "continues to contribute to sentencing injustices in every district court in the country."

Mr. Hillier asserted that mandatory minimum sentences erode confidence in the criminal justice system and obstruct the Sentencing Commission's goals. "When a courtroom observer hears a judge say that the sentence imposed is unfair, they wonder why. Their confidence in the impartiality of judges and the integrity of our system is necessarily undercut." He argued that the Commission can improve public confidence in judges by "persuading Congress to repeal mandatory minimum statutes except in the most extraordinary circumstances." Mr. Hillier further asserted that mandatory minimum sentences "risk . . . public safety because people who

know they have been treated unfairly are more likely to leave prison angry, increasing the possibility of recidivism."

Mr. Hillier further explained that mandatory minimum sentences unjustly affect charging decisions and plea negotiations. He argued that the "institutional imbalance" created by mandatory minimum sentences "threatens the truth-seeking function of the criminal justice system" because they "create a powerful incentive for informants and cooperators to provide exaggerated or false information" that is "not subjected to the crucible of trial." And, according to Mr. Hillier, when defendants "don't capitulate" and proceed to trial, "they may suffer horrific penalties." He asked the Commission to "recognize such injustices in reporting to Congress on the desirability of maintaining mandatory minimum penalty statutes."