

MANDATORY MINIMUMS AND UNINTENDED CONSEQUENCES

HEARING BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 2934, H.R. 834 and H.R. 1466

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JULY 14, 2009
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MANDATORY MINIMUMS AND UNINTENDED CONSEQUENCES

TUESDAY, JULY 14, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:34 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Lofgren, Waters, Wasserman Schultz, Quigley, Gohmert, and Poe.

Also present: Representative Smith.

Staff present: (Majority) Bobby Vassar, Chief Counsel; Jesselyn McCurdy, Counsel; Karen Wilkinson, (Fellow) Federal Public Defender Office Detailee; Ron LeGrand, Counsel; Joe Graupensperger, Counsel; Veronica Eligan, Professional Staff Member; (Minority) Caroline Lynch, Counsel; Robert Woldt, FBI Detailee; and Kelsey Whitlock, Staff Assistant.

Mr. SCOTT. The Subcommittee will now come to order. I am pleased to welcome you today to the hearing before the Subcommittee on crime, terrorism, and homeland security on mandatory minimums and unintended consequences.

We have over 170 mandatory minimum penalties in the Federal Criminal Code. In fiscal year 2008, over 28 percent of Federal defendants were convicted of crimes carrying a mandatory minimum penalty. These mandatory minimum sentences are a misnomer because they are typical, not minimal sentences, but involve sentences exceeding 5, 10, even 25 years.

These mandatory sentences are part of a larger trend of increasingly long sentences. The result is that the United States now incarcerates more people than any country in the world, both in absolute numbers and on a per capita basis with an incarceration rate of over 700 inmates per 100,000 population.

Among industrialized nations to which we are most similar, the United States locks up people at a rate 5 to 12 times that of others. When we look at the racial impact of incarceration in the United States, we find that while African Americans make up about 13 percent of the general population, they make up about 50 percent of the prison population.

According to a recent sentencing project study the Blacks in this country are incarcerated at an average rate of 2,290 per 100,000

compared to 412 for Whites, 747 for Hispanics. In some communities the rate for incarceration for Blacks exceeds 4,000.

In fact, 10 States have rates approaching 4,000 per 100,000. The Federal prison population has quadrupled since the Sentencing Reform Act of 1984. At the end of last year, the Bureau of Prisons was 36 percent over capacity. Federal corrections costs have soared in the last 25 years, increasing 925 percent between 1982 and 2007 to over \$5.4 billion. That is just Federal alone.

Federal mandatory minimum sentence laws also unfairly impact minorities. Studies over the last 25 years by groups such as the U.S. Sentencing Commission and the Federal Judicial Center repeatedly have shown that these mandatory minimum penalties disproportionately affect minorities.

For example, just last year, Black defendants in 2008 comprised 24 percent of the total Federal offenders, yet they comprised almost 36 percent of offenders convicted under mandatory minimum sentences.

Not only are the mandatory minimum penalty schemes costly and discriminatory, they make no sense. A defendant's sentence should reflect the seriousness of the crime, the defendant's role in the crime, his history and any future danger to society.

The best point in time to make this determination is when someone is deciding whether it is appropriate at that time to release the offender, historically a decision made by a parole officer or a parole board.

At that point the decision maker has the most information about both the crime and the defendant. Unfortunately, we abolished parole decades ago and we no longer have this option.

The next most logical place for the decision to be made is by the judge at the time of sentencing. At that time, the judge can consider the seriousness of the offense, the role of the defendant in the offense and the defendant's history and can make an assessment as to when the defendant will be less likely to pose a further threat to the community if released.

His sentence and reasoning is placed on the record, open for public scrutiny. Unfortunately, by passing mandatory minimums we place ourselves at the least logical place to make a decision and that is when Congress passes a statute.

Congress knows nothing about the specific offense or the defendant and sets a sentence based solely on the name of the crime, which seldom tells you much about the facts or seriousness of the particular offense, and nothing about the role or the background of the offender.

And yet this is a system we end up with, with mandatory minimum sentences based solely on the name of the code. Determining a sentence based only on code section often results in irrational and even cruel sentences.

We get girlfriend cases like Kemba Smith where a young woman with no criminal history is sentenced to spend over 25 years in prison because as a 19-year-old college student she fell in love with someone who turned out to be an abusive drug dealing boyfriend.

Although the evidence shows she never handled or used drugs and was not directly involved in any drug dealing, she ended up getting a totally irrational sentence. Even worse, there are cases

where such minor role defendants actually get higher sentences than the principals because unlike the drug dealer they have no information to trade for below mandatory minimum sentences.

Another example of the ridiculous sentences result from the mandatory minimums that Marion Hungerford, a mentally ill 52-year-old woman with no prior criminal history, ended up with a 159-year sentence.

After 26 years of marriage her husband left her, because of her mental illness, with no job or money. She began living with another man who began to rob stores with a gun. Mrs. Hungerford never touched the gun, was never present at any of the robberies, but she did know about them and benefited from the proceeds.

Because of this association she was at the mercy, first, of the prosecutor's charging decision made behind closed doors, then, of mandatory sentencing laws, which precluded the sentencing judge from considering her mental illness, or any other mitigating factors at the time of her sentencing. She got the sentence of 159 years. The boyfriend, who actually committed the robberies, cooperated with the government and got 32 years.

Finally, you will hear about the Ramos and Compean cases, where two Border Patrol agents were convicted of shooting a suspected drug dealer during their work. Again, because of a prosecutor's charging decision made behind closed doors and mandatory sentencing laws, the judge's hands were tied and could not even consider anything about the agents' years of service as law enforcement officers, particular circumstances of the shooting or any other mitigating factors.

The judge had no choice but to sentence each man to 10 years on their gun convictions. And this is not a partisan issue, and this is not a liberal or conservative issue. It is a common sense issue, and I hope that we can work together to begin to address some of the unjust and unintended consequences of mandatory minimum sentences.

There are many approaches to this problem. The bill that I have introduced, the Common Sense in Sentencing Act of 2009, is one approach that is simple and seeks to address the most egregious and unfair consequences of mandatory minimum sentences.

I believe that we should eliminate all mandatory minimum sentences, but the bill does not do that. Rather, in cases where mandatory minimum sentences result in clearly unintended or absurd consequences it allows the judge to impose a below mandatory minimum sentence.

You will hear about two other bills that address the same problem. You take different approaches and carving out exceptions to eliminating mandatory minimum sentencing laws. We have known for years that our costly experiment in mandatory minimums do not work.

It has not resulted in predictable or fair sentences. It has not reduced disparity in sentencing. It has not reduced crime. States are starting to realize this and are changing the sentencing laws and practices, and it is time for Congress to do the same.

I look forward to hearing from this panel about the unintended consequences of mandatory minimum sentences and how Congress can address the problem.

[The bills follow:]

I

111TH CONGRESS
1ST SESSION

H. R. 2934

To amend title 18, United States Code, to prevent unjust and irrational criminal punishments.

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 2009

Mr. SCOTT of Virginia (for himself and Mr. CONYERS) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to prevent unjust and irrational criminal punishments.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Common Sense in Sen-
5 tencing Act of 2009”.

6 **SEC. 2. AUTHORITY TO IMPOSE A SENTENCE BELOW A**
7 **STATUTORY MINIMUM.**

8 Section 3553 of title 18, United States Code, is
9 amended by adding at the end the following:

1 “(g) AUTHORITY TO IMPOSE A SENTENCE BELOW A
2 STATUTORY MINIMUM TO PREVENT AN UNJUST SEN-
3 TENCE.—Notwithstanding any other provision of law, the
4 court may impose a sentence below a statutory minimum
5 if the court finds that it is necessary to do so in order
6 to avoid violating the requirements of subsection (a).”.

○

111TH CONGRESS
1ST SESSION

H. R. 834

To amend chapter 44 of title 18, United States Code, to exempt certain peace officers from certain minimum sentencing requirements for using a firearm to commit a crime of violence during or in relation to their employment.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 2009

Mr. POE of Texas introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 44 of title 18, United States Code, to exempt certain peace officers from certain minimum sentencing requirements for using a firearm to commit a crime of violence during or in relation to their employment.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ramos and Compean
5 Justice Act of 2009”.

1 **SEC. 2. EXEMPTION FROM CERTAIN MINIMUM SENTENCING**
2 **REQUIREMENTS FOR CERTAIN PEACE OFFI-**
3 **CERS WHO USE A FIREARM TO COMMIT A**
4 **CRIME OF VIOLENCE DURING OR IN RELA-**
5 **TION TO THEIR EMPLOYMENT.**

6 Section 924(e) of title 18, United States Code, is
7 amended by adding at the end the following:

8 “(6)(A) The minimum sentencing requirements
9 in this subsection shall not apply to a person who
10 used, carried, or possessed a firearm if—

11 “(i) the offense under this subsection oc-
12 curred during or in relation to the performance
13 of the duties of the person as a peace officer;

14 “(ii) the firearm is of the same type as the
15 firearm authorized to be carried by the person
16 in the performance of those duties; and

17 “(iii) the crime during and in relation to
18 which the offense under this subsection oc-
19 curred is a crime of violence.

20 “(B) In subparagraph (A), the term ‘peace offi-
21 cer’ means an officer or employee of the Federal
22 Government, or of a State or local government, who
23 is authorized by law to carry a firearm in the lawful
24 performance of his or her duties as such an officer
25 or employee.”.

○

111TH CONGRESS
1ST SESSION

H. R. 1466

To concentrate Federal resources aimed at the prosecution of drug offenses on those offenses that are major.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Ms. WATERS (for herself, Mr. SCOTT of Virginia, Ms. CORRINE BROWN of Florida, Mr. MEEKS of New York, Ms. KILPATRICK of Michigan, Ms. NORTON, Mr. JOHNSON of Georgia, Ms. CLARKE, Mr. COITEN, Mr. HASTINGS of Florida, Mr. ELLISON, Mr. PASTOR of Arizona, Mr. STARK, Ms. FUDGE, Mr. FATAH, and Mr. DAVIS of Illinois) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To concentrate Federal resources aimed at the prosecution of drug offenses on those offenses that are major.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Major Drug Traf-
5 ficking Prosecution Act of 2009”.

1 **SEC. 2. FINDINGS.**

2 Congress makes the following findings:

3 (1) Since the enactment of mandatory min-
4 imum sentencing for drug users, the Federal Bureau
5 of Prisons budget increased from \$220 million in
6 1986 to \$5.4 billion in 2008.

7 (2) Mandatory minimum sentences are statu-
8 torily prescribed terms of imprisonment that auto-
9 matically attach upon conviction of certain criminal
10 conduct, usually pertaining to drug or firearm of-
11 fenses. Absent very narrow criteria for relief, a sen-
12 tencing judge is powerless to mandate a term of im-
13 prisonment below the mandatory minimum. Manda-
14 tory minimum sentences for drug offenses rely solely
15 upon the weight of the substance as a proxy for the
16 degree of involvement of a defendant's role.

17 (3) Mandatory minimum sentences have con-
18 sistently been shown to have a disproportionate im-
19 pact on African Americans. The United States Sen-
20 tencing Commission, in a 15-year overview of the
21 Federal sentencing system, concluded that "manda-
22 tory penalty statutes are used inconsistently" and
23 disproportionately affect African American defend-
24 ants. As a result, African American drug defendants
25 are 20 percent more likely to be sentenced to prison
26 than white drug defendants.

1 (4) In the Anti-Drug Abuse Act of 1986, Con-
2 gress structured antidrug penalties to encourage the
3 Department of Justice to concentrate its enforce-
4 ment effort against high-level and major-level drug
5 traffickers, and provided new, long mandatory min-
6 imum sentences for such offenders, correctly recog-
7 nizing the Federal role in the combined Federal-
8 State drug enforcement effort.

9 (5) Between 1994 and 2003, the average time
10 served by African Americans for a drug offense in-
11 creased by 62 percent, compared with a 17 percent
12 increase among white drug defendants. Much of this
13 disparity is attributable to the severe penalties asso-
14 ciated with crack cocaine.

15 (6) African Americans, on average, now serve
16 almost as much time in Federal prison for a drug
17 offense (58.7 months) as whites do for a violent of-
18 fense (61.7 months).

19 (7) Linking drug quantity with punishment se-
20 verity has had a particularly profound impact on
21 women, who are more likely to play peripheral roles
22 in a drug enterprise than men. However, because
23 prosecutors can attach drug quantities to an indi-
24 vidual regardless of the level of culpability of a de-
25 fendant's participation in the charged offense,

1 women have been exposed to increasingly punitive
2 sentences to incarceration.

3 (8) In 2003, the States sentenced more than
4 340,000 drug offenders to felony convictions, com-
5 pared to 25,000 Federal felony drug convictions.

6 (9) Low-level and mid-level drug offenders can
7 be adequately prosecuted by the States and punished
8 or supervised in treatment as appropriate.

9 (10) Federal drug enforcement resources are
10 not being properly focused, as only 12.8 percent of
11 powder cocaine prosecutions and 8.4 percent of
12 crack cocaine prosecutions were brought against
13 high-level traffickers, according to the Report to
14 Congress: Cocaine and Federal Sentencing Policy,
15 issued May, 2007 by the United States Sentencing
16 Commission.

17 (11) According to the Report to Congress, “The
18 majority of federal cocaine offenders generally per-
19 form low-level functions . . .”.

20 (12) The Departments of Justice, Treasury,
21 and Homeland Security are the agencies with the
22 greatest capacity to investigate, prosecute and dis-
23 mantle the highest level of drug trafficking organiza-
24 tions, and investigations and prosecutions of low-
25 level offenders divert Federal personnel and re-

1 sources from the prosecution of the highest-level
2 traffickers, for which such agencies are best suited.

3 (13) Congress must have the most current in-
4 formation on the number of prosecutions of high-
5 level and low-level drug offenders in order to prop-
6 erly reauthorize Federal drug enforcement programs.

7 (14) One consequence of the improper focus of
8 Federal cocaine prosecutions has been that the over-
9 whelming majority of low-level offenders subject to
10 the heightened crack cocaine penalties are black and
11 according to the Report to Congress only 8.8 percent
12 of Federal crack cocaine convictions were imposed
13 on whites, while 81.8 percent and 8.4 percent were
14 imposed on blacks and Hispanics, respectively

15 (15) According to the 2002 Report to Congress:
16 Cocaine and Federal Sentencing Policy, issued May,
17 2002 by the United States Sentencing Commission,
18 there is “a widely-held perception that the current
19 penalty structure for federal cocaine offenses pro-
20 motes unwarranted disparity based on race”.

21 (16) African Americans comprise 12 percent of
22 the US population and 14 percent of drug users, but
23 30 percent of all Federal drug convictions.

24 (17) Drug offenders released from prison in
25 1986 who had been sentenced before the adoption of

1 mandatory sentences and sentencing guidelines had
2 served an average of 22 months in prison. Offenders
3 sentenced in 2004, after the adoption of mandatory
4 sentences, were expected to serve almost three times
5 that length, or 62 months in prison.

6 (18) According to the Justice Department, the
7 time spent in prison does not affect recidivism rates.

8 (19) Government surveys document that drug
9 use is fairly consistent across racial and ethnic
10 groups. While there is less data available regarding
11 drug sellers, research finds that drug users generally
12 buy drugs from someone of their own racial or eth-
13 nic background. But almost three-quarters of all
14 Federal narcotics cases are filed against blacks and
15 Hispanics, many of whom are low-level offenders.

16 **SEC. 3. APPROVAL OF CERTAIN PROSECUTIONS BY ATTOR-**
17 **NEY GENERAL.**

18 A Federal prosecution for an offense under the Con-
19 trolled Substances Act, the Controlled Substances Import
20 and Export Act, or for any conspiracy to commit such an
21 offense, where the offense involves the illegal distribution
22 or possession of a controlled substance in an amount less
23 than that amount specified as a minimum for an offense
24 under section 401(b)(1)(A) of the Controlled Substances
25 Act (21 U.S.C. 841(b)(1)(A)) or, in the case of any sub-

1 stance containing cocaine or cocaine base, in an amount
2 less than 500 grams, shall not be commenced without the
3 prior written approval of the Attorney General.

4 **SEC. 4. MODIFICATION OF CERTAIN SENTENCING PROVI-**
5 **SIONS.**

6 (a) SECTION 404.—Section 404(a) of the Controlled
7 Substances Act (21 U.S.C. 844(a)) is amended—

8 (1) by striking “not less than 15 days but”;

9 (2) by striking “not less than 90 days but”;

10 (3) by striking “not less than 5 years and”; and

11 (4) by striking the sentence beginning “The im-
12 position or execution of a minimum sentence”.

13 (b) SECTION 401.—Section 401(b) of the Controlled
14 Substances Act (21 U.S.C. 841(b)) is amended—

15 (1) in paragraph (1)(A)—

16 (A) by striking “which may not be less
17 than 10 years and or more than” and inserting
18 “for any term of years or for”;

19 (B) by striking “and if death” the first
20 place it appears and all that follows through
21 “20 years or more than life” the first place it
22 appears;

23 (C) by striking “which may not be less
24 than 20 years and not more than life imprison-

1 ment” and inserting “for any term of years or
2 for life”;

3 (D) by inserting “imprisonment for any
4 term of years or” after “if death or serious bod-
5 ily injury results from the use of such substance
6 shall be sentenced to”;

7 (E) by striking the sentence beginning “If
8 any person commits a violation of this subpara-
9 graph”;

10 (F) by striking the sentence beginning
11 “Notwithstanding any other provision of law”
12 and the sentence beginning “No person sen-
13 tenced”; and

14 (2) in paragraph (1)(B)—

15 (A) by striking “which may not be less
16 than 5 years and” and inserting “for”;

17 (B) by striking “not less than 20 years or
18 more than” and inserting “for any term of
19 years or to”;

20 (C) by striking “which may not be less
21 than 10 years and more than” and inserting
22 “for any term of years or for”;

23 (D) by inserting “imprisonment for any
24 term of years or to” after “if death or serious

1 bodily injury results from the use of such sub-
2 stance shall be sentenced to”;

3 (E) by striking the sentence beginning
4 “Notwithstanding any other provision of law”.

5 (c) SECTION 1010.—Section 1010(b) of the Con-
6 trolled Substances Import and Export Act (21 U.S.C.
7 960(b)) is amended—

8 (1) in paragraph (1)—

9 (A) by striking “of not less than 10 years
10 and not more than” and inserting “for any
11 term of years or for”;

12 (B) by striking “and if death” the first
13 place it appears and all that follows through
14 “20 years and not more than life” the first
15 place it appears;

16 (C) by striking “of not less than 20 years
17 and not more than life imprisonment” and in-
18 serting “for any term of years or for life”;

19 (D) by inserting “imprisonment for any
20 term of years or to” after “if death or serious
21 bodily injury results from the use of such sub-
22 stance shall be sentenced to”;

23 (E) by striking the sentence beginning
24 “Notwithstanding any other provision of law”;
25 and

1 (2) in paragraph (2)—

2 (A) by striking “not less than 5 years
3 and”;

4 (B) by striking “of not less than twenty
5 years and not more than” and inserting “for
6 any term of years or for”;

7 (C) by striking “of not less than 10 years
8 and not more than” and inserting “for any
9 term of years or to”;

10 (D) by inserting “imprisonment for any
11 term of years or to” after “if death or serious
12 bodily injury results from the use of such sub-
13 stance shall be sentenced to”;

14 (E) by striking the sentence beginning
15 “Notwithstanding any other provision of law”.

16 (d) SECTION 418.—Section 418 of the Controlled
17 Substances Act (21 U.S.C. 859) is amended by striking
18 the sentence beginning “Except to the extent” each place
19 it appears and by striking the sentence beginning “The
20 mandatory minimum”.

21 (e) SECTION 419.—Section 419 of the Controlled
22 Substances Act (21 U.S.C. 860) is amended by striking
23 the sentence beginning “Except to the extent” each place
24 it appears and by striking the sentence beginning “The
25 mandatory minimum”.

1 (f) SECTION 420.—Section 420 of the Controlled
2 Substances Act (21 U.S.C. 861) is amended—

3 (1) in each of subsections (b) and (c), by strik-
4 ing the sentence beginning “Except to the extent”;

5 (2) by striking subsection (e); and

6 (3) in subsection (f), by striking “, (e), and (e)”
7 and inserting “and (e)”.

○

Mr. SCOTT. It is my pleasure now to recognize the esteemed Ranking Member of the Subcommittee, the gentlemen from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and I do appreciate your comments and your opinion, and I do thank the witnesses for all being here.

Crime has gone down overall the last 20 years. When you look at areas like Texas where sentences have gotten tougher, bad people have been locked up for longer periods of time and fewer people have been killed by recidivist defendants.

But since the start of the 111th Congress, there has been a concerted effort to eliminate or severely weaken certain mandatory minimum penalties. Both H.R. 2934 and H.R. 1466 seek to do so by either allowing Federal judges to sentence without regard to the mandatory minimum applicable to any crime or by eliminating drug related mandatory minimums altogether.

As a former judge I support the need and the importance of judicial discretion. I always had a problem with the Federal sentencing guidelines being mandatory, but the discretion should not be completely unfettered.

Judges should not be free to sentence felonies as misdemeanors, particularly when such a sentence directly contradicts the legislature's prerogative.

In Texas, for felonies, we have a range. A minimum of 2 years, a maximum of 10 years for third degree felonies, minimum of 2 years, maximum to 20 years for second degree felonies, minimum of 5 years, maximum of life for first degree felonies.

I would hate to ever see the minimum withdrawn. A mandatory minimum is the bottom of the range. There are some mandatory minimums or bottoms of the range that should be readdressed and discussed and legislatively changed, but I would hate to see no bottom restraints on judges.

In light of the Supreme Court's 2005 *Booker* decision, which made the Federal sentencing guidelines advisory, the role of mandatory minimums has become even more important in ensuring that appropriate penalties are prescribed.

The evisceration of all mandatory penalties from our current advisory sentencing structure will undoubtedly return us to where we were 25 years ago; a system of indeterminate and unequal penalties across the Federal circuits.

In December 2007, the Congressional Research Service conducted a study that documented 239 mandatory minimums applicable to some of the most far-reaching and acute crime problems we have in this country, including drug trafficking, crimes against children, recidivist offenders and use of weapons in crimes of violence.

When Congress are cognizant that mandatory minimums are not, and should not be a one-size-fits-all approach to sentencing, there should be wide discretion, but not misdemeanor discretion for felonies.

On the contrary, there are any number of Federal statutes that do not contain mandated minimum criminal sentences. Anecdotal cases of light sentences that allowed a defendant out only to kill innocent people are abundant.

If there is no bottom to the range, then there will be more innocents who will be killed or harmed because of light sentences. As a judge I saw it repeatedly, and some judges do not have the heart to make tough sentences in appropriate cases.

By contrast, 1466 would remove the mandatory minimums from drug-related crimes altogether and return to drug sentencing where judges are free to sentence without regard to any floor, regardless of the nature of the crimes committed, the quantity of drugs involved, or the role the offender played in trafficking them.

Mandatory minimums are one end of the range. The range gives the judge discretion within the range to sentence. Setting the discretionary range is a legislative job. It would be hard to imagine any judge in Texas campaigning for judge or being appointed to judge while advocating there be no bottom limit to the range of punishment.

While there is definitely legitimate job for judges in fashioning sentences appropriate to the particular defendant in the courtroom, there is also a legitimate role for Congress to play in deciding the appropriate range of the sentence for the most egregious crimes and those that do the most harm to individuals and society.

H.R. 1466 doesn't seem to me to provide the amount of balance between those two roles that is needed. It eliminates the bottom end of the range of punishment. If a minimum is too high, it should be lowered.

Normally in striving for protection in laws, we should continue to tweak those laws to their greatest propriety. Swinging the laws wildly from extreme to another in each direction is not healthy legislative discretion.

We are better served with moderation. This course of action contemplated will beg for a wild political swing back to even higher mandatory minimums when the political winds reverse. We should be loathe to invite such dramatic changes in either direction. When the thermostat is swung from one extreme temperature to another, people in that environment get sick.

We just came out from sentencing guidelines that severely limited judicial discretion. Now this contemplated action will remove the bottom restraint. There are top restraints. There should be bottom restraints on sentencing depending on the seriousness of the crime, because some judges do not have the good discretion of someone like Judge Poe for example who is known for good sentences in Houston.

And since the Federal judges are not ever voted out, those judges in the Federal system are there for life with no mandatory maximum on their service. Maybe we need one of those mandatory maximums on Federal judicial service, but with that I yield back.

Mr. SCOTT. Thank you, Mr. Gohmert.

We have the Ranking Member of the full Committee with us today, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. The lessons of the greatly reduced crime rates of the last 15 years apparently have been forgotten. Putting criminals in jail works. It keeps them off the streets and out of our homes. The Democratic Party continues to treat criminals as victims and then ignores the real victims.

Let me mention a few bills that reduced penalties on criminals while endangering innocent Americans. Earlier this year, this Subcommittee held a hearing on legislation that would require States to give parole hearings to juveniles sentenced to life without parole, regardless of the fact that most of the offenders are serving time for violent, dangerous offenses.

Today this Subcommittee was scheduled to mark up H.R. 1064, a bill that removes crack cocaine from our Federal drug laws and eliminates mandatory minimums for cocaine trafficking. And then there are literally dozens of other bills in Congress this year to release felons from prison and weaken our criminal justice system.

For example, this hearing considers H.R. 1466, a bill that eliminates all Federal mandatory penalties for drug trafficking. I have news. The drug trafficking problem in America has not disappeared. We still need tough criminal penalties to fight Mexican drug cartels and dangerous drug organizations.

Also alarming is H.R. 2934, legislation to allow Federal judges to ignore all mandatory penalties in the Federal system including penalties for crimes against children and illegal firearms trafficking.

Twenty-five years ago Congress rightly responded to the huge disparities in sentences and passed bipartisan legislation to address runaway judicial discretion in Federal courtrooms. Republicans and Democrats alike supported the Sentencing Reform Act, which created the U.S. Sentencing Commission and provided consistency and fairness in Federal sentencing.

Congress also imposed mandatory minimum penalties to ensure that similar sentences were given for similar offenses. This is common sense fairness. Most of these penalties apply to crimes that represent the greatest threats to those who live in a civilized society.

The proponents of H.R. 2934, the so-called Common Sense in Sentencing Act of 2009, would return to a system in which Federal judges once again would be free to disregard the laws enacted by Congress, and ignore the statutory mandatory minimum sentences.

Such a system will result in different sentences for similar crimes and the manifest unfairness that brings. It also will cause a rise in overall crime rates because penalties will be weakened and more criminals will do less time.

Another bill we consider today, H.R. 1466, does away with drug-related mandatory minimums that impose tough sentences on drug traffickers. In the past, critics have complained that sentences were too long for low level drug offenders and those with no criminal history.

In response to such criticisms Congress passed a safety valve exemption to drug trafficking mandatory minimums in 1994. The safety valve provides an opportunity for non-violent offenders with little or no criminal history to be sentenced without regard to mandatory minimums as long as they are not the leader of the criminal enterprise.

So Congress has already created a way for non-violent, first time offenders to be exempted from drug related mandatory minimums. H.R. 1466's attempt to eliminate them altogether is both extreme and dangerous.

No Congress or Administration has ever advocated mandatory minimums as a blanket proposal for all crimes. Every Congress and every Administration for the last 25 years has supported mandatory minimum sentences for the most serious offenses as a way to create uniform, consistent sentences and reduce crime.

As a result the violent crime rate is down. While there are many reasons for this, surely the incarceration of the worst offenders because of mandatory minimums, is one of them. If there are occasional problems with mandatory minimums, we should look to deal with them in a targeted fashion as we did in enacting the safety valve.

But empowering judges to ignore minimum penalties means fewer criminals in jail, and more crimes on the streets. Thank you, Mr. Chairman, for your indulgence and I will yield back.

Mr. SCOTT. Thank you. And without objection, we will have comments from the gentlelady from Texas and the gentleman from Texas—excuse me—the gentlelady from California and gentleman from Texas. I was looking over here, and I didn't see anything but Texas. [Laughter.]

I am sorry. The gentlelady from California is the sponsor of one of the bills we are considering today.

Ms. Waters?

Ms. WATERS. Thank you very much, Chairman Scott, and Ranking Member Gohmert. I thank both of you for your work, holding today's hearing on mandatory minimum sentences, and legislative proposals from both sides of the aisle that will address this issue.

I very much appreciate that my bill, H.R. 1466, the Major Drug Traffic and Prosecution Act, is one of the bills being considered today. The Major Drug Traffic and Prosecution Act would eliminate mandatory minimum sentences for drug offenses and redirect Federal prosecutorial resources toward major drug traffickers.

I first introduced this proposal 10 years ago in the 106th Congress and since that time I have held town hall meetings ever year at the Congressional Black Caucus legislative weekend, and traveled throughout this country listening to the stories of families who had relatives who were first time offenders convicted under mandatory minimum sentencing laws, some of whom were college students who got caught at the wrong place at the wrong time and basically convicted under conspiracy laws.

I sincerely hope that today's hearing will help us pass the legislation that will end sentencing disparities so that we can begin to refocus Federal resources to lock up the major drug traffickers.

Today's hearing is so important because the evidence is growing irrefutable. The current sentencing requirements have failed to accomplish the legislative intent of the 1986 Anti-Drug Abuse Act. We are wasting precious government resources on low level drug offenders.

Moreover the act has had a disparate impact on the African American community, resulting in the incarceration of a disproportionate number of African Americans often for many, many years.

Mr. Chairman, I have a longer statement on the history of mandatory minimum sentences, that in the interest of time, that I would like to enter into the record today with unanimous consent.

[The prepared statement of Ms. Waters follows:]

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Introductory Remarks for Rep. Maxine Waters

**Congressional Black Caucus Community Re-Investment
Taskforce**

&

**Charles Hamilton Houston Institute for Race & Justice
Harvard Law School**

*Rethinking Federal Sentencing Policy: 25th Anniversary of the
Sentencing Reform Act*

Wednesday, June 24, 2009

4:00-8:40 pm

**U.S. Capitol Visitors Center
Orientation Theater South
Washington, D.C.**

Overview

Good Evening. I am truly delighted to participate in this historic event. And I want to again acknowledge the collective efforts of my colleagues on the CBC Community Re-Investment Taskforce, Danny Davis and Eddie Bernice Johnson for organizing these panels. I'd also like to thank our very special guests for making time to join us today for these discussions –

Justice Stephen Breyer and Attorney General Holder. Many of us have worked on some of these issues for many years, but I believe today marks the long-awaited start of real reform to our criminal justice system.

History of Mandatory Minimum Drug Sentences

In order to understand the judicially corrosive nature of mandatory minimums, it is appropriate to discuss the events leading up to the legislative reinstatement of mandatory minimum prison sentences. If you recall, Len Bias was a 22 year-old rising star athlete in the late 1980s. In 1986, Len seemed to be on the fast track to great success and achievement. He was the second overall pick in 1986 NBA Draft for the Boston Celtics, and he had reportedly signed a lucrative shoe endorsement contract with Adidas soon after his selection. Tragically, however, Len's bright future was cut short when he convulsed and died of a cocaine overdose mere days after his NBA draft. Len Bias's death, coupled with growing public fear and panic regarding pervasive crack cocaine use in the 1980s, led to an expedited congressional response. The then Speaker of the House, Thomas P. "Tipp" O'Neil, demanded the House

democrats to draft legislation addressing the growing crack cocaine epidemic. Accordingly, Congress wanted to assuage public concern and send a message to high-level drug traffickers. The message was clear: Congress would focus its resources on prosecuting major drug traffickers using harsh and mandatory penalties. As a result Congress passed the Anti Drug Abuse Act of 1986. With this legislation, Congress reinstated mandatory prison terms by defining the amounts of certain drugs it believed would be in the hands of major drug kingpins. Accordingly, individuals possessing a certain threshold amount of crack/powder cocaine face a mandatory minimum sentence.

The rationale for this policy decision was to disrupt the supply of drugs from their source and remove leaders of criminal enterprises from communities. When effectively carried out, this approach would naturally reduce the availability of drugs on the streets and weaken some of the activities leading to increased drug use and drug-related crimes. Twenty years later, mandatory drug sentences have utterly failed to achieve these Congressional objectives. The result has, however, been the incarceration of thousands of low level drug offenders, most of

whom are minorities and an exponential boom in the Federal prison population. Moreover, it is fiscally burdensome on federal resources and taxpayers to prosecute and incarcerate countless individual low-level drug abusers each year who are ultimately not at the crux of the problem.

Mandatory minimums are not only ineffective, but they are also in direct contradiction with our fundamental principals of justice and the rule of law. It is the judge, not a legislative body, who should have discretion in these cases. Today, in place of individualized determinations, we have mandated that a judge must sentence a particular defendant to a minimum sentence. Accordingly, with every mandatory minimum penalty case a prosecutor brings before the court, Congress has already chosen the defendant's fate. We have already issued a sentence before a case is even tried. In this context, the right to counsel, trial by jury, and due process of law means nothing when we have already sentenced a defendant before his case is heard before a judge.

For this reason, I have worked diligently over the years to introduce legislation that would reverse the effects of mandatory minimum prison sentences. Beginning as early as 1996, I introduced a bill to approve a previously disapproved amendment to the Sentencing Guidelines relating to criminal sentences for cocaine offenses. This amendment would have worked to reverse the effects of the crack/powder cocaine sentencing disparity. When that amendment was unsuccessful, I introduced a bill to directly address the crack/powder disparity. Accordingly, I introduced H.R. 1241 – the Elimination of the Crack Cocaine Sentencing Disparity Act of 1999. Among other provisions, this measure would have also eliminated mandatory minimums. That same year, I introduced the first Major Drug Trafficking Prosecution Act of 1999. This bill would have amended the Controlled Substances Act to eliminate mandatory minimum sentences for certain drug possessions. And over the next ten years thereafter, I have been persistent in introducing legislation to address mandatory minimums with: the Common Sense Drug Policy Act of 2009; the Major Drug Trafficking Prosecution Act of 2001; and the Justice in Sentencing Act of 2004.

Most recently, this year I introduced the Major Drug Traffickers Prosecution Act of 2009, H.R. 1466. This bill, similar to my previous legislation, would restore judicial discretion, end mandatory minimum sentences for drug offenses, and re-focus scarce federal resources to prosecute major drug kingpins. This measure will eliminate all mandatory minimum sentences for drug offenses, curb federal prosecutions of low-level drug offenders, and give courts and judges greater discretion to place drug users on probation or suspend the sentence entirely. This measure will not prevent drug offenders from escaping justice, but it will restore judicial discretion. With this bill, judges will be able to make individualized determinations and take into account a defendant's individual and unique circumstances rather than being held to a stringent sentencing requirement prescribed by Congress.

Tonight, we have the opportunity to identify some consensus priorities regarding the changes needed in our federal sentencing policy, including mandatory minimums. I believe we can all agree that our criminal justice system will never be perfect. As imperfect policy makers, our rule of law can only

reflect the imperfection of those who establish the system. Thus, we may never achieve a perfect judicial system, but we can be persistent, making improvements and corrections to the system to provide more fairness and consistency. Our system must work so that justice – regardless of race or socioeconomic background – will be blind and equally accessible to all under protection of the U.S. Constitution. And with a new executive administration and the Department of Justice’s expressed interest in creating effective solutions to problems in criminal justice, we have the opportunity to act under new momentum and cooperation.

Ms. WATERS. I am still awaiting statistics requested from the Department of Justice, but from data published for funding year 2008, there were 16,932 individuals. Of the 25,000, 337 sentenced for drugs who received mandatory minimum drug sentences in funding year 2008.

That is about 6.8 percent of all individuals sentenced for drug crimes that year. I have also seen figures showing Federal prosecution against approximately 19,000 drug defendants that were not described as major or organized crime drug enforcement cases.

That is why on March 12, 2009, I reintroduced the Major Drug Trafficking Prosecution Act, H.R. 1466, to end mandatory minimum sentences for drug offenses, and refocus scarce Federal sources to prosecute major drug kingpins.

This bill will eliminate all mandatory minimum sentences for drug offenses, curb Federal prosecutions of low level drug offenders, and give courts and judges greater discretion to place drug users on probation or, when appropriate, to suspend the sentence entirely.

This bill restores discretion to judges and allows them to make individualized determinations that take into account a defendant's individual and unique circumstances instead of being forced to apply stringent sentencing requirements that don't necessary fit the crime.

The Major Drug Trafficking Prosecution Act of 2009 goes to the root of the problem by creating a more just system that will apply penalties actually warranted by the crime instead of mandating sentences, regardless of individual circumstances, as required under current mandatory minimum laws.

It does so by eliminating the mandatory minimum sentences for simple possession including the notorious 5-year mandatory for possession of five grams of crack cocaine, distribution, manufacturing, importation and other drug related offenses, and allows the United States Sentencing Commission to set appropriate proportionate sentences with respect to the nature and the seriousness of the offense and the role and background of the offender.

My bill also addresses other problems relating to the use of mandatory minimum sentences by curbing prosecutions of low level drug offenders in Federal court and by allowing Federal prosecutors to focus on the major drug pins and other high level offenders.

Additionally, my bill would strip current statutory language that limits the courts' ability to place a person on probation or suspend the sentence, thus allowing for discretion as appropriate under certain circumstances.

Twenty years later the so-called war on drugs has not been won, and mandatory drug sentences have utterly failed to achieve these congressional objectives. Mandatory minimum sentences are not stopping major drug traffickers.

There are, however, resulting in the incarceration of thousands of low level sellers and addicts. Moreover, these lengthened drug sentences have increased the need for more taxpayer dollars to build more prisons.

Finally, these sentences are disproportionately impacting African Americans. While African Americans comprise only 12 percent of the U.S. population and 14 percent of drug users, they are 20 percent more likely to be sentenced to prison than White defendants.

Much of this disparity is due to the severe penalties for crack cocaine. The Federal judiciary, along with experts in criminal justice, has long argued against mandatory minimums, especially those for

crack cocaine. They point out that the current system requires the courts to sentence defendants with differing levels of culpability to identical prison terms.

I am very pleased that we will hear testimony today from Judge Carnes, representing the Judicial Conference of the United States, and from Julie Stewart, the founder and president of Families Against Mandatory Minimum Sentences.

Julie, I must say to you publicly what I have said privately. The long, hard work you and FAMM have done over the years has been invaluable and I thank you so much for your hard work.

And although Nkechi Taifa is not testifying today, she is the leader of the Open Society Institute. She is here, and I have to thank her again for her tireless efforts to help make today's hearing a reality.

Mr. Chairman, again, I thank you for today's hearing on our legislation to address mandatory amendment sentences, and I am looking forward to working with my colleagues, especially those on the Crime Subcommittee and with the Obama administration to pass legislation that finally ends mandatory amendment sentences and rightfully restores discretion to judges.

I thank you, and I yield back.

Mr. SCOTT. Thank you, very much.

Gentleman from Texas, Judge Poe.

Mr. POE. Thank you, Mr. Chairman. Everybody has heard of two people by the name of Ramos and Compean, two Border Patrol agents who were doing their job on the Texas border, and they were prosecuted for doing that.

They were sent to prison for 11 and 12 years. Part of the reason was a mandatory requirement that, because they had a gun and discharged it, they got an extra 10 years, even though peace officers, by law, must carry guns.

The prosecution in that case, in my opinion, was vindictive and prosecuted them for various reasons other than seeking justice because they even admitted that their own witness lied on the witness stand, a drug dealer who was given a deal, a back room deal.

Be that as it may, after all the smoke cleared, even the prosecution said the sentence was over the top. And the reason, of course, they had to get a mandatory extra 10 years for carrying a weapon.

The United States House of Representatives, by voice vote last year, or in the last Congress, passed legislation that would prohibit any Federal funding going to incarcerate those two Border Patrol agents. The Senate never took the case up, or the bill up, so it died.

But this is a case of injustice and it cannot be remedied. The only thing that happened was the last President commuted the sentence of these two individuals, even though they spent 2 years of their lives in prison, most of that time in solitary confinement.

I do believe in judicial discretion. I was on the bench 22 years and I tried only felonies. I heard over 25,000 felony cases, and I have been accused of a lot of things, but being soft on crime was not one of them. I even thought that the maximum sometimes was not near high enough in the cases that I heard.

But even Texas, with its hard-nosed reputation across the country, does have a remedy that allows for judges in felony cases to

allow the person to be sentenced as a misdemeanor offender even though he is convicted of a felony.

And for the record, Mr. Chairman, I would like to submit section 12.44 A and B of the Texas penal code into the record—

Mr. SCOTT. Without objection that will be introduced, and I believe the gentelady from California had also made a unanimous consent and without objection the material she wanted in the record will also be introduced.

[The information referred to follows:]

MATERIAL SUBMITTED BY THE HONORABLE TED POE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

§ 12.44. REDUCTION OF STATE JAIL FELONY PUNISHMENT TO MISDEMEANOR PUNISHMENT.

(a) A court may punish a defendant who is convicted of a state jail felony by imposing the confinement permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice.

(b) At the request of the prosecuting attorney, the court may authorize the prosecuting attorney to prosecute a state jail felony as a Class A misdemeanor.

Mr. POE [continuing]. Which allows the judge, in his or her discretion, a person convicted of what is called a State jail felony to sentence the person as a misdemeanor offender. I did that as a judge because justice demanded that that occur in cases because the system that we have, although it is not perfect, it allows for some discretion needs to be imposed by the sentencing judge.

And in those cases where justice demands that a person be sentenced to something less than the statutory minimum, I think judges should have the discretion, when they can justify it under Federal rules of why they would reduce the sentence to a lesser sentence, and of course allow the prosecution in appropriate cases to appeal that sentence.

So for the reasons of Ramos and Compean, and many other cases down the road, judicial discretion is something that we should be interested in. Congress cannot, even in its great wisdom, pass appropriate legislation to cover every type of criminal case that there is because there are no two cases alike.

And the facts must be weighed and justice must be imposed in every case, not just in most of the cases, and one remedy to do that is to allow, in certain rare cases, for the sentencing judge in Federal court to sentence something less than the statutory minimum if that can be justified.

And I would hope that, in the future, that border agents and all peace officers in the country who are doing their job would not be subject to arbitrary decisions based on legislation that Congress has passed because it does prevent or does provide, unfortunately, unintended consequences and forces individuals who, as Ramos and Compean were doing what I thought was a noble job on the Texas border in arresting a drug smuggler, and they go to jail for just doing what they were sworn to do.

I will reserve the rest of my comments to the questions I have of the witness, and I yield back my time.

Mr. SCOTT. Thank you. We have a distinguished panel of witnesses here today to help us consider the important issues. We currently have before us, and ask each of the witnesses to complete his or her statement within 5 minutes as the timing device in front you at the table. It will start green and turn to yellow when 1 minute is left. The light will turn red when your 5 minutes has expired.

All of the witnesses' statements will be entered into the record in its entirety. Our first panelist is Chief Judge Julie Carnes. She is testifying on behalf of the Judicial Conference of The United States, the policymaking body for the Federal judicial branch.

She has served on the Conference's committee on criminal law since 2005, and was selected by Chief Justice Roberts to chair the committee in 2007. Chief Judge Carnes was appointed to the district court bench for the Northern District of Georgia in 1992 and became Chief Judge of that district in January 2009.

She is also a member of the U. S. Sentencing Commission. She was also a member of the U.S. Sentencing Commission from 1990 to 1996, and prior to serving on the bench she was an Assistant U.S. Attorney, an Appellate Chief in the Northern District of Georgia for 12 years.

Our next panelist will be Grover Norquist. He is the president of Americans for Tax Reform, a coalition of taxpayer groups, individuals and businesses opposed to higher taxes at the Federal, State and local levels.

He serves on the board of directors for the National Rifle Association of America and the American Conservative Union. He has

authored the book, "Leave Us Alone: Getting the Government's Hand Off Our Money, Our Guns, Our Lives."

He has worked with the U. S. Chamber of Commerce, served as a campaign staff for various Republican platform committees and served as executive director for both the National Taxpayers Union and the College Republicans. He holds a Master's of business administration and Bachelor of Arts degree in economics, both from Harvard University.

Our next panelist is Michael Sullivan, currently practices with the Ashcroft Law Group, specializing in health care, government fraud, corporate compliance and ethics, corruption and corporate security.

In 2001, he was appointed U.S. Attorney for the district of Massachusetts. While there, he served on the attorney general's advisory committee and was chair of the Health Care Fraud Working Group, as well as serving on other crime subcommittees including Sentencing, Violent Crime and Drugs.

In 2006, President Bush also appointed him as acting director of the Bureau of Alcohol, Tobacco and Firearms. He was nominated director in 2007 and served until January 2009. He was Plymouth County District Attorney between 1995 and 2001 and prior to that served in the Massachusetts House of Representatives.

Our next panelist will be T.J. Bonner, who is testifying on behalf of the National Border Control Council of the American Federal Government Employees Union, the labor organization that represents approximately 17,000 non-supervisory Border Patrol employees.

He is president of the council, and has held that position since 1989. He has been a Border Patrol agent in San Diego since 1978. He has testified before Congress on numerous occasions concerning a variety of related issues. He has made numerous appearances on various network and cable news programs, and is an expert on immigration, border and homeland security issues.

And our final panelist will be Julie Stewart, who is the president of Families Against Mandatory Minimums, known as FAMM. She started FAMM in 1991 after her brother was sentenced to 5 years in Federal prison for growing marijuana.

FAMM now has over 20,000 individual and organizational members. Ms. Stewart has testified before Congress and the U.S. Sentencing Commission about mandatory minimum sentences and has discussed these issues on countless television and radio shows.

She is a graduate from Mills College with a B.A. in international relations and has worked at the Cato Institute for 3 years as director of public affairs.

We will begin now with Judge Carnes.

**TESTIMONY OF THE HONORABLE JULIE E. CARNES, CHAIR,
CRIMINAL LAW COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, WASHINGTON, DC**

Judge CARNES. Good morning. Mr. Chairman and distinguished Members of the Committee, I am pleased to testify on behalf of the Judicial Conference and the Criminal Law Committee and to offer you a judicial perspective on mandatory minimum laws and the harm that we judges firsthand have seen them bring to our system.

I begin by attributing no bad purpose to any congressional member who may have supported these kinds of statutes in the past. To the contrary, many of them were enacted out of a sincere effort to effectively combat serious crimes that undermine a safe society.

Yet as well-intentioned as the proponents of this legislation may have been, these kinds of statutes have created what the late Chief Justice Rehnquist aptly termed "unintended consequences." Specifically, these mandatory provisions typically focus on one factor only, to the exclusion of other potentially relevant factors.

And because of this, they sweep broadly, sweeping in both the egregious offender as well as other less culpable offenders who may have violated the statute. Necessarily, the sentence that may be appropriate for the most egregious offender will often be excessive for this less culpable person.

Now the Conference has opposed mandatory sentencing for the last 50 years. Nevertheless, we know that with over 170 such statutes on the books, a repeal of all of them may not be the first step some in Congress would wish to take.

For that reason, while we applaud a comprehensive assessment of these statutes, we note that there are some mandatory statutes that are indefensibly harsh, and we hope Congress will act quickly to repeal them.

One of these statutes, the enhanced penalty section of section 924(c), is so draconian that the Conference has taken a specific position against it. Section 924(c) prohibits the possession of a firearm during a drug crime or a crime of violence, and it calls for a mandatory 5-year sentence for the first such occurrence.

But it also states that a second or subsequent such event receive a 25-year mandatory consecutive sentence for each subsequent occurrence. My predecessor chair of this committee, Judge Paul Cassell, testified about this and he testified about a real case that he had had.

In his case, a defendant named Weldon Angelos was a 24-year-old first offender who was involved in three undercover sales of marijuana to undercover agents. That would have called for a 6-to 8-year sentence under the guidelines.

But because Mr. Angelos also possessed a firearm during two of the sales and because the agents found some guns in his home during a subsequent search, he was subject to a 5-year consecutive sentence on the first gun count, a 25-year consecutive sentence on the second gun count and another 25-year consecutive on the third.

Mr. Angelos, a 24-year-old first offender who never fired his gun received a 55-year sentence. Now that sentence was greater by many years than the guideline sentence for an airline hijacker, a terrorist who detonates a bomb in a public place, or a hate crime in which the victim receives permanent injury.

There can be no persuasive justification for this sentence. Congress could easily make this statute a true recidivist statute, if not rescinding it all together. Yet as it now stands, a young man has effectively had his life taken away for an offense that did not merit this punishment.

We hope that Congress will act expeditiously to correct this and other similarly unsupportable statutes. We greatly appreciate your efforts and thank you.

[The prepared statement of Judge Carnes follows:]

PREPARED STATEMENT OF THE HONORABLE JULIE E. CARNES

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**

TESTIMONY OF THE HONORABLE JUDGE JULIE E. CARNES

CHAIR OF THE CRIMINAL LAW COMMITTEE

ON

BEHALF OF THE JUDICIAL CONFERENCE



BEFORE

**THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY**

**ON THE SUBJECT OF
MANDATORY MINIMUM SENTENCES**

**TUESDAY, JULY 14, 2009
10:30 a.m.**

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to testify on behalf of the Judicial Conference of the United States and its Criminal Law Committee and to offer you a judicial perspective on mandatory minimum sentencing statutes and the harms that we judges, first-hand, have seen them visit on our federal sentencing system.

I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimum sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws. For example, 18 U.S.C. § 924(c), which provides a mandatory minimum sentence for the use of a gun in a crime of violence, was enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy.¹ Likewise, the mandatory minimum sentencing statute for crack cocaine was enacted in response to the death of basketball star Len Bias, and grew out of a concern that crack cocaine was a dangerous substance that could devastate the poorest and most vulnerable communities in our society.²

Yet, as well-intentioned as the proponents of mandatory minimum legislation may have been, these kinds of sentencing statutes have created what the late Chief Justice Rehnquist aptly

¹ See H.R. REP. NO. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

² See, e.g., *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity Before the Senate Subcomm. on Crime and Drugs*, 111th Cong. (Statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice) (attributing high profile overdose death of Len Bias as a source of congressional interest in cocaine sentencing policy).

identified as “unintended consequences.”³ Indeed, appropriately echoing the Chief Justice’s phrase, this hearing is focused on “Mandatory Minimums and Unintended Consequences.”

What are some of those consequences? First, because these statutes typically focus on one factor only, such as drug weight, to the exclusion of all other potentially relevant factors, they sweep quite broadly. Therefore, a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator, as long as the one factor identified in the statute is present. The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct.

Unjust mandatory minimum statutes also have a corrosive effect on our broader society. To function successfully, our judicial system must enjoy the respect of the public. The robotic imposition of sentences that are viewed as unfair or irrational greatly undermines that respect. Further, as I will explain later in my testimony, some of these statutes do not produce merely questionable results; instead, a few produce truly bizarre outcomes.

Excessive mandatory sentences also squander scarce resources. It costs \$25,895 a year to incarcerate a federal prisoner.⁴ While this is money well-spent when the punishment fits the crime, these funds are wasted when they are used to incarcerate an individual whose sentence greatly exceeds what would be deemed a reasonable sentence.

³ See William H. Rehnquist, *Luncheon Address* (June 18, 1993), in United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993) (suggesting that federal mandatory minimum sentencing statutes are “perhaps a good example of the law of unintended consequences”).

⁴ See Matthew Rowland, Deputy Assistant Director, Administrative Office of the United States Courts Memorandum (May 6, 2009), *Cost of Incarceration and Supervision* (on file) (reporting the annual cost of Bureau of Prisons confinement as \$25,894.50 as opposed to \$3743.23 per year for supervision outside of confinement.)

In my testimony today on behalf of the Judicial Conference, I will touch on three points. In Part I, I will explain why mandatory minimum statutes are systemically flawed and will rarely avoid undesirable outcomes. In Part II, I will set out the history of the Judicial Conference's consistent and vigorous opposition to mandatory minimum sentences. In Part III, I will describe two recent cases in which use of mandatory minimum sentencing provisions produced sentences that greatly exceeded what even the toughest sentencer would consider an appropriate punishment. In Part IV, I will conclude by providing the Committee with some preliminary thoughts about approaches that Congress may begin to take to ameliorate the current situation and about a specific recommendation on one statute that the Conference has made.

PART I: THE SYSTEMIC FLAW IN MANDATORY MINIMUM SENTENCES, AND WHY IT WILL ALWAYS BE PROBLEMATIC TO DRAFT A MANDATORY MINIMUM STATUTE THAT WILL WORK

As I note in Part II, the Judicial Conference has, for decades, opposed mandatory minimum sentences. While this opposition has been clearly communicated, the reasons for the opposition may sometimes have been misinterpreted by Congress and others. My sense is that some believe that judicial opposition to mandatory minimums arises strictly out of a sense of wounded autonomy: that is, district judges believe that they should have the absolute right to impose whatever sentence they consider appropriate, unfettered by outside constraints. In other words, according to this theory, district judges do not believe that they should be dictated to in this manner.

In reality, however, district judges are continually dictated to in a variety of ways, in both civil and criminal cases. In fact, much of a judge's daily activity is consumed with executing "mandatory" tasks, using a decision-making process that is "mandated" by some other entity.

Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge's possible disagreement with some of these instructions. Myriad other examples abound.

Judges understand and accept these constraints because judges know that they do not create the law; this is Congress's role. Rather, judges interpret that law and apply it to the facts of the case, within whatever ambit of discretion is deemed permissible for the particular issue. Likewise, as to mandatory minimum statutes, the Judicial Conference's opposition derives not from a narrow defense of a district judge's prerogatives but from a recognition, gained through years of experience, that mandatory minimum sentencing provisions have created untenable results and that they simply do not hang together in any coherent or rational way. As Chief Justice Rehnquist noted, they almost invariably create unintended, as well as undesirable, consequences.

The reason for this phenomenon lies in the way that mandatory minimum statutes must be constructed. A contrast with the federal sentencing guidelines system is instructive. The guidelines were premised on a "heartland" theory.⁵ That is, the United States Sentencing Commission identified the typical core conduct that comprised a particular offense—the "heartland"—and assigned a numerical base offense level to that conduct. Then, the Sentencing Commission identified potential aggravating and mitigating conduct that could occur in

⁵ See United States Sentencing Commission, Guidelines Manual Ch. 1, Pt. A.(4)(b) (2008) ("The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes.").

connection with that offense and assigned a numerical value to that conduct, which number would either be added to or subtracted from the base offense level. A very calibrated criminal history formula was devised and included in the guidelines' calculation. Finally, a judge was given some limited departure authority to adjust a sentence up or down if "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines"⁶ was found to exist.

It is true that some judges and others have criticized the severity of some of the sentences prescribed by the guidelines. Some also believe that the sentencing ranges are too narrow and that departure authority is too cramped.⁷ Whatever criticisms can be made as to the substance of the Guidelines, however, it is clear that the Guidelines' system looks at multiple factors that relate to culpability and consequences of the commission of criminal conduct and dangerousness of the offender. In short, the federal guidelines allow for some flex in the joints.⁸

In contrast, mandatory minimum statutes typically identify just one aggravating factor, and then pin the prescribed enhanced sentence totally on that one factor, without regard to the

⁶ 18 U.S.C. § 3553(b).

⁷ In *Koon v. United States*, 518 U.S. 81 (1996), the Supreme Court expanded departure authority, holding that whether a given sentencing factor was a legitimate ground for departure was a factual matter to be determined by the sentencing judge, subject to an abuse of discretion standard. With the 2003 passage of the PROTECT Act (Pub. L. No. 108-21, § 401(d)), however, *Koon* was overturned and departure authority was substantially restricted.

⁸ See United States Sentencing Commission, Report to Congress, Downward Departures From the Federal Sentencing Guidelines (October 2003).

The Committee does not intend that the Guidelines be imposed in a mechanistic fashion. *It believes that the sentencing judge has an obligation to consider all the factors in a case and to impose sentences outside the Guidelines in an appropriate case.* The purpose of the sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender as compared to similarly situated offenders, not to eliminate the imposition of thoughtful individualized sentences.

Id. at B-9 (quoting S. Rep. No. 97-307 at 969) (emphasis added).

possibility of mitigating factors surrounding the commission of the offense. For such a sentence to be reasonable in every case, then, the particular conduct triggering the mandatory minimum must necessarily always warrant the mandated sentence, regardless of any of the circumstances of the offense or the offender. There are perhaps a few types of criminal conduct that are so unambiguous or heinous in nature that no examination of any fact other than the commission of the crime itself is necessary to persuade a reasonable person that the prescribed mandatory penalty is appropriate. Most criminal conduct, however, does not lend itself to such narrow scrutiny.

In short, mandatory minimum statutes are a blunt and inflexible tool. There is an inherent structural challenge in drafting a mandatory minimum statute that can truly apply to every case. Such a statute, to be just in every case, must not over-punish the most benign conduct that could be prosecuted under the particular criminal statute. Thus, the drafter of a proportional and fair mandatory minimum sentencing provision must consider the “minimum” *conduct, circumstances and offender type* that could be punished under the statute. In this sense, the word “minimum” should not refer only to the minimum penalty for a typical offense, but instead to the “minimum”–or most extenuated–conduct that could satisfy the statutory elements of the offense. Having envisioned the most sympathetic hypothetical offender possible, the drafter should only then determine what would be an appropriate minimum penalty for that offender.

Yet, when one examines the approximately 170 mandatory minimum statutory provisions in the federal code, it appears that the above approach has infrequently been taken by Congress. Instead the approach has frequently resembled a search for severity, whereby the particular

statute appears to envision the most culpable offender and offense conduct possible, and the minimum penalty is then pegged to that hypothetical person. Such an approach will necessarily mean that any offender who is convicted of the particular statute, but whose conduct has been extenuated in ways not taken into account in fixing the penalty, will necessarily be given a sentence that is excessive.

Let me give you an example. Title 21 U.S.C. § 841(b)(1)(A) provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of 10 years imprisonment—e.g., 5 kilograms of cocaine—the defendant’s 10-year mandatory sentence shall be doubled to a 20-year sentence if he has been previously convicted of a drug distribution-type offense.

Now, if our defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a 20-year sentence may sound just fine. But, kingpins are, by definition, few in number, and they are not the most typical drug defendant that we see in federal court.

Instead, envision a low-level defendant who is one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving in a boat. The quantity of drugs in the boat will easily qualify for a 10-year mandatory sentence. Further, assume that this off-loader has one prior conviction for distributing a small-quantity of marijuana, for which he served no time in prison. Further, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his wife and children. This defendant will now be subject to a 20-year sentence. Many persons would question the proportionality of this sentence.

I do not want to leave you with the impression that mandatory minimum sentencing provisions necessarily result in an unfair and excessive sentence in all cases. They do not. In some cases, the mandatory penalty will seem appropriate and reasonable. When that happens, judges do not typically fret that the sentence was also called for by a mandatory sentencing provision, because the judge believes the sentence to be fair. In other words, the “minimum” made sense in that particular case.

Unfortunately, however, given the severity of many of the mandatory sentences that are most frequently utilized in our system, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the crime and terribly cruel to the human being standing before the judge for sentencing. It is this unintended consequence of a mandatory minimum statute that has created such concern and dismay.

PART II: THE JUDICIAL CONFERENCE’S HISTORY OF OPPOSITION TO MANDATORY MINIMUM SENTENCES

For more than fifty years, the Judicial Conference has consistently opposed mandatory minimum sentences. At its September 1953 meeting, the Conference endorsed a resolution from the Judicial Conference of the District of Columbia Circuit, opposing enactment of laws that compelled judges to impose minimum sentences and that denied judges the ability to place certain defendants on probation.⁹

Since then, the Judicial Conference of the United States has condemned mandatory minimum sentences with considerable regularity. In September 1961, the Conference

⁹ JCUS-SEP 53, pp. 28-29.

considered several criminal bills pending before Congress.¹⁰ The Conference took no position on the substantive merits of the bills, but “disapproved in principle those provisions requiring the imposition of mandatory minimum sentences.”¹¹ By the next year, opposition to mandatory minimum sentences was considered to be the well-established position of the Judicial Conference. In March 1962, the Conference supported a bill easing parole restrictions, “consistent with the *established policy* of the Conference concerning mandatory minimum sentences.”¹² Legislation containing mandatory minimum sentencing provisions was opposed on these grounds in 1965,¹³ 1967,¹⁴ and 1971.¹⁵

In 1976, the Conference affirmed its opposition, noting that there was no demonstrated need for legislation imposing mandatory minimum terms for certain offenses, and concluding that such legislation would “unnecessarily prolong the sentencing process and engender additional appellate review and would increase the expenditure of public funds without increase in additional benefits.”¹⁶

¹⁰ JCUS-SEP 61, pp. 98-99.

¹¹ *Id.* at 99.

¹² JCUS-MAR 62, p. 22 (emphasis added).

¹³ JCUS-MAR 65, p. 20.

¹⁴ JCUS-SEP 67, pp. 79-80 (“The Conference approved a recommendation of its Committee confirming the general opposition of the Conference to mandatory minimum sentences.”).

¹⁵ JCUS-OCT 71, p. 40 (“The Conference reaffirmed its disapproval of mandatory minimum sentences.”).

¹⁶ JCUS-APR 76, p. 10.

In 1981, the Conference disapproved of a bill that would have imposed extended and strengthened mandatory penalties for the use of firearms in federal felonies.¹⁷ The Conference noted that proposed legislation typically required the imposition of a minimum term while prohibiting probation and parole eligibility.¹⁸ The Conference noted, “Statutes of this type limit judicial discretion in the sentencing function and tend to increase the number of criminal trials and the number of appeals in criminal cases. Upon the recommendation of the Committee the Conference reaffirmed its opposition to legislation requiring the imposition of mandatory minimum sentences.”¹⁹

In March 1990, the Conference noted that the Third, Eighth, Ninth, and Tenth Circuits had all passed resolutions against mandatory minimum sentences, and voted to “urge the Congress to reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities.”²⁰ In May 1990, the Executive Committee of the Judicial Conference, acting on the Conference’s behalf, reaffirmed this position in the form of approving a recommendation of the Federal Courts Study Committee that mandatory minimum sentencing provisions should be repealed, whereupon the Sentencing Commission should reconsider the guidelines applicable to the affected offenses.²¹ The Conference’s

¹⁷ JCUS-SEP 81, p. 90.

¹⁸ JCUS-SEP 81, p. 93.

¹⁹ *Id.*

²⁰ JCUS-MAR 90, p. 16.

²¹ JCUS-SEP 90, p. 62.

longstanding opposition to mandatory minimum terms was reaffirmed in July and August of 1991 by the Executive Committee, acting on behalf of the Judicial Conference, when it opposed amendments to the Violent Crime Control Act of 1991.²²

In September 1991, the Conference approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.²³ The Conference noted that “[w]hile the judiciary’s overriding goal is to persuade Congress to repeal mandatory minimum sentences, for the short term, a safety valve of some sort is needed to ameliorate some of the harshest results of mandatory minimums.”²⁴

In March 1993, in the context of a long-range planning initiative, the Conference again agreed to renew efforts to reverse the trend of enacting mandatory minimum prison sentences.²⁵ Later, in September 1993, the Conference considered the Controlled Substances Minimum Penalty – Sentencing Guideline Reconciliation Act of 1993, legislation presented by the Chairman of the Sentencing Commission that attempted to reconcile mandatory minimum sentences with the sentencing guidelines.²⁶ “The Committee on Criminal Law believed that, although the proposed legislation would not solve all of the problems associated with mandatory minimum sentences, it addresses the essential incompatibility of mandatory minimums and

²² JCUS-SEP 91, p. 45 (opposing mandatory minimum sentencing amendments to S. 1241, 102nd Congress).

²³ JCUS-SEP 91, p. 56.

²⁴ *Id.*

²⁵ JCUS-MAR 93, p. 13.

²⁶ JCUS-SEP 93, p. 46.

sentencing guidelines and represents a promising approach.²⁷ On recommendation of the Committee on Criminal Law, the Conference endorsed the concept.²⁸

On May 17, 1994, the Executive Committee, acting on behalf of the Judicial Conference, agreed not to oppose retroactivity of “safety valves” included in pending crime legislation to ameliorate some of the harshest results of mandatory minimum sentences despite the burden that retroactivity may impose upon the judiciary.²⁹

The Long Range Plan for the Federal Courts, adopted in 1995, reiterated the Conference position that Congress should be discouraged from prescribing mandatory minimum sentences.³⁰ More recently, when considering the appropriate responses to the Supreme Court’s decision in *Booker v. U.S.*, 543 U.S. 220 (2005), the Conference resolved to “oppose legislation that would respond to the Supreme Court’s decision by (1) raising directly the upper limit of each guideline range or (2) expanding the use of mandatory minimum sentences.”³¹ In 2006, the Conference also considered the consequences of mandatory minimum terms in opposing the existing differences between crack and powder cocaine sentences.³²

²⁷ *Id.*

²⁸ *Id.*

²⁹ JCUS-SEP 94, p. 42.

³⁰ JCUS-SEP 95, p. 47.

³¹ JCUS-MAR 05, pp. 15-16.

³² JCUS-SEP 06, p. 18 (“Under the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570), 100 times as much powder cocaine as crack cocaine is needed to trigger the same mandatory minimum sentences.”).

Most recently, upon the recommendation of the Criminal Law Committee, the Judicial Conference has endorsed seeking legislation that would “unstack” penalties under 18 U.S.C. § 924(c) and permit the statute to operate as a true recidivist statute.³³

In short, for more than fifty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing.

PART III: TWO EXAMPLES OF INJUSTICE WROUGHT BY MANDATORY MINIMUM SENTENCES

The description of an actual case can often convey more effectively than any abstract analysis the very real injustice that some specific mandatory minimum statutes have caused.

A. The Case of Weldon Angelos

Just over two years ago, my predecessor as Chair of the Criminal Law Committee, then-Judge, now-Professor Paul G. Cassell, testified before the Subcommittee on Crime, Terrorism, and Homeland Security,³⁴ and described in considerable detail the case of *United States v. Angelos*.³⁵ The sentencing of Weldon Angelos was a source of considerable distress for Judge Cassell,³⁶ and his description of that event stands as a powerful example of the unintended consequences that can result from well-intended legislation. I will not explore the intricacies of

³³ JCUS-MAR 09, pp. 16-17.

³⁴ *Mandatory Minimum Sentencing Laws – The Issues Before the House Subcomm. on Crimes, Terrorism and Homeland Security*, 110th Cong. (Statement of Paul G. Cassell, Chair, Criminal Law Committee of the Judicial Conference).

³⁵ 345 F. Supp. 2d 1227 (D. Utah 2004).

³⁶ See J.C. Olcson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669, 682 (2007) (“Judge Cassell appears to have agonized over the decision, aching to strike down the fifty-five year sentence on Equal Protection and Eighth Amendment grounds....”). *Id.* at 683 (describing Judge Cassell’s feeling of being “ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.”) (citing *U.S. v. Angelos*, at 1261).

the case as deeply as did Judge Cassell, but I will review some of the key facts, as they may prove instructive.

When Mr. Angelos was sentenced in November of 2004, he was a twenty-four-year-old, first-time offender, arrested for trafficking marijuana. For his offense of dealing marijuana and related offenses, both the Government and the defense agreed that he should serve between six and eight years in prison. Under the U.S. Sentencing Guidelines, his crimes resulted in a total offense level of 28,³⁷ and, because Mr. Angelos had no significant prior criminal history, he was treated as a first-time offender (criminal history category I) under the Guidelines, resulting in a prescribed Guidelines sentence between 78 to 97 months.

But in imposing his sentence, Judge Cassell was also required to consider three additional firearms counts, pursuant to 18 U.S.C. § 924(c), a mandatory minimum statute that requires a court to impose a consecutive sentence of five years in prison the first time a drug dealer carries a gun and a twenty-five-year consecutive sentence for each subsequent time.³⁸

Two of the § 924(c) counts arose because Mr. Angelos carried a handgun to two separate \$350 marijuana deals. The third count arose out of the discovery by police, during the execution of a search warrant, of several additional handguns at Angelos' home. As a result of his conviction on these three counts, the Government insisted that Mr. Angelos must serve the statutory minimum, which was a *de facto* life sentence. Specifically, the Government contended that the court had to sentence Mr. Angelos to a prison term of no less than 6½ years: 6½ years

³⁷ U.S. v. Angelos, Tr. 9/14/04 at 27 (based on U.S.S.G. § 2D1.1(c)(7) & § 2S1.1(b)(2)(B)).

³⁸ 18 U.S.C. § 924(c)(1)(A)(I), (C)(i), and (D)(ii).

for drug dealing, followed by 55 additional years for the three counts of possessing a firearm in connection with a drug offense.

It is also worth noting that the original indictment issued against Mr. Angelos contained only three counts of distribution of marijuana,³⁹ one § 924(c) count, and two other lesser charges.⁴⁰ The Government had told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and the § 924(c) count, the Government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. However, the Government also warned that if he rejected the offer, prosecutors would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence. He elected to go to trial. As promised, the Government obtained two superseding indictments, charging a total of twenty counts, including five § 924(c) counts that alone carried a minimum mandatory sentence of 105 years (5 + 25 + 25 + 25 + 25).

At trial, the jury found Mr. Angelos guilty on sixteen of the twenty counts, including three § 924(c) counts. Those counts, alone, produced a mandatory 55 year term (5 + 25 + 25). Judge Cassell was troubled by the sentence, viewing it as unjust, cruel, and irrational,⁴¹ but his role in evaluating § 924(c) was limited. A judge may ignore a statutorily-mandated sentence typically only on constitutional grounds under the Fifth or Eighth Amendment, i.e., if it produces

³⁹ 18 U.S.C. § 841(b)(1).

⁴⁰ See *supra* note 34 (describing Judge Cassell's account of plea negotiations).

⁴¹ *Angelos*, 345 F. Supp 2nd at 1251.

irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment.

Judge Cassell considered these arguments carefully, noting that adding 55 years on top of a 6½ year sentence for drug dealing is *far* beyond the roughly two-year-increase in sentence that the United States Sentencing Guidelines indicated to be appropriate for possessing firearms under the same circumstances,⁴² and also noting that the sentence exceeded what the jury recommended to the court.⁴³ Judge Cassell also contrasted the sentence of Mr. Angelos with the sentences that would be imposed for various serious crimes under the Sentencing Guidelines.⁴⁴ He noted that the sentence exceeded the sentences prescribed for these much more serious crimes. In fact, the punishment imposed in Mr. Angelos' case so exceeded the penalties associated with these other, serious crimes that it is impossible to credibly contend that the sentence was proportional to the penalties for those offenses at the time.⁴⁵ See Table I, below.

⁴² See U.S.S.G. § 2D1.1(b)(1) (describing gun enhancement for drug offenses). If Angelos' sentence had been calculated under the Sentencing Guidelines rather than stacked 924 (c) counts, it would have increased his offense level from 28 to 30, resulting in 24 additional months of imprisonment.

⁴³ Following the trial – over the government's objection – Judge Cassell sent each of the *Angelos* jurors the relevant information about Mr. Angelos' limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos. Nine jurors responded and provided the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7) 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years.

⁴⁴ The 2003 Guidelines were used in all calculations. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

⁴⁵ See *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy J., concurring) (noting that “[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender”).

Table I: Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes

Offense and Offense Guideline	Offense Calculation	Maximum Sentence
Mr. Angelos with Guidelines sentence plus § 924(c) counts	Base Offense Level 28 + 3 § 924(c) counts (55 years)	738 Months
Kingpin of major drug trafficking ring in which death resulted U.S.S.G. § 2D1.1(a)(2)	Base Offense Level 38	293 Months
Aircraft hijacker U.S.S.G. § 2A5.1	Base Offense Level 38	293 Months
Terrorist who detonates a bomb in a public place intending to kill a bystander U.S.S.G. § 2K1.4(a)(1)	Total Level 36 (by cross reference to § 2A2.1(a)(2) and terrorist enhancement in § 3A1.4(a))	235 Months
Racist who attacks a minority with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)(1)	Base Level 28 + 4 for life threatening + 3 for racial selection under § 3A1.1	210 Months
Spy who gathers top secret information U.S.S.G. § 2M3.2(a)(1)	Base Offense Level 35	210 Months
Second-degree murderer U.S.S.G. § 2A1.2	Base Offense Level 33	168 Months
Criminal who assaults with the intent to kill U.S.S.G. § 2A2.1(a)(1) & (b)	Base Offense Level 28 + 4 for intent to kill = 32	151 Months
Kidnapper U.S.S.G. § 2A4.1(a)	Base Offense Level 32	151 Months
Saboteur who destroys military materials U.S.S.G. § 2M2.1(a)	Base Offense Level 32	151 Months
Marijuana dealer who shoots an innocent person during drug transaction U.S.S.G. § 2D1.1(c)(13) & (b)(2)	Base Offense Level 16 + 1 § 924(c) count	146 Months
Rapist of a 10-year-old child U.S.S.G. § 2A3.1(a) & (B)(4)(2)(A)	Base Offense Level 27 + 4 for young child = 31	135 Months
Child pornographer who photographs a 12-year-old in sexual positions U.S.S.G. § 2G2.1(a) & (b)	Base Offense Level 27 + 2 for young child = 29	108 Months
Criminal who provides weapons to support a foreign terrorist organization U.S.S.G. § 2M5.3(a) & (b)	Base Offense Level 26 + 2 for weapons = 28	97 Months
Criminal who detonates a bomb in an aircraft U.S.S.G. § 2K1.4(a)(1)	By cross reference to § 2A2.1(a)(1)	97 Months
Rapist U.S.S.G. § 2A3.1	Base Offense Level 27	87 Months

It would be myopic to suggest that drug trafficking is a non-violent offense,⁴⁶ but the *potential* for violence associated with Mr. Angelos' carrying a firearm to his drug deals certainly did not cause the kind of *actual violence* associated with aircraft hijacking, murder, and rape. Yet, as indicated in Table I, Mr. Angelos faced a prison term more than double the sentence of, for example, an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racially-motivated defendant who attacks a minority victim with the intent to kill and inflicts permanent or life-threatening injuries (210 months), or a second-degree murderer (168 months). Indeed, Mr. Angelos faced a prison term more than *five times as long* as the Guidelines sentence of someone who rapes a ten-year-old child (135 months) and more than eight times as long as that of a rapist (87 months).

In fact, on the very same day that Judge Cassell sentenced Weldon Angelos, he imposed sentence in another case, *United States v. Visinaiz*.⁴⁷ In the Visinaiz case, the defendant had beaten a 68-year-old woman to death by striking her in the head with a log, before hiding her body and then dumping it in a river, weighed down with cement blocks. The Sentencing Guidelines required a sentence for this brutal second-degree murder of between 210 to 262 months.⁴⁸ Upon the Government's recommendation, Judge Cassell imposed a sentence of 262 months, which was less than half the sentence he was compelled to impose on Mr. Angelos.

⁴⁶ Harmelin, at 1002 (Kennedy J., concurring).

⁴⁷ 344 F. Supp. 2d 1310 (2004).

⁴⁸ U.S.S.G. § 2A1.2 (offense level of 33) + § 3A1.1(b) (two-level increase for vulnerable victim) + § 3C1.1 (two-level increase for obstruction of justice).

But despite that contrasting experience and notwithstanding all the above considerations, controlling precedent required Judge Cassell to reject Mr. Angelos' constitutional challenges and Judge Cassell imposed the mandatory 55-years sentence. Troubled by an unjust but unavoidable sentence, Judge Cassell wrote to the Office of the Pardon Attorney, asking the President to commute Mr. Angelos' sentence to no more than 18 years in prison (the average recommended by jurors in the case).⁴⁹ He also recommended that Congress modify § 924(c) so that its harsh provisions for 25-year multiple sentences apply only to "true" recidivist drug offenders: those who have been sent to prison for a particular crime, but who have failed to learn their lesson and repeat the same crime after release.⁵⁰ Judge Cassell also testified about the *Angelos* case, twice, when appearing before the House Subcommittee on Crime, Terrorism and Homeland Security in 2006 and 2007.⁵¹

B. The Case of Marion Hungerford

Another case illustrating the cruelly harsh results that can emanate from the "stacking effect" of § 924(c) is *United States v. Hungerford*,⁵² a case from the Ninth Circuit Court of Appeals. Although Marion Hungerford never held a weapon during the robberies that her boyfriend carried out, she was involved in the planning of the crimes and she enjoyed the spoils of the offense. She would not agree to a plea bargain, and in accordance with the law she was

⁴⁹ See *United States v. Angelos*, 345 F. Supp. 2d at 1261-62.

⁵⁰ See *id.* at 1262-63.

⁵¹ See *Oversight Hearing on United States v. Booker: One Year Later—Chaos or Status Quo? Before the House Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. (2006) (statement of Paul Cassell, Chair, Criminal Law Committee of the Judicial Conference); *Mandatory Minimum Sentencing Laws – The Issues*, *supra* note 4.

⁵² 465 F.3d 1113 (2006).

convicted of conspiracy and seven counts of robbery and using a firearm in relation to a crime of violence.⁵³ Because of the seven stacked § 924(c) counts, Hungerford was sentenced to slightly more than 159 years in prison.⁵⁴ Although the evidence indicated that Marion Hungerford suffered from a severe case of borderline personality disorder,⁵⁵ the Ninth Circuit followed established precedent, rejected her claims, and affirmed her sentence.⁵⁶

In short, as the above two cases illustrate, mandatory minimum sentencing laws can be grenades: powerful, but crude, and lacking in the ability to distinguish meaningfully between serious offenders and those who are substantially less culpable. With mandatory minimum sentences, there is no discretion afforded to judges at either the trial or appellate level to correct sentences that are obviously greatly disproportionate to the offense.

PART IV: SUPPORT OF THE JUDICIAL CONFERENCE AND OTHERS FOR EFFORTS TO RESCIND MANDATORY MINIMUM STATUTES OR TO AMELIORATE THEIR DELETERIOUS EFFECTS

As the Conference has consistently opposed mandatory minimum sentencing provisions over the last five decades, we are pleased that Congress is taking steps to address the problems created by these statutes. Indeed, three bills have already been introduced, and additional approaches will likely be suggested by Congressional members.

⁵³ *Id.* at 1114.

⁵⁴ *Id.* at 1119.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1118.

A. Previous Suggested Approaches

Approximately 170 mandatory minimum sentencing provisions are found throughout the federal criminal code. Any thorough reform should ultimately address all of them. In considering what approach to take, Congress can draw on the views of many knowledgeable observers who have considered the question over the years. The Judicial Conference has offered several ideas in the past, which might usefully serve as a basis for reform now. For example, the Conference has long sought the repeal of mandatory minimum sentences.⁵⁷ As interim or partial solutions, the Judicial Conference has supported other measures. In September 1991, the Judicial Conference approved a proposed statutory amendment that would provide district judges with authority to impose a sentence below a mandatory minimum when a defendant has limited involvement in an offense.⁵⁸ In 1993, the Conference endorsed a proposal offered by Judge William W. Wilkins, Jr., in his capacity as chair of the Sentencing Commission, in which the guidelines would trump the statutory mandatory minimum.⁵⁹

Over the years, at the same time that the Conference has been maintaining its opposition to mandatory minimum sentences, several Members of Congress have proposed alternatives to them. In February 1993, Representative Don Edwards introduced the Sentencing Uniformity Act of 1993. The Act sought to amend the federal criminal code and other federal laws to abolish

⁵⁷ See *supra* notes 24 and 25.

⁵⁸ *Supra* note 23.

⁵⁹ *Supra* note 26. See also Paul J. Hofer, *The Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 FED. SENTENCING REP. 2, at 63 (September 1993) (explaining that Judge Wilkins' proposal was seen as "too sweeping" by Congress).

mandatory minimums.⁶⁰ Although the bill had 36 co-sponsors, it never left the subcommittee. Later that year, Senator Orrin G. Hatch, citing the Sentencing Commission's special report on mandatory minimums, suggested that Congress should begin using methods other than mandatory minimums to shape sentencing policy. Among the recommendations cited were: (1) specific statutory directives to the Sentencing Commission (e.g., instructing the Commission to adjust the guidelines by a specific number of levels), (2) general directives (e.g., highlighting Congress' concerns for the Commission's consideration when amending the guidelines), (3) increased statutory maximums, and (4) diligent oversight of federal sentencing policy (e.g., relying on data and research, conducting oversight hearings).⁶¹

Simultaneously with the Judicial Conference, groups such as the American Bar Association⁶² and the Sentencing Project⁶³ have called for the outright repeal of all mandatory minimums. The Constitution Project has called for the enactment of mandatory minimum sentences "only in the most extraordinary circumstances."⁶⁴ The members of Families Against Mandatory Minimums (FAMM) have been active over the years in the debate concerning mandatory minimums and, true to the name of their organization, they have repeatedly challenged

⁶⁰ H.R. 957, 103rd Congress (February 7, 1993).

⁶¹ See Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

⁶² See American Bar Association, Justice Kennedy Commission, *Reports with Recommendations to the House of Delegates* 9 (Aug. 2004).

⁶³ Ryan S. King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* (2007), available at <http://sentencingproject.org/Admin/Documents/publications/sentencingreformforweb.pdf>.

⁶⁴ Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report* (March 15, 2006), available at http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf.

“inflexible and excessive penalties required by mandatory sentencing laws.”⁶⁵ They have traditionally supported three primary strategies to be used in lieu of mandatory minimums.

First, they have recommended restoring sentencing discretion to judges. To insure a judge’s decision will meet standards for appropriate punishment, the prosecutor or the defendant would be able to appeal the judge’s sentence.⁶⁶ Second, FAMM supports the use of sentencing guidelines. Finally, FAMM recommends that Congress consider sentencing alternatives--such as substance abuse treatment, drug court supervision, probation, and community correctional programs--as well as incarceration.⁶⁷

Congress could use the Sentencing Commission as a starting point for reform. Congress created the Commission in 1984 as part of its efforts to reduce sentencing disparities and improve the transparency of federal sentencing. The irony, however, is that Congress has created two conflicting federal sentencing systems: the Guidelines system and mandatory minimum statutes.

While guidelines and mandatory minimums can occasionally be reconciled,⁶⁸ far more often they seem to cut in opposite directions. As the Sentencing Commission has cogently explained, the two systems are “structurally and functionally at odds.”⁶⁹ In the *Angelos* case, for

⁶⁵ Families Against Mandatory Minimums, FAMMGRAM, *The Case Against Mandatory Minimums* (Winter 2005), available at <http://www.famm.org/Repository/Files/PrimerFinal.pdf>.

⁶⁶ *Id.* See also, Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259 (July 2002) (suggesting that prosecutorial sentence appeals maintain judicial discretion while at the same time providing a mechanism for correcting judicial mistakes, including “unreasonable” sentences).

⁶⁷ *Id.*

⁶⁸ See, e.g., 18 U.S.C. §§ 3553(e) and (f).

⁶⁹ See United States Sentencing Commission, *Special Report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System* 25 (August 1991).

example, the guidelines called for a sentence for Mr. Angelos that was more than forty years lower than what he ultimately received as a result of mandatory minimum penalties. Moreover, because of the transparency of the Guidelines system, it was possible to calculate precisely how far Angelos' sentence exceeded what he would have received for committing other more serious crimes such as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape.

In reforming the system today, Congress should, at a minimum, examine offenses in which mandatory minimum provisions have produced sentences significantly different from those produced by the Guidelines. As noted, the Judicial Conference has previously endorsed a proposal that would allow the court to "depart" from the mandatory minimum sentence to impose any sentence that would be proper under the Sentencing Guidelines.⁷⁰

In short, there are a variety of ways to address and ameliorate the unintended and deleterious effects of mandatory minimum sentencing provisions: from outright repeal to other more incremental steps. The Judicial Conference is supportive of Congress' efforts to make a thoughtful and thorough assessment of this continuing problem.

B. The Need to Unstack § 924(c) Penalties

The Conference recognizes the significance and scope of any undertaking to revise the current mandatory minimum regime. At the same time, we hope that the Congress will attempt to identify expeditiously and address those most egregious mandatory minimum provisions that produce the unfair, harshest, and most irrational results in the cases sentenced under their

⁷⁰ *Supra* notes 23 and 26.

provisions. The Conference, at the recommendation of the Criminal Law Committee, has identified one such provision—the stacking aspect of § 924(c) penalties—and has explicitly endorsed seeking legislation that would unstack § 924(c) penalties and permit the statute to operate as a true recidivist statute.⁷¹

To understand the basis for this recommendation, a familiarity with the history of this section is instructive. Title 18 U.S.C. § 924(c) was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968, which had been prompted by the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the “increasing rate of crime and lawlessness and the growing use of firearms in violent crime.”⁷² Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose,⁷³ and only a few statements made during floor debate are available.⁷⁴

As originally enacted, § 924(c) gave judges considerable discretion in sentencing and was not nearly as harsh as it has become. When passed in 1968, § 924(c) imposed an enhancement of “not less than one year nor more than ten years” for the person who “uses a firearm to commit any felony for which he may be prosecuted in a court of the United States” or “carries a firearm unlawfully during the commission of any felony for which he may be

⁷¹ JCUS-MAR 09, pp. 16-17.

⁷² H.R. REP. NO. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412.

⁷³ Cf. *Jung v. Association of American Medical Colleges*, 339 F.Supp.2d 26,40, 2004 WL 1803198 at * 11 (D.D.C. 2004) (noting interpretive difficulties created when legislation is passed without legislative hearings).

⁷⁴ *Basic v. United States*, 446 U.S. 398, 405 (1980).

prosecuted in a court of the United States.”⁷⁵ If the person was convicted of a “second or subsequent” violation of § 924(c), the additional penalty was “not less than 2 nor more than 25 years,” which could not run “concurrently with any term of imprisonment imposed for the commission of such felony.”⁷⁶

One of the first questions involving the statute concerned whether a defendant could be sentenced under § 924(c) when the underlying felony statute already included an enhancement for use of a firearm. In 1972, in *Simpson v. United States*,⁷⁷ the Supreme Court, relying on floor statements from Representative Poff, held that “the purpose of § 924(c) is already served whenever the substantive federal offense provides enhanced punishment for the use of a dangerous weapon” and that “to construe the statute to allow the additional sentence authorized by § 924(c) to be pyramided upon a sentence already enhanced under § 2113(c) would violate the established rule that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’”⁷⁸

In 1980, in *Busic v. United States*,⁷⁹ the Court reaffirmed its decision in *Simpson* and went one step further, holding that prosecutors could not file a § 924(c) count instead of the enhancement provided for in the underlying federal statute. In support of this decision, the Court noted that, in 1971, the Department of Justice had advised prosecutors not to proceed under

⁷⁵ *Simpson v. United States*, 435 U.S. 6, 7-8 (1978) (citing 18 U.S.C. § 924(c) (1968)).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 13, 14.

⁷⁹ 446 U.S. 398 (1980).

§ 924(c) if the predicate felony statute provided for “increased penalties where a firearm was used in the commission of the offense.”⁸⁰

In response to *Simpson* and *Busic*, Congress amended § 924(c) in 1984 “so that its sentencing enhancement would apply regardless of whether the underlying felony statute ‘provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.’”⁸¹ The 1984 amendment also established a five-year mandatory minimum for use of a firearm during commission of a crime of violence.⁸²

In 1986, as part of the Firearms Owner’s Protection Act, Congress amended § 924(c) so that it also applied to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.⁸³ In later amendments, Congress increased the penalty for a “second or subsequent” § 924(c) conviction to a mandatory minimum of twenty years, which twenty years later became twenty-five years.⁸⁴

The increased penalties for “second or subsequent” § 924(c) convictions gave rise to litigation over whether multiple convictions in the same proceeding constituted “second or subsequent” convictions subject to the enhanced penalty. In essence, the issue was whether Congress intended § 924(c) to be a “true” recidivist statute or one that applies enhanced penalties to successive counts of carrying a firearm during a crime of violence within a single proceeding.

⁸⁰ *Id.* at 406 (quoting 19 U.S. Atty’s Bull. No. 3, p.63 (U.S. Dept. of Justice, 1981)).

⁸¹ *United States v. Gonzales*, 520 U.S. 1, 10 (1997)(citing Comprehensive Crime Control Act of 1984, Pub. L. 98-47, § 1005(a), 98 Stat. 2128-39).

⁸² *Id.*

⁸³ Pub. L. No. 99-308, § 104(a)(2)(A)-(F).

⁸⁴ Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (1988).

Most courts, including the Tenth Circuit, did not apply the twenty-year penalty when the “second” conviction was just the second § 924(c) count in an indictment.⁸⁵

In *Deal v. United States*,⁸⁶ however, the Supreme Court, in a six-to-three decision, construed the statute more broadly. Deal had been convicted of committing six different bank robberies on six different dates, each time using a gun. He was sentenced to five years for the first § 924(c) charge, and twenty years consecutive for each of the other five § 924(c) charges, for a total of 105 years. In affirming his sentence, the Court held that a “second or subsequent” conviction could arise from a single prosecution.⁸⁷ The Court stated, “We choose to follow the language of the statute, which give no indication that punishment of those who fail to learn the ‘lesson’ of prior conviction or of prior punishment is the sole purpose of § 924(c)(1), to the exclusion of other penal goals such as taking repeat offenders off the streets for especially long periods or simply visiting society’s retribution upon repeat offenders more severely.”⁸⁸

Less than two weeks after *Deal*, the Court again interpreted the statute in *Smith v. United States*.⁸⁹ In *Smith*, the Court held that exchanging a gun for drugs constitutes “use” of a firearm “during and in relation to . . . [a] drug trafficking crime.” The Court rejected the defendant’s argument that “use” of a firearm required use as a *weapon*.⁹⁰ The majority noted that when

⁸⁵ See, e.g., *United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

⁸⁶ 508 U.S. 129 (1993).

⁸⁷ *Id.* at 133-34.

⁸⁸ *Id.* at 136.

⁸⁹ 508 U.S. 223 (1993).

⁹⁰ *Id.* at 228.

Congress enacted the relevant version of § 924(c), it was no doubt responding to concerns that drugs and guns were a “dangerous combination.”⁹¹ Justice Scalia argued in dissent that it was “significant” that the portion of § 924(c) relating to drug trafficking was affiliated with the pre-existing provision pertaining to use of a firearm in relation to a crime of violence.⁹² He therefore construed the word “use” in relation to a crime of violence to mean use as a weapon, and concluded that this definition of use should carry over to the addition of drug trafficking to the statute.⁹³

Additional rulings further broadened the applicability and effect of § 924(c). The Court again interpreted § 924(c) in *United States v. Gonzales*,⁹⁴ where it held that a sentence under § 924(c) could not be served concurrently with an unrelated sentence from a state conviction.⁹⁵ Finally, in *Muscarello v. United States*,⁹⁶ the Court held that, as used in § 924(c), “carries” is not limited to a firearm that is carried by the felon on his person, but also includes a gun found in the glove compartment of a vehicle that was present at the drug transaction.

The Conference recommends that, at the least, Congress should establish § 924(c) as a “true” recidivist statute. This would be particularly important in cases like *Angelos* that do not involve direct violence, but instead only the possession of a gun. A “true” recidivist statute would

⁹¹ *Id.* at 239.

⁹² *Id.* at 244 (Scalia J., dissenting).

⁹³ *Id.*

⁹⁴ 520 U.S. 1 (1997).

⁹⁵ *Id.* at 9-10.

⁹⁶ 524 U.S. 125 (1998).

mean that the "second and subsequent" enhancement would apply only to defendants who have been previously convicted of a § 924(c) offense prior to the firearm possession that led to the § 924(c) charge being sentenced. It is an approach that we believe makes good sense.

CONCLUSION

The Conference supports Congress's efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. A predecessor chair of the Criminal Law Committee of the Judicial Conference, the late and wise Senior Judge Vincent L. Broderick, summarized the conclusion that many reach concerning mandatory minimum sentences when he testified about the mandatory minimum sentences before the House Judiciary Subcommittee on Crime and Criminal Justice of the House Committee in 1993. What he said then still makes a great deal of sense today.

I firmly believe that any reasonable person who exposes himself or herself to this [mandatory minimum] system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality. In our view, the Sentencing Commission is the appropriate institution to carry out this important task.⁹⁷

I hope that Congress will act swiftly to reform mandatory minimums to eliminate the great injustices that they are creating.

⁹⁷ Senior Judge Vincent L. Broderick, Southern District of New York, speaking for the Judicial Conference Committee on Criminal Law in testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, July 28, 1993.

Mr. SCOTT. Thank you.
Mr. Norquist?

**TESTIMONY OF GROVER G. NORQUIST, PRESIDENT,
AMERICANS FOR TAX REFORM, WASHINGTON, DC**

Mr. NORQUIST. Okay. Thank you. My written testimony was skillfully written by my wonderful staff. It is worth reading repeat-

edly, and I commend it to everyone as holiday gifts for loved ones. I would like to make three observations today.

The first is that all government costs money. Nothing is for free. Those of us who try and limit the cost and destructiveness of government sometimes divide government between the things that are vaguely mentioned in the Constitution, and we don't focus on those, and those things that are silly and destructive and we focus only on the cost there.

But even the worthwhile, important parts of government, national defense and the judicial system, cost money. And if we are going to focus on the cost of government, that means we should also keep an eye on cost of the legitimate functions of government.

Those people who defended the Bush spending legacy, both of them, would sometimes say well, if you don't count Iraq he didn't spend all that much. But Iraq wasn't free. However useful you thought it was, it wasn't for free. It cost money. The French weren't paying for it.

And the same thing is true for our prison system. It costs money and we need to look at how to keep these costs down. I have two suggestions, and I think mandatory minimums sometimes run up the costs of incarceration.

And my two suggestions are one, sunseting those laws that force government spending and mandatory minimums that force other parts of the government to spend a lot of money. If we would revisit these every 4 years, say they lapse, and unless we look at them it would at least mean that they don't continue year after year without being looked at, debated and refocused.

After September 11, I testified on the Senate side, the Judiciary Committee on the PATRIOT Act, and they had this 300-page Patriot Act they were going to pass, and I said, "I am not a lawyer, but my suggestion is that you all read this first before voting on it," which the Senators all politely laughed. They had no intention of reading it and every intention of passing it. I said, "I understand that. Then sunset it at 4 years."

So we are passing it now as a political statement. Let us look in 4 years and see which were the useful bits and which were not useful and which were dangerous. And the same thing I think should be done with mandatory minimums.

When heads are cool, when we are not in front of TV cameras saying that we are against a particular crime and proving it by putting a mandatory minimum in, let us take a look at it in 4 years again and again and again. Some of them you may want to keep, but some may want to reduce, some may want to eliminate.

And the last thought is that one of the questions to ask is not whether there should be a mandatory minimum for certain Federal crimes, but whether certain crimes should be dealt with by the Federal Government. Should they perhaps be State crimes?

There is always the temptation for elected officials to go in front of the cameras and make something that the States are handling perfectly well a Federal crime for political reasons, and I would argue for sunseting Federal crimes in the first place, because a lot of what is listed in the mandatory minimums could perfectly well be handled at the State level if they wanted to have mandatory minimums. They could or they couldn't.

So there is a separate question of which crimes actually need to be Federal crimes, national crimes, as opposed to local and State crimes. Thank you.

[The prepared statement of Mr. Norquist follows:]

PREPARED STATEMENT OF GROVER G. NORQUIST

Statement of Grover G. Norquist
President, Americans for Tax Reform
Subcommittee on Crime, Terrorism, and Homeland Security
House Committee on the Judiciary
July 14, 2009

Mr. Chairman, my name is Grover Norquist and I am the President of Americans for Tax Reform. Thank you for inviting me to testify today on the subject of mandatory minimum sentences.

Americans for Tax Reform is dedicated to reducing the influence of government in our lives. The first and most important way that ATR works toward this end is by reducing the burden of taxation on all taxpayers, but for years ATR has also fought the creeping federal regulatory burden and otherwise sought to promote individuals' control of their own lives rather than government.

We tend to view each and every federal program skeptically. We want to know if its benefits are worth the cost both in terms of money - that is, the taxes that are necessary to subsidize the program - and in terms of freedom - that is, is this an activity that free people should be doing for themselves or is this something only the government can do?

Taking the second consideration first, I think maintaining public safety and order is a legitimate function of government. But while fighting crime might be a responsibility of the state, my skepticism about government action extends even to popular-sounding anti-crime initiatives. I think it goes without saying that the Justice Department is no less interested in accumulating power than are the IRS, EPA or FDA. As a result, I don't think every law purportedly designed to protect us from terrorists or homegrown criminals is justifiable. Indeed, I have spoken out in the past against major provisions of the Patriot Act and against the use of secret evidence.

Against this backdrop, I would like to share my thoughts on mandatory minimum sentencing laws. I recognize that these laws might not constitute a government program *per se*, but their use certainly constitutes government policy.

To begin with, their pedigree makes them highly suspect. As with so many other federal programs, mandatory minimums were hatched by the Left, later embraced by the Right, and have been maintained by a bipartisan majority.

The Left's support for mandatory minimums was well-intentioned if ill-conceived. Their goal was to eliminate disparities in sentencing and thereby make the criminal justice

system fairer. The idea that one judge might give two drug traffickers completely different sentences was questionable on its face. But what made it intolerable was that the disparity too often seemed to be a product of the color of the defendant's face. The Left's answer was to eliminate judicial discretion and force all judges to give the same sentence.

Conservatives later saw virtue in mandatory minimums not only as a tool for stopping a few errant liberal judges from handing down light sentences, but as a means to increase sentences across the board. Thus, the minimums established by Congress- especially in the 1980s during the height of the crack cocaine scare - were not really minimums at all, but rather uniformly tough sentences.

We should know by now to beware of easy solutions. As H.L. Mencken said, "There is always an easy solution to every human problem – neat, plausible, and wrong." Today, a generation later, it is increasingly clear that adoption of mandatory minimums, while a neat and plausible response to sentencing disparities, was the wrong solution.

First, the discretion exercised by judges was not extinguished but simply transferred to prosecutors. Prosecutors now have control over sentencing through their charging decisions. Unsurprisingly, politically-appointed and elected prosecutors are no less foolproof than judges. Both sides of the political aisle can point to examples of abuse in prosecutorial discretion, including, most recently, the decision to seek lengthy prison sentences for the Texas border agents. President Bush fixed that error before he left office by granting commutations to both men, but it would be preferable to have judges with the authority to review and check prosecutorial decisions.

The biggest problem from the perspective of the taxpayer, however, is that mandatory minimum sentencing policies have proven prohibitively expensive. In 2008, American taxpayers spent over \$5.4 billion on federal prisons¹, a 925 percent increase since 1982.² This explosion in costs is driven by the expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums. Drug offenders are the largest category of offenders entering federal prisons each year. One third of all individuals sentenced in federal courts each year are drug offenders. And these convicts are getting long sentences. In 2008, more than two-thirds of all drug offenders receive a mandatory minimum sentence, with most receiving a ten-year minimum.

¹ U.S. DEP'T OF JUSTICE, FY 2009 BUDGET AND PERFORMANCE SUMMARY, FEDERAL PRISON SYSTEM, available at http://www.usdoj.gov/jmd/2009summary/html/127_bop.htm (last visited June 8, 2009).

² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (Apr. 2006), at 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf> (last visited July 2, 2009).

The jump in corrections costs at the state level has been equally dramatic. State corrections spending has ballooned from \$6 billion in 1982 to over \$50 billion in 2008. These skyrocketing costs are hitting states at a time when they are already being forced to cut back due to the bad economy.

The benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become a sort of poor man's Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself.

Yet all is not lost. Center-right governors like Rick Perry of Texas are trying new approaches. A couple of years ago, Texas started sending low-level, first-time felony drug users to mandatory drug treatment rather than prison. Before Governor Perry, it was Republican Governor – John Engler of Michigan – who signed into law the first major repeal of state mandatory minimum sentences. Engler's action saved Michigan taxpayers \$40 million in prison costs without jeopardizing public safety.

In closing, I want to note that questioning the wisdom of mandatory minimums has nothing to do with being soft on crime. I believe in strong and swift punishment when appropriate. I support the death penalty for murderers. But the government has a responsibility to use taxpayer money wisely. Viewed through the skeptical eye I train on all other government programs, I have concluded that mandatory minimum sentencing policies are not worth the high cost to America's taxpayers.

Mr. SCOTT. Thank you.
Mr. Sullivan?

**TESTIMONY OF MICHAEL J. SULLIVAN, PARTNER,
ASHCROFT SULLIVAN, LLC, BOSTON, MA**

Mr. SULLIVAN. Good morning, Mr. Chairman. Thank you for giving me an opportunity, and honorable Members of the Committee, to share with you some of my professional experiences dealing with crime and punishment, and the role that minimum mandatory sentencing has played in our pursuit of justice in crime reduction efforts.

Minimum mandatories have been around since the beginning of sentencing, with death and life sentences being imposed for the most serious offenses. Congress and State legislators have listened to the concerns of law abiding citizens about escalating violence, a perceived lenient judiciary and a perceived revolving door of the criminal justice system.

The response, both in our Nation's capital and throughout our State capitals have been to impose greater certainty and uniformity in punishment, with minimum mandatory sentencing playing a greater role and a more important role in addressing recidivism through longer incarcerations, especially for those crimes that pose the greatest risk to society and thus to your constituents.

With the rising tide of violent crime, Congress passed major initiatives, including sentencing reform and the establishment of the United States Sentencing Commission. With that as a backdrop, since the passage, prison population has increased and crime rates have dropped.

There should be no doubt there is a correlation between prison population and crime rates. Criminals oftentimes commit multiple offenses, most of which they are never caught for or charged with. By convicting them of a particular crime and incapacitating them for the offense, scores of people avoid being victimized and crime rates are affected.

So instead of asking the question if crime rates are down, why are prisons overcrowded, one could simply State crime rates are down because prisons are overcrowded. While the early goals of the passage of minimum mandatory offenses dealt with uniformity, just punishment and deterrents, collateral benefits have emerged over the last 20 years in the use of cooperators to achieve even greater results for the government and, thus, for the American people.

Lower level drug dealing offenders faced with serious prison time, seek cooperation with the government as an opportunity to shave time off of their sentences, and the government is able to use lower level drug dealers to open up much larger investigations, targeting the organization in its highest Ranking Members.

Without minimum mandatories, especially in our post-*Booker* world, there would be little or no incentive for these defendants to cooperate with the government. Without their cooperation, the government would be at a distinct disadvantage in developing investigations against these regional, national and international organizations.

The critics of mandatory minimums, especially for drug crimes, argue that users, low level and first time offenders are filling up our prisons at a great cost and with little benefit. While that

sounds compelling, and has been repeated so many times, many take it as a fact, the numbers just don't bear it out.

A review of the Massachusetts State prison population a few years ago yielded some contrary data when it showed that the profile of the drug dealer sentenced to the State prison had a long criminal history.

Over 20 adult arraignments, over 20 juvenile arraignments and multiple convictions, including, oftentimes, multiple drug-related charges. In most instances, they will be viewed, if not by a strict reading of the statutes, certainly by the public as career offenders who have spent the better part of their adult life committing crimes and victimizing people in the greater community.

Recently, I heard that a district attorney in Massachusetts was quoted as saying, "fewer than 3 percent of the Massachusetts State prison population was there only due to a drug dealing conviction." A closer examination of the Federal prison population yields similar results and allows the informed to reach the conclusion, "You have to earn your way into Federal prison."

As you look at ways to strengthen the criminal justice system and reduce recidivism, I would encourage you to avoid the rhetoric from both sides. Review the history of the Federal prison population.

Begin looking at and collecting sentencing trends in this post-*Booker* environment, examine crime statistics and the impact that crime reduction has on victimization, and when you do, I am confident you will come to a conclusion that mandatory minimum sentencing has a role to play in Congress' sentencing scheme.

I know that members of law enforcement and prosecutor's offices see it as a very valuable tool. As long as recidivism continues to pose such an insurmountable challenge within our criminal justice system, longer prison sentences for violent offenders provide the best tool to protect our law abiding citizens.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF MICHAEL J. SULLIVAN

Statement of Michael J. Sullivan
Partner, Ashcroft Sullivan, LLC
before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives
Mandatory Minimums and Unintended Consequences

July 14, 2009

Chairman Scott, Ranking Member Gohmert, and Members of the Committee, thank you for the opportunity to appear before you to discuss mandatory minimum sentencing policy.

Since the early days of our nation, Congress has recognized its important and legitimate role in the formulation of appropriate criminal sentences, and has prudently exercised this responsibility in setting fair and effective sentences, including minimum mandatory sentences, for certain serious offenses and/or offenders.

History has shown great leadership and foresight by legislative bodies at both the federal and state levels in understanding the important value of mandatory (minimum) sentences, as both a deterrent for potential offenders and a safety net against unbridled judicial sentencing discretion. This insight dates back to 1790 and is shown throughout the 19th and 20th centuries¹ and includes crimes such as murder, carjacking resulting in death, aggravated sexual assault, gun and drug dealing offenses, reentry after deportation, manufacturing and distribution of child pornography and national security type offenses. Throughout our history there are scores of examples of Congress proposing and enacting mandatory (minimum) sentences to address public safety and public policy concerns.

Mandatory minimum sentencing was first introduced as a comprehensive scheme at the federal level in 1984 with the creation of the United States Sentencing Commission. The principal, though not exclusive, purpose of the passage of the legislation creating the United States Sentencing Commission was to provide greater consistency and uniformity in federal sentencing.² Prior to the establishment of the United States Sentencing Commission and the development of a body of sentencing factors, oftentimes it was difficult to reconcile sentences from jurisdiction to jurisdiction or between similar conduct by defendants with comparable criminal histories. The goal beyond this important goal of uniformity in sentencing was to have a sentencing system that provided an appropriate punishment, helped to send the right deterrent message, ultimately leading to a reduction of crime and working toward improving a suspicious public's confidence in our criminal justice system. History has shown that the goals of uniformity, appropriate punishment, deterrence and building public confidence were achieved.

¹ United States Sentencing Commission, 1991 *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Justice System* (as directed by section 1706 of Pub. L. 101-647) at 6-7 (hereinafter "USSC 1991 Report").

² *Id.* at 14-15.

Congress' interest and commitment to fair and effective sentencing as an important public policy didn't stop with the passage and establishment of the United States Sentencing Commission. Congress recognized the important correlation between crime and punishment, the danger of drug dealers being armed, and the growing criminal use of guns as part of the drug dealing trade and passed the Comprehensive Crime Control Act of 1984. The Act established certain minimum sentences for using a firearm during the commission of drug trafficking offenses.³ As part of that comprehensive legislation, Congress also drew a line in the sand around schools and playgrounds and said clearly, especially don't sell drugs there! President Ronald Reagan said in 1984 "That legislation . . . is the most comprehensive revision of federal criminal statutes to be enacted in many years."

Congress demonstrated its continued commitment to positively impacting public safety through crime reduction and greater uniformity in sentencing by enacting the Anti-Drug Abuse Acts of 1986⁴ and 1988.⁵ These effective, crime-reducing laws were enacted during a Democratic-controlled Congress and received strong bipartisan support.⁶ This strong bipartisan support reflected the public's expectation that Congress should continue to pass laws that have certainty in consequences for those that fail to comply.

Congress was not finished with its work and support of mandatory minimums and passed other laws with mandatory minimums, including provisions of the 1990 Crime Control Act, which provided a 10-year mandatory sentence for organizing, managing, or supervising a continuing financial crimes enterprise.⁷

The mandatory minimum sentencing scheme for drug crimes oftentimes receives attention, scrutiny, and some criticism. This may be due to the victimization these crimes have on law abiding citizens, families, neighborhoods, and our health care systems together with the violence that is part of the drug dealing business.⁸ However, many other crimes and criminal histories appropriately trigger minimum sentences at the federal and state levels. For example, we can look at certain gun violations, crimes against children, violent sexual offenses, civil rights violations, and even certain financial crimes and find that Congress and many state legislatures have had the wisdom to and are willing to shape public policy and sentencing outcomes with the enactment of mandatory minimum sentences.

The 108th Congress alone enacted "a flurry of new or enhanced mandatory minimum sentencing provisions." These included, the PROTECT Act ("Amber Alert"), the Unborn

³ Pub. L. 98-473, 98 Stat. 1976 (1984).

⁴ Pub. L. 99-570, 100 Stat. 3207 (1986).

⁵ Pub. L. 100-690, 102 Stat. 4181 (1988).

⁶ The Anti-Drug Abuse Act of 1986 had strong bipartisan support: 207 Democratic and 94 Republican House co-sponsors of H.R. 5484, and 15 Democratic and 14 Republican Senate co-sponsors of S. 2878.

⁷ Pub. L. 101-647, 104 Stat. 4789 (1990).

⁸ Drug offenders charged with another offense were most often charged in tandem with a firearm offense (57% of offenders charged with a drug crime were charged in tandem with a firearm offense. Scalia, John. (2001). Office of Justice Programs, Bureau of Justice Statistics *Special Report: Federal Drug Offenders, 1999, with trends: 1984-1999* (NCJ 187285) (hereinafter "BJS August 2001 Report"). Washington, DC: U.S. Department of Justice. Retrieved from Bureau of Justice Statistics reports online via DOJ access:

<http://www.ojp.usdoj.gov/bjs/pub/pdf/fdo99.pdf>

Victims of Violence Act, the Identity Theft Penalty Enforcement Act, the Intelligence Reform and Terrorism Prevention Act, the Anti-Terrorism and Port Security Act of 2003.⁹

The point is quite simple: mandatory minimums are an important legislative tool to clearly communicate to the American people the value that Congress puts on crime prevention, reduction of victimization and appropriate punishment. So there we have it, Congress has always played an important part, both substantively and as a leadership body, in a national crime and victimization reduction effort with remarkable results. The branch of government closest to the people they serve must continue to play this important public safety role. Many people closest to the criminal justice system – police, prosecutors, victims, community groups – recognize that the leadership of Congress in this area is as important today as any time in our nation’s history. And, in light of the recent decisions by the United States Supreme Court, beginning with *United States v. Booker*¹⁰ and the cases that have followed *Booker* that have increased the opportunity for sentencing disparity, Congress’ role is even more important.

The question that needs to be asked and answered is “Has the role that Congress played in sentencing, including the passage of mandatory minimum sentences, had an impact on public safety and crime?” The answer to that question can easily be found in crime statistics and is buttressed by anecdotal story after story from across our nation. Crime rates over the past 30 years certainly paint a picture of continuing success of reducing crime and victimization through sound public policy. As these numbers show, our nation has experienced a substantial reduction in violent crime over the past 30 years. This achievement was not by accident, but by design. The formula for success was to ensure an appropriate punishment at the federal level for serious criminal offenders. This strategy once showing success has been replicated across our nation by state legislatures. In addition, one only has to listen to their constituents to learn about parks and playgrounds reclaimed, young children being able to walk to school without fear, and law abiding citizens being able to exercise their God given right to peaceful enjoyment of their home and their neighborhood.

Let’s look at the crime statistics, comparing where we were back in the early and mid-1980s that captured the nation and called upon Congress to do something, to the reduced crime levels of today that are a product of Congress’ tough-on-crime sentencing policies since 1984.

- According to the Department of Justice, the proportion of drug defendants sentenced to a term of imprisonment increased from 72% in 1984 to 89% in 1999; nearly 2/3 of those sentenced were subject to a statutory minimum prison term¹¹
- Though the number of drug offenders incarcerated has greatly increased, a 2007 FBI CIUS report shows the violent crime rate in America has greatly declined. The violent crime rate (per 100,000 inhabitants) was down 173.7 in 2007 compared to

⁹ U.S. Congressional Research Service. *Federal Mandatory Minimum Sentencing Statutes: Legislative Proposals in the 108th Congress* (RS21597; Dec. 17, 2004), by Charles Doyle.

¹⁰ *United States v. Booker*, 125 S. Ct. 738 (2005).

¹¹ BJS August 2001 Report.

1988. The year of lowest violent crime rate was 2004 with 463.2, followed by 2007 with 466.9. The highest was 1991 with 758.2.¹²

- the proportion of the sentence that drug offenders entering federal prison could expect to serve increased from 48% to 87%¹³. Mandatory minimum sentences are keeping serious offenders off our streets longer, keeping our communities safer.

In addition to these important goals being achieved -- uniformity in sentencing, certain offenses carrying certainty in punishment, and repeat violent offenders receiving enhanced punishment -- there has also been a collateral benefit of mandatory minimums. This collateral benefit deals with cooperation by the lower level offenders, providing critically important information to investigators and prosecutors that enhance investigations, identify more culpable and, in many instances, higher level players in the criminal organization. Mandatory minimums have allowed the government to make a case against the highest ranking members of national and international criminal organizations, from organized crime figures, to major drug traffickers, to those that manufacture child pornography. Nothing provides an incentive to cooperate with the government like the risk of a long mandatory sentence.

These hanging dark clouds of long prison sentences encourage offenders to help law enforcement to work their way up the criminal organization. Investigators and prosecutors across the country rely on the tools provided by Congress and state legislative bodies to open investigative windows into the organization and people of elaborate crime rings. Without the negotiation tool of mandatory minimum sentences, this crucial cooperation of lower level offenders might be impossible, and such access to the inside of the upper levels of the criminal organizations might be unattainable. This is particularly true as government prosecutors make cases against some of the most prolific, seemingly untouchable and very violent drug trafficking organizations. The heads of these organizations attempt to distance themselves from people and from the drugs. The mid-level offenders who often carry the large quantities of illicit drugs quickly see the value of cooperation in giving prosecutors information when facing long prison sentences. Statistics show that at the federal level, and I suspect at the state level as well, that more cooperation is provided to the government in drug investigations than any other type of crime.¹⁴ Speaking from my personal experience as a former federal prosecutor, repealing mandatory minimums would make it much more challenging than it already is to target the leadership of these organizations by taking away the incentive to cooperate. The American public would suffer the ham of elevated crime rates in exchange for relaxed sentencing policies for serious criminals.¹⁵

¹² See Table 1 of the Federal Bureau of Investigation, *Crime in the United States: 2007* (Sept. 2008). Washington, DC: U.S. Department of Justice. Available at: http://www.fbi.gov/ucr/cius2007/data/table_01.html; Retrieved: 07/09/2009.

¹³ BJS August 2001 Report.

¹⁴ According to the U.S. Department of Justice, 28% of convicted drug defendants received a reduced sentence for providing substantial assistance to prosecutors. BJS August 2001 Report.

¹⁵ See David Risley, *Mandatory Minimum Sentences: an Overview*. (May 2000) (discussing desensitization of judges and resulting trends of sentencing leniency in areas of high drug crime concentration). Available at: <http://www.drugwatch.org/Mandatory%20Minimum%20Sentences.htm>; Retrieved: 07/09/2009.

Congress has heard of the myths associated with mandatory minimum sentences, such as the unfairness of the sentence and that our prisons are filled with users and low level first time offenders. That information is simply not true. Several years ago, there was an effort by Families Against Mandatory Minimums and a handful of judges who wanted complete authority over sentencing to repeal all the minimum mandatory drug trafficking sentences in Massachusetts. They made the same arguments as above. However, an examination of the Massachusetts State prison population revealed that those being sent to the state prison for drug trafficking offenses were not first time, low level offenders. They had long criminal records (over thirty arraignments and over twenty adjudications and guilty findings). The criminal record of those being sent to the state prison in Massachusetts for drug offenses looked very similar to those being sent to prison for other violent offenses; they both had long criminal records and had victimized scores of people and their communities.

The federal story is similar in that though our federal prison population has grown over the last 30 years, very few are there as first offenders and only for drug related crimes. These convicted drug offenders are not the street corner dealers, but serious players in the intricate drug dealing operations that threaten our communities, trafficking substantial amounts of illicit drugs and contributing significantly to the violent crime rates in our country. In order to qualify for a federal mandatory minimum sentence of 5 years, a first-time offender must be in possession of a minimum of 500 grams of cocaine,¹⁶ which is the equivalent of 2,500 to 5,000 doses and an estimated street value of between \$32,500 and \$50,000 dollars.

- According to a 2001 study by the U.S. Department of Justice, in 1999, 62% of convicted drug defendants had committed a drug offense so serious they were subject to a statutory minimum prison term: 29% 60 months or less, 30% 61 to 120 months; 3% 121 months or more (including life).¹⁷
- According to 2008 U.S. Sentencing Commission data on prisoners under mandatory minimum sentences:
 - 6,905 (27.3%) drug offenders received mandatory minimums for 5-years; 9,882 (39.0%) received for 10-years; total = 16,787¹⁸
 - 10,359 (43.1%) drug offenders received mandatory minimum with no safety valve; 5,764 received mandatory minimum but safety valve (24.0%)¹⁹

Incarceration under a mandatory minimum sentence is infrequent for simple possession, accounting for approximately 2% – less than 800 – of all suspects merely investigated by U.S. prosecutors in 1999.²⁰ According to the testimony of Ricardo H. Hinojosa, Acting Chair of the U.S. Sentencing Commission, before the Subcommittee on May 21, 2009:

¹⁶ See U.S. Drug Enforcement Agency: *Federal Trafficking Penalties*. Available at: <http://www.usdoj.gov/dea/agency/penalties.htm>. Retrieved: 07/09/2009.

¹⁷ BJS August 2001 Report.

¹⁸ See Table 43 of the U.S. Sentencing Commission Datafile FY 2008 USSCFY08.

¹⁹ See Table 44 of the U.S. Sentencing Commission Datafile FY 2008. USSCFY08.

²⁰ BJS August 2001 Report, at 3. See Table 2, *Drug suspects evaluated for prosecution by U.S. Attorneys, by statutory offense and drug type, 1999*.

- In FY 2008, there were 105 federal cases for simple possession of crack cocaine, in which 58 offenders were subject to the statutory mandatory minimum penalty. 14.3% of crack cocaine offenders received the benefit of a safety valve provision compared to 43% of powder cocaine offenders²¹
- In FY 2007, there were 109 such cases, in which 49 offenders were subject to the statutory mandatory minimum penalty²²

Consider a 1997 Bureau of Justice Statistics survey of federal prison inmates that shows how many drug offenders reported they had a substantial role in the drug conspiracy for which they were convicted. Of those incarcerated drug offenders,

- 16% reported they were either an importer or manufacturer of illicit drugs; and
- 25% reported they were responsible for distributing drugs to street-level drug dealers (total = 41%)²³

The “safety valve”²⁴ implemented by Congress provides additional protection for first-time defendants without prior criminal history, who don’t use the threat of violence in committing their drug offense, and who aren’t the highly culpable offenders the mandatory minimum sentencing policy aims to target.

In closing, let me state that Congress should continue to examine our sentencing scheme. You should find opportunities to improve public safety through punishment and deterrence and you should be willing, especially in this post-*Booker* world, use minimum mandatory sentencing to accomplish the laudable goals that a Congress before you set out to achieve. Mr. Chairman, Ranking Member Gohmert, and Members of the Committee, thank you again for holding this very important hearing and allowing me to comment on the effectiveness of mandatory minimum sentencing. I will be glad to answer any question you may have.

²¹ Hinojosa, Ricardo H. Statement to the House, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security. *Unfairness in Federal Cocaine Sentencing: Is it time to Crack the 100 to 1 Disparity?*, Hearing, May 21, 2009. Available at: http://www.ussc.gov/testimony/Hinojosa_HouseTestimony_20090521.pdf. Accessed: 07/09/09.

²² *Id.*

²³ BJS August 2001 Report, at 11.

²⁴ *See*, 18 U.S.C. § 3553(f).

Mr. SCOTT. Thank you.
Mr. Bonner?

**TESTIMONY OF T.J. BONNER, PRESIDENT,
NATIONAL BORDER PATROL COUNCIL, CAMPO, CA**

Mr. BONNER. Chairman Scott, Ranking Member Gohmert, other distinguished Members of the Subcommittee, thank you for the opportunity to present the views of the 17,000 Border Patrol agents, frontline agents.

I want to focus today on one aspect of mandatory minimum sentencing, its application to law enforcement officers who are acting in good faith in the scope of their authority. Everyone is familiar with the case of Border Patrol agents Ignacio Ramos and Jose Compean and the unfortunate fallout of that prosecution, which resulted in the incarceration of two innocent men for lengthy periods, 11 and 12 years in Federal prison.

Although their sentences were ultimately commuted after they served 25 months in prison, the adverse effects continue to this day. They are convicted felons. Their hopes of gaining any type of employment that pays more than minimum wage are minimal. The damage done to those families can never be repaired.

But more importantly, I want to focus on what it has done to the law enforcement community in general, not just the Border Patrol, but other law enforcement agencies. A number of people have confided in me and other members of my organization, that they did not join the Border Patrol, and bear in mind the Border Patrol is engaged in the most aggressive recruiting campaign of its history, these people have confided that they ultimately turned down the job because of what happened to those two agents.

Others who did join have confided to us that it was a very difficult decision because of that prosecution. Some of these young men and women, while being trained at the Border Patrol Academy have pulled their instructors aside and said, "What exactly are the rules of engagement?"

And the instructor says, "Well you are entitled to defend yourself if somebody threatens your life." They say, "That is all good and fine on paper, but I look at the facts of the case involving agents Ramos and Compean, and that is exactly what they did, and they ended up being prosecuted."

And there is no good answer to tell those young men and women. Perhaps even more disturbing is the fact that you have a number of experienced officers out there who have quietly confided that they are not going to chase that person.

They will seize that load of narcotics, but they are not going to put their livelihood, their freedom on the line by chasing that person and engaging in a fire fight, because they fear the consequences of using justifiable deadly force, fearing that the provisions of 18 U.S.C. 924(c) are going to be turned against them.

And I realize that in a perfect world, that prosecution never would have happened. But obviously we do not live in a perfect world. The prosecution decided that they were going to levy this charge and the prosecutors have great discretion as to whether or not they are going to levy those charges.

In this case, it was a serious mistake to use that charge against those two agents. It happened. It tied the hands of the judge. This is a problem that needs to be addressed. As I said from the outset,

I am focusing on the effect on law enforcement. I realize that there are injustices that occur at both ends of the spectrum.

I am not an expert in criminal law. I am not an attorney, and I don't feel qualified to address all of the ramifications, but as a law enforcement officer who represents thousands of other law enforcement officers, I can certainly see the effects of having these mandatory minimum sentences apply to law enforcement officers who are presumed to be acting in good faith, and the overwhelming majority of them act in good faith.

Allowing judges to downwardly depart would not result in rogue officers being given a pass because judges could still throw the book at them, and I would strongly encourage judges to throw the book at law enforcement officers who abuse their authority.

If someone wakes up in the morning and decides that they are going to rob a 7-11 while in uniform using their service weapon, I have absolutely no sympathy for that individual.

But someone who goes out there and makes a split second decision, which is later Monday-morning quarterbacked, and the U.S. attorney decides that they are going to stack on a charge against them, that, to me, is unconscionable.

And it has affected not just the morale, but it has affected the ability of our law enforcement officers across the country to do their jobs effectively and safely, and it needs to be corrected. Thank you.

[The prepared statement of Mr. Bonner follows:]

PREPARED STATEMENT OF T.J. BONNER

STATEMENT OF THE
NATIONAL BORDER PATROL COUNCIL
OF THE
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

MANDATORY MINIMUMS AND UNINTENDED CONSEQUENCES

PRESENTED BY
T.J. BONNER
NATIONAL PRESIDENT

JULY 14, 2009

officers who are using firearms – the tools of their trade – while acting within the scope of their authority. It is important to recognize that this legislative proposal would not shield rogue officers from the full consequences of their illegal actions, but would properly presume that the overwhelming majority of our Nation’s law enforcement officers carry out their duties honorably under extremely difficult circumstances, and must often make split-second decisions with incomplete information. Forcing judges who preside over cases involving those issues to mechanically apply minimum sentences can easily result in gross miscarriages of justice.

A careful examination of the facts of the Ramos and Compean case reveals that these two agents were falsely accused and wrongfully prosecuted. Although this hearing primarily focuses on the unintended consequences of mandatory minimum sentences, a basic understanding of that case provides insight into how this travesty occurred and how to prevent recurrences. Accordingly, a synopsis of the relevant facts of that case is set forth in the attached appendix.

Although Ignacio Ramos and José Alonso Compean were released from prison by President George W. Bush’s final act of executive clemency, nothing can compensate them for the twenty-five months of their lives that were lost serving unwarranted sentences, nor can the harsh suffering of these men and their families ever be erased. Moreover, the stigma of those unjust felony convictions continues to follow them around, severely diminishing their employment opportunities and curtailing other basic rights and freedoms enjoyed by most Americans. The adverse consequences of that prosecution extend far beyond that, however, and still have a negative impact on morale within the Border Patrol and numerous other law enforcement organizations. Many of these law enforcement officers are left wondering if the same fate will befall them if they defend themselves against an armed criminal. This is untenable in an occupation where even a moment’s hesitation can spell disaster.

APPENDIX**SYNOPSIS OF THE RAMOS AND COMPEAN CASE**

Although some of the relevant facts in the case involving Agents Ramos and Compean are in dispute, one thing is clear: There were only three eyewitnesses to the shooting that occurred on the afternoon of February 17, 2005 in Fabens, Texas — Border Patrol Agents Ignacio Ramos and José Alonso Compean, and Osvaldo Aldrete-Davila, a Mexican national who was transporting 743 pounds of marijuana into the United States. No one else who was near the scene of the shooting could have possibly seen what transpired, as their view was completely blocked by the levee access road, which is eleven feet higher than the ground on which they stood.

As one might expect, the version of events recounted by Agents Ramos and Compean differs dramatically from the story told by the drug smuggler. The Border Patrol agents maintain that they fired in self-defense because Osvaldo Aldrete-Davila was pointing a weapon at them, and he contends that he was simply trying to flee back to Mexico. Since the drug smuggler absconded across the international boundary, we will never know with absolute certainty whether or not he was armed. It is possible, however, to glean some important clues from the few pieces of physical evidence that were able to be examined. The bullet that struck Osvaldo Aldrete-Davila did not exit his body, and a large fragment lodged in his right thigh near the skin and was subsequently recovered. Moreover, the wound channel became infected and was still quite visible when he was attended to by a doctor on March 16, 2005, about a month after he was shot.

The March 18, 2005 affidavit of the Department of Homeland Security's Office of Inspector General in support of the criminal complaint against Agents Ramos and Compean stated that "[o]n or about March 16, 2005, Colonel Winston J. Warne, MD, Orthopedics, William Beaumont Army Medical Center removed a 40 caliber Smith & Wesson jacketed hollow point projectile from the upper thigh of the victim. Colonel Warne, MD, advised that the bullet entered the lower left buttocks of the victim and passed through his pelvic triangle and lodged in his right thigh." At the

unarmed. It does, however, explain why none of the agents shot at him at that time. Osvaldo Aldrete-Davila did not produce a weapon until after he was alone with Agent Compean on the other side of the levee road, out of view of the agents who remained north of the drainage ditch.

It is also important to dispel the ridiculous notion put forth by former U.S. Attorney Sutton that the drug smuggler tried to surrender, and that if Agent Compean had simply placed handcuffs on him at that point, the incident would have ended peacefully. A careful analysis of the facts reveals that nothing could be farther from the truth. Osvaldo Aldrete-Davila could have pulled his van over to the side of the road and given up at any point after the Border Patrol vehicles following him activated their emergency lights, but he chose to ignore them and speed away. He could have obeyed the agents' commands to stop after he exited his vehicle north of the drainage ditch, but he chose to keep running. He could have stopped at the bottom of the drainage ditch, but chose to charge up the other side at full speed toward Agent Compean. None of these actions are consistent with those of someone who is desirous of surrendering. Agent Compean had every reason to believe that Osvaldo Aldrete-Davila was attempting to assault him, and acted appropriately when he tried to push him back down into the drainage ditch.

The alleged destruction of evidence consisted of Agent Compean picking up some of the empty cartridges and tossing them into the drainage ditch a few yards from where they were fired. If he were truly intent on "destroying evidence," he would have taken the shell casings as far away as possible and disposed of them. Rather than a sinister effort to conceal something, it is far more likely that in a state of confusion induced by post-traumatic stress disorder, he reverted to his firearms training, where agents are required to pick up their empty cartridges at the shooting range and place them in nearby containers after firing their weapons.

According to former U.S. Attorney Johnny Sutton, the failure by Agents Ramos and Compean to report the discharge of their weapons was a "cover-up," as Border Patrol policy requires

investigative officers involved in the local INS investigation of the shooting incident are aware that any information provided by any employee under threat of disciplinary action by the Service or through any other means of coercion cannot be used against such employee in any type of action other than administrative action(s) taken by the Service consistent with *Garrity v. New Jersey*, 385 U.S. 493 (1966).”

It bears emphasizing that in order to prosecute these two Border Patrol agents, the U.S. Attorney’s Office granted a high-ranking member of the notorious Juarez drug cartel full transactional immunity against prosecution for transporting large quantities of illicit narcotics in exchange for his perjured testimony. This is unprecedented, and sends a terrible message to other law enforcement officers, as well as to law-abiding citizens.

On September 24, 2005, shortly before the trial of Agents Ramos and Compean was scheduled to begin, Border Patrol agents observed Osvaldo Aldrete-Davila drive a van to a location near the same area of border where the February 17, 2005 incident occurred. Several individuals crossed from Mexico into the United States and began loading marijuana into the van. When the agents approached, Aldrete-Davila and the others fled into Mexico. Agents seized the van and discovered 1,040 pounds of marijuana inside.

Less than a month later, on October 23, 2005, the Border Patrol and Drug Enforcement Administration seized another 753 pounds of marijuana belonging to Osvaldo Aldrete-Davila in a van parked in the back of a residence near the border. The house’s primary occupant identified Osvaldo Aldrete-Davila by name and physical description, and also picked him out of a photo lineup. Moreover, his brother in Mexico identified Aldrete-Davila over the phone as “the person who was shot by Border Patrol agents about six months ago.”

All of this information was brought to the attention of the U.S. Attorney’s Office for the Western District of Texas, which vigorously argued that it should not be allowed into evidence

§ 1512(c)(2), “tampering with an official proceeding,” which carries a maximum sentence of 20 years imprisonment; and two additional counts of the same charge against José Alonso Compean, which each carry an additional maximum sentence of 20 years imprisonment.

This stands in sharp contrast to a case filed two years ago by former U.S. Attorney Sutton against an individual in Del Rio, Texas who fired a high-powered (.30-06) rifle at Federal, State, and local law enforcement officers on the evening of January 28, 2007. While being handcuffed, the suspect remarked that he only stopped firing because he ran out of ammunition. This person was only charged with violating 18 U.S.C. § 111, “assaulting, resisting, or impeding certain officers or employees.” That statute provides for an enhanced penalty of no more than 20 years imprisonment if a deadly or dangerous weapon is used in the assault, but carries no mandatory minimum sentence.

More than two years after the aforementioned September and October 2005 incidents involving the smuggling of large quantities of marijuana into the United States by Osvaldo Aldrete-Davila, he was finally indicted and arrested for those crimes. He entered a guilty plea, and was sentenced to nine and one-half years in prison. Aldrete-Davila subsequently appealed that sentence, and the U.S. Courts of Appeals for the Fifth Circuit denied the appeal on June 29, 2009.

Mr. SCOTT. Thank you.
Ms. Stewart?

**TESTIMONY OF JULIE STEWART, PRESIDENT AND FOUNDER,
FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION,
WASHINGTON, DC**

Ms. STEWART. Good morning, Chairman Scott and distinguished Members of the Committee. Thank you for inviting me to be here today, and thank you for your commitment to sentencing reform.

As stated, I am here representing the 20,000 of FAMM. We are a national nonprofit organization, whose mission is to promote fair and proportionate sentencing policies. We don't oppose prisons, but we do want the punishment to fit the crime.

I did start FAMM 18 years ago after my brother was arrested for growing marijuana in his garage. He was guilty. He deserved to be punished, and I don't even mind that he was sentenced to some prison time, but 5 years seemed excessive to me then, and it seems excessive to me today.

It is a long time, a lot of missed birthdays and family holidays and, unfortunately, my dad died while he was in prison, while Jeff was in prison, and it is hard to grieve for someone, while you are behind bars.

But what motivated me to start an organization to repeal mandatory minimum sentences was not the length of Jeff's sentence, but the fact that his judge was unable to give him the sentence that he wanted to. His hands were tied.

And when I learned this, it seemed so counter-intuitive to me that the person who had all the information about his case, and knew all the facts, could not deliver the sentence that was appropriate.

I thought in this country that we sentence individuals, not crimes. I thought courts imposed the sentences, not lawmakers miles away in Washington who have never laid eyes on my brother or any other defendant. It seemed utterly un-American to me then and it still does today.

This is not the first time I have testified before this Committee or this Subcommittee. Sixteen years ago there was a hearing on mandatory minimums chaired by Charles Schumer, and I was sitting here testifying pretty much the same as I am today.

And beside me was a young woman who was in a prison jump suit. They had brought her from prison. Her name was Nicole Richardson. She was serving a 10-year prison sentence. She was there because her boyfriend was an LSD dealer, and she had taken a phone call for him, to tell this undercover agent—she didn't realize that, of course—where they could find her boyfriend to pay him for some LSD.

That linked her into the conspiracy. She was charged as a conspirator and sentenced to 10 years in prison. Her boyfriend, who had information to give the prosecution, got a 5-year sentence. She, of course, didn't have anything of value, so hers was a classic "girlfriend case," and her judge at the time did not want to sentence her to that much time in prison, but he had no choice.

At that same 1993 Subcommittee hearing, Judge Carnes' predecessor, Judge Vincent Broderick testified—he was the chair of the Criminal Law Committee at that time—and he said that Nicole's case was not an isolated horror story. Rather, Judge Broderick

said, "I respectfully submit that the mandatory minimum system in place is itself the horror story."

Thankfully, the upshot of that hearing was the passage of the safety valve the following year. The safety valve does allow the courts to sentence below the mandatory minimum, for a narrow band of drug defendants only.

It was a great first step, but it does not go far enough. Since its passage, over 210,000 people have been sentenced federally to 5- or 10-year mandatory prison sentences. That is an enormous number of families devastated by one-size-fits-all sentences.

Now, it is time to take the next step, and today's hearing sets us on that path toward passing a bill that will, in fact, allow judges to sentence individually.

We are here today in part because of the border agents' cases, Ramos and Compean. Their sentence angered many Americans, as we have just heard, in addition to the border agents, who saw them as heroes and feared that the decision and the sentence would have a chilling effect on those who work on the border, and it sounds like it has.

Whatever your thoughts about the border agents' case, those of us who have been fighting against mandatory minimum sentences for years, almost decades, would caution Members of this Committee and Congress against seeing their case as an anomaly. In reality, it is one more of the all too common features of one-size-fits-all sentencing.

First, to briefly say why that is true, that you had a prosecutor who was following instructions of his supervisors. In this case, it was Attorney General Ashcroft's memo from 2003 that said to prosecute. The prosecutors "must bring the most serious, readily provable chargeable offense and to oppose downward departures at sentencing."

Second, a jury of peers found them guilty, and finally, you had a judge whose discretion was extinguished by mandatory sentencing laws passed by Congress.

Mr. Chairman, this happens everyday in Federal courtrooms all across the country. FAMM's files are filled with cases that reflect the same rigid process and result in sentences that over-punish.

As Mr. Poe has already said, it would be impossible for this Committee to draft a bill listing all of the defendants deserving to have a carve-out from the mandatory minimum sentence, the single mothers, the Vietnam vets, the drug addicts.

You would probably capture some of the right people, but you could never capture all of them because every case is different, every defendant is different, and the judge should have the ability to sentence differently for each one under the circumstances for each defendant, and that would be subject, of course, to appellate review. Judges would not have unfettered discretion.

In the interest of time, I am not going to give you the 25 cases I brought that show you how this is always working badly—just kidding—but I will say just one quick case. I know my time is up, but I do want to point out that the safety value was a wonderful thing that passed in 1994, but it did not go far enough.

And one of the reasons it didn't go far enough because it does not allow defendants who have a gun in their offense to receive a safe-

ty valve, and so for instance Jesus Esparza, who was sentenced in 2007 for driving with a friend of his to Seattle where the friend picked up a kilo of cocaine, driving back through Wyoming they are stopped by State troopers.

The troopers find the cocaine. They find a loaded pistol under the friend's seat. So they are both charged, they both are convicted. Jesus pleads guilty. He accepts his responsibility for the role in his offense.

His guideline sentence would have been between 4 and 5 years, but the judge must give him 5 years for the cocaine, 5 years for the gun, even though it was his friend's gun. He got 10 years in prison. He was not able to benefit from the safety valve.

So I will close by just saying I believe as fervently today as I did 16 years ago, that the time is ready right now to repeal mandatory minimums. It has been done before, as we have pointed out in our "Correcting Course" report, which is available on the table.

A bipartisan Congress in 1970 repealed mandatory minimums for drug offenses. The sky didn't fall, drug and crime rates didn't soar, judges didn't turn squishy and let everybody go. So please, I hope that this hearing will lead up to the next step of repealing mandatory minimum sentences again. Thank you.

[The prepared statement of Ms. Stewart follows:]



**Statement of Julie Stewart
President, Families Against Mandatory Minimums**

**On
“Mandatory Minimums and Unintended Consequences”**

**Submitted to the
Subcommittee on Crime, Terrorism, and Homeland Security
Of the Committee on the Judiciary
United States House of Representatives**

July 14, 2009

I am Julie Stewart, President of Families Against Mandatory Minimums. FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies. FAMM does not oppose prison; we simply want the punishment to fit the crime.

I want to thank Chairman Scott, ranking member Gohmert and distinguished members of the Committee, for the opportunity to testify before the Subcommittee on Crime, Terrorism and Homeland Security and for your commitment to sentencing reform.

As some of you know, I started FAMM 18 years ago after watching my brother get sentenced to five years for growing marijuana in a garage. My brother, Jeff, deserved to be punished because he broke the law. And some time in prison might have even been appropriate. But five years seemed excessive then and still seems that way to me now. A lot can happen in five years – a lot of missed birthdays, holidays and family gatherings, and in Jeff’s case, the death of our Dad. That’s a blow that’s hard to bear from a prison cell.

But what motivated me to start an organization to repeal mandatory minimum sentences was not really the length of my brother’s sentence – it was witnessing the judge’s inability to give my brother the sentence he wanted to. At sentencing, the judge stated that his “hands were tied” by mandatory sentencing laws. It seemed counterintuitive to me that the person who knew all the facts of Jeff’s case could not deliver the sentence that was appropriate for Jeff and his role in the offense. I thought in this country we sentenced individuals - not crimes. I thought courts imposed sentence, not lawmakers miles away in Washington.

It seemed utterly un-American. It still does.

Sixteen years ago I made that same argument before this same subcommittee on this same subject: mandatory minimum sentencing. Sitting beside me at the witness table that day in 1993 was a young woman named Nicole Richardson. She was dressed in a prison jumpsuit and brought into the hearing room in shackles. Nicole had been convicted of drug trafficking for giving her boyfriend’s phone number to an informant who wanted to pay him for some LSD. Even though she cooperated with the DEA, she was charged with conspiracy to distribute LSD. Her boyfriend, the drug dealer, had incriminating information about others to give the prosecutors. He received a five-year sentence as a reward for his cooperation. Nicole had no one to finger, so she bore the brunt of the government’s case and at the age of 18 was sentenced to ten years in federal prison without parole. Nicole’s judge did not want to sentence her to such a long prison term, and when the jury foreman later found out the sentence Nicole received, he said, “If I had known she would receive a mandatory 10-year prison sentence, we would still be sitting in that jury room today.”

At that same 1993 subcommittee hearing, Judge Vincent Broderick, then chair of the Criminal Law Committee of the Judicial Conference of the United States, testified that Nicole’s case was not an isolated horror story. Rather, Judge Broderick said, “I respectfully submit that the mandatory minimum system in place is itself the ‘horror story’ ... [and] ... that mandatory minimums are the major obstacle to the development of a fair, rational, honest, and proportional federal criminal justice sentencing system.”

The upshot of that hearing was the passage the following year of the “safety-valve,” which allows the courts to sentence below the mandatory minimum for a narrow band of drug defendants. The safety valve was a great first step, but it did not go far enough. Since 1995, over 200,000 people have received mandatory prison sentences of five or ten years. That’s an enormous number of families devastated by one-size-fits-all sentences.

Now is the time to take the next step. This hearing sets us on that path.

We are here today in part, because of the mandatory minimum sentences imposed on border agents Ignacio Ramos and Jose Alonso Compean. Their sentences angered many Americans who saw the agents as heroes and who feared their convictions and long sentences might have a chilling effect on those who work on the border or other front lines of law enforcement.

Whatever your thoughts about the border agents’ case, those of us who have been fighting against mandatory sentencing for years would caution Members of this Committee and Congress against seeing it as an anomaly. In reality, it is just one more of the all-too-common failures of one-size-fits-all sentencing.

Consider the following facts: First, you had a prosecutor following the instructions of his superiors – in this case, Attorney General Ashcroft’s memo of 2003, ordering all federal prosecutors to bring “the most serious readily provable chargeable offense” and to oppose downward departures at sentencing. Second, a jury of peers delivered guilty verdicts. Finally, you had a sentencing judge whose discretion was extinguished by a mandatory sentencing law passed by Congress.

Mr. Chairman, this happens every day in federal court rooms all across this country.

Consider the case of Michael Mahoney. In 1979, when he was 24 years old, Michael was living in Texas, using methamphetamine and selling small amounts to support his habit. Within a one-month period, he made three sales totaling less than \$300 dollars to an undercover officer and was arrested. He pled guilty and was convicted of three felonies and served almost two years in jail in Texas. When he got out, he moved home to Tennessee and turned his life around. He opened a successful local restaurant and pool hall, paid taxes, employed people, and was a productive member of society for more than a decade. One day, Michael decided to purchase a gun from a pawn shop to protect himself when he made deposits after closing. The pawn shop owner, who said he was also an attorney, told Michael it was okay to own a gun because his convictions were more than ten years old. Michael thought this made sense because he had been allowed to get a liquor license after a ten-year waiting period.

Sometime later, Michael’s gun was stolen. Concerned that it might be used to commit a crime, he reported the theft to authorities. He returned to the pawn shop and bought another gun. In a routine check of the pawnshop’s records, the Bureau of Alcohol, Tobacco, and Firearms, discovered the sale and arrested Michael as a felon in possession of a firearm. Michael was found guilty of the “crime” and federal prosecutors decided to count the three 14 year-old drug sales as separate convictions at Michael’s sentencing in 1994. This decision meant the difference between a five-year and 15-year mandatory minimum. Rather than receiving a sentence designed

for a simple felon in possession of a firearm, he received a sentence intended for hardened career criminals.

Michael's judge was a Reagan appointee with a reputation for being extremely tough on crime. But, at sentencing, he said, "... it seems to me this sentence is just completely out of proportion to the defendant's conduct in this case. ... [I]t just seems to me this is not what Congress had in mind." At the end of the day, however, he had no choice. He handed down the 15-year sentence required by law. Seven years into his 15-year sentence, Michael died in prison.

The judge who sentenced Jesus Esparza, expressed similar frustration when sentencing Jesus to 10 years in prison. Jesus, who had served his country honorably in the armed forces, accompanied a friend from Michigan to Seattle, where his friend picked up one kilogram of cocaine. On the return trip, they were stopped in Wyoming by state troopers. The troopers found the cocaine and a loaded handgun under the friend's seat. Jesus pled guilty and accepted responsibility for his role in the offense. The sentencing guidelines called for a sentence of 46-57 months. But the mandatory minimum statutes required the judge to sentence Jesus to five years for the cocaine and another five years for the gun.

The judge said, "When it comes to mandatory minimums, the powers of the Court...and the consideration of underlying facts ... pretty much flies out the window. [The Court] could have considered...your role in that offense as a person who essentially went along to help drive [your codefendant] as a favor to him...and measure the seriousness of your conduct as compared to that of [your codefendant], who brought the gun."

I believe as fervently as I did 15 years ago when I testified from this table that you should use your power to repeal mandatory minimum sentences. I do not want to be sitting at this same table 15 or 16 years from now asking for the same sentencing reforms I urged back then and again, today. After two decades of experimenting with mandatory minimum sentencing policies, the verdict is in: mandatory minimums are a failure. They are a failure today, just as they were in 1970 when a bipartisan Congress voted to repeal the Bogg's Act, which required mandatory minimum sentences for drug offenses. That repeal is the focus of a FAMM report, *Correcting Course*, which urges that we learn from history and repeal mandatory minimums once more.

The reasons that led Congress to repeal mandatory minimums nearly 40 years ago are the same reasons Congress should abolish them today. By any standard, including their proponents' stated goals, the mandatory minimums enacted in the 1980s have failed. Specifically:

- They have not discouraged drug use or abuse. Drug use rates had already declined before Congress passed the 1986 and 1988 anti-drug laws. Between 1985 and 1988, drug use

¹ FAMILIES AGAINST MANDATORY MINIMUMS. CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS, available at http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf (last visited July 13, 2009).

within the past 30 days declined from 12.1 percent to 7.7 percent². As of 2007, drug use rates within the past 30 days had increased to 8.3 percent³.

- They have stripped courts of cost-effective, recidivism-reducing sentencing options like drug courts. According to the Bureau of Justice Statistics, one-third of all federal drug offenders said they were using drugs at the time of arrest⁴ and almost 80 percent of federal offenders admit to having used drugs at some time.⁵ Unfortunately, according to BJS, less than 15 percent of federal offenders with drug problems receive treatment while in prison.⁶
- They have failed to reduce drug trafficking. Despite 50 years of experimenting with mandatory minimums, supporters cannot point to a single study that conclusively demonstrates any positive impact of mandatory minimum sentences on drug trafficking rates.
- They are responsible for a prison population explosion. The federal prison population has increased nearly five-fold since mandatory minimums were enacted in the mid-80s and mandatory guidelines became law.⁷ The major cause is the increase in sentence length for drug trafficking from 23 months⁸ before mandatory minimums to 83.2 months in 2008.⁹ About 75 percent of the increase was due to mandatory minimums and 25 percent due to guideline increases above mandatory minimums.¹⁰
- Their failure comes with billion-dollar direct costs. Expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums have caused a dramatic increase in state and federal corrections costs. State corrections spending jumped from \$6 billion in 1982 to over \$50 billion in 2008.¹¹

² OFFICE OF NATIONAL DRUG POLICY, DRUG USE TRENDS (October 2002).

³ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, OFFICE OF APPLIED STUDIES (2008). RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS (NSDUH Series H-34, DHHS Publication No. SMA 08-4343), Rockville, MD.

⁴ BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dudsp04.pdf> (last visited July 13, 2009).

⁵ *Id.* at 2.

⁶ *Id.* at 9.

⁷ U.S. BUREAU OF PRISONS, A BRIEF HISTORY OF THE BUREAU OF PRISONS, available at <http://www.bop.gov/about/history.jsp> (last visited July 10, 2009).

⁸ UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (Nov. 2004), at 48, available at http://www.ussc.gov/15_year/15year.htm (last visited July 13, 2009) [hereinafter FIFTEEN YEAR REVIEW]; UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL GUIDELINES AND POLICY STATEMENTS (June 18, 1987), at 69-70.

⁹ UNITED STATES SENTENCING COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2008), at Table 14, available at <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm> (last visited July 13, 2009).

¹⁰ FIFTEEN YEAR REVIEW, at 54.

¹¹ PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF THE AMERICAN CORRECTIONS 11 (Mar. 2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_lin31_report_FINAL_WEB_3-26-09.pdf (last visited June 10, 2009).

- They impose substantial indirect costs. Not only do longer prison sentences make it more difficult for prisoners to re-enter society successfully, but they also put a heavy burden on families and children who must live without a spouse or parent while that person is incarcerated.
- They are not applied evenly. In practice, mandatory minimum sentences have not been applied equally when viewed by race of the defendant. Further, two equally culpable defendants can receive vastly different sentences based on the value of the information they have to share with prosecutors.

In all of these ways, mandatory minimums have failed to perform as advertised. And, yet, I can't help but think that even if they were effective to some degree they would still be objectionable. Mandatory sentences offend a bedrock principle of justice best articulated in the federal sentencing statute. The core congressional command in the Sentencing Reform Act of 1984 directs courts to impose a sentence "sufficient, but not greater than necessary to comply" with the purposes of punishment.¹² This principle of parsimony has deep roots in American soil and in our sense of fundamental fairness. The law directs judges to exercise reasoned discretion, taking into account considerations such as the need to avoid unwarranted disparity, the history and characteristics of the defendant, and the seriousness of the offense, and then fashion a sentence for the particular individual who stands convicted.¹³ Mandatory minimums prohibit courts from complying with that mandate.

Moreover, mandatory minimums challenge basic structures on which our government is founded. Federal mandatory minimum laws upset federalism by turning many heretofore state drug offenses into federal crimes. In addition, state and federal mandatory sentencing laws distort traditional roles by transferring judicial discretion to legislatures as well as prosecutors, who, by choice of charge, exercise undue and unreviewable influence over sentencing.

All of these problems have caused many former prosecutors, judges, and legal commentators to speak out against mandatory minimums. A report by the non-partisan Federal Judicial Center concluded with this statement about mandatory sentencing laws: "As instruments of public policy [mandatory minimums] do little good and much harm."¹⁴ Today, mandatory minimum repeal enjoys widespread support from leaders in the criminal justice community. The Judicial Conference of the United States,¹⁵ the American Bar Association,¹⁶ the United States

¹² 18 U.S.C. § 3553(a) (2008).

¹³ The list of sentencing considerations and the parsimony mandate are found in the sentencing statute at 18 U.S.C. § 3553(a)(1)-(7) (2008).

¹⁴ Barbara S. Vincent & Paul Hofer, *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center (1994), at 32 (quoting Michael Tonry, ed., *Mandatory Penalties*, in 16 CRIME & JUSTICE: A REVIEW OF RESEARCH 243-44 (1990))

¹⁵ See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (Mar. 13, 1990) (voting in favor of urging Congress to reconsider the wisdom of mandatory minimum sentences), available at <http://www.uscourts.gov/judconf/90-Mar.pdf> (last visited Nov. 5, 2008); see also Testimony of Honorable Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security (June 26, 2007), available at <http://judiciary.house.gov/hearings/Junc2007/Cassell070626.pdf> (last visited Nov. 5, 2008).

¹⁶ See AMERICAN BAR ASSOCIATION, REPORT # 121-A (Aug. 9-10, 2004), available at <http://www.abanct.org/leadership/2004/annual/dailyjournal/121A.doc> (last visited Nov. 5, 2008).

Sentencing Commission,¹⁷ and the United States Conference of Mayors¹⁸ are among those who oppose mandatory minimum sentencing.

President Obama also has spoken of the need for reform. Noting that his predecessor, former President George W. Bush, expressed skepticism about imposing long sentences for first-time drug offenders, then-candidate Obama said, "I agree with the President. The difference is, he hasn't done anything about it. When I'm President, I will. We will review these sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of non-violent offenders."

Attorney General Eric Holder seems to be making good on President Obama's commitment to sentencing policy review. At a recent sentencing symposium, Mr. Holder said that "[t]he desire to have an almost mechanical system of sentencing has led us away from individualized, fact-based determinations that I believe, within reason, should be our goal."

Last, but certainly not least, the American people support mandatory minimum reform. A 2008 poll found that fully 78 percent of Americans agree that courts, not Congress, should determine an individual's sentence, and 59 percent oppose mandatory minimums for nonviolent offenders.¹⁹

It's past time to put an end to mandatory minimums.

We are grateful to Chairman Scott for introducing legislation to enable courts to exercise discretion when the mandatory minimum is greater than necessary to comply with the purposes of punishment. We thank Congresswoman Waters for her bill that would eliminate all drug mandatory minimums and Mr. Poe for his that would eliminate mandatory minimums in certain cases. We look forward to working with all of you to eliminate one-size-fits-all sentencing laws.

¹⁷ See U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 25-33 (Aug. 1991) (describing how mandatory minimums undermine the purpose and goals of the federal sentencing guidelines, and concluding that "the intended purposes of mandatory minimums can be equally or better served by guidelines, without compromising the crime control goals to which Congress has evidenced its commitment."), available at http://www.ussc.gov/r_congress/MANMIN.PDF (last visited Nov. 5 2008).

¹⁸ U.S. CONFERENCE OF MAYORS, 74TH ANNUAL MEETING ADOPTED RESOLUTIONS 47-48 (June 2-6, 2006), available at http://usmayors.org/resolutions/74th_conference/resolutions_adopted_2006.pdf (last visited Nov. 5, 2008).

¹⁹ Families Against Mandatory Minimums/Strategy One poll on mandatory minimums (Aug. 2008), available at <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf> (last visited July 13, 2009).

Mr. SCOTT. Thank you.

Ms. STEWART. Also, may I say that I would like my written statement to be included in the record.

Mr. SCOTT. Yes. It will. Thank you. Thank you. We will now recognize Members under the 5 minute rule, and I recognize myself first.

Judge Carnes, there is a code section about adults having sex with minors that has a 40-year-old having sex with a 13-year-old. It is also covered a 19-year-old having consensual sex with a 15-year-old. What is wrong with applying the same mandatory minimum to both of those cases?

Judge CARNES. I think your question suggests the answer. What it indicates is that there are certain kind of crimes that sound—both of those are bad situations, but we tend to envision the worst case scenario when we hear a description of a crime, and your scenario indicates that there also are less culpable iterations.

For example, a teenager having sex with someone that he may have dated in a high school setting or whatever, and clearly, I don't think anyone could reasonably disagree that in your second example, there is a much more culpable situation in the first instance. As Ms. Stewart said, the one-size-fits-all creates these problems.

Mr. SCOTT. Now, what discretion would a judge have, with the person—both were found guilty, what discretion would a judge have under the mandatory minimum sentencing scheme to apply an appropriate sentence for both cases?

Judge CARNES. Well, assuming, as you stated it, that the mandatory applies regardless of the age or the circumstances of the offense, you would have no discretion.

Mr. SCOTT. There has to be a 4-year difference in age, the—

Judge CARNES. Right.

Mr. SCOTT.—19 and 15.

Judge CARNES. Right. There would be—as long as the age disparity was reached it could be 5 years of disparity. Then the judge would have no discretion at that point. The judge would be stuck.

Mr. SCOTT. Now, Mr. Norquist, you indicated that there is a false choice between mandatory minimums and public safety. Can you tell us what you meant by that?

Mr. NORQUIST. Well, I think my argument was that you ought to look at them periodically to see whether they are necessary and how expensive they are, and to keep in mind that these mandatory minimums force government spending, and it is not free. It is not something that just happens.

The other question is whether Federal mandatory minimums are necessary, if the law shouldn't be a Federal law in the first place. If you reduced the Federal mandatory minimum for any of these crimes that are mentioned, there is nothing that prevents the State from having a State rule that says, "No, no, no. In our State we really think this is serious, and we want to make it a more serious crime in terms of time spent."

However, I would argue that if we don't examine these every once in a while, when the mandatory is passed because the TV cameras are there and every elected official wants to say, "I am really, really against this."

It is just an expensive way to get a photo op if the taxpayers are paying for it forever and ever and ever. Let us look at it every few years and see whether some of those ought to come down, or whether they should be Federal crimes in the first place.

Mr. SCOTT. Thank you.

Mr. Sullivan, you indicated that a profile of most people in jail under mandatory minimums are appropriately there. Are you sug-

gesting that there are no people serving bizarre sentences because of mandatory minimums?

Mr. SULLIVAN. No, I am not suggesting that at all, Mr. Chairman. I suspect that we would be able to identify some anecdotal examples where you would wonder whether or not the sentence was necessary in order to accomplish the goals of sentencing.

But my suggestion is when you look at the larger profile of the prison population at the Federal and at the State level—

Mr. SCOTT. Well—

Mr. SULLIVAN [continuing]. You will find that the vast majority of people are there because they—

Mr. SCOTT [continuing]. How does it reduce recidivism to have people serving that you would admit are bizarre under the individual circumstances?

Mr. SULLIVAN. Well, I am suggesting that most of them, the vast majority of them have sentences that are appropriate under the present sentencing scheme.

Mr. SCOTT. And for the—

Mr. SULLIVAN. We have—I am sorry.

Mr. SCOTT. And for the others?

Mr. SULLIVAN. Well, again, I am not sure how many of that population is for the others, but we do know that criminals commit crimes, and while they are incarcerated, their opportunities to commit additional crimes are substantially reduced. They don't stop committing crimes; they even commit crimes in prison. So there is a constant recidivism—

Mr. SCOTT. Well, if you locked up people randomly, you would have the same result.

Ms. Stewart, are you familiar with the RAND study that concluded that mandatory minimums was the least cost effective way of reducing recidivism?

Ms. STEWART. Yes, for drug crimes, that it is something like eight or nine times more effective to use treatment.

Mr. SCOTT. And even more effective to use traditional sentencing rather than mandatory minimums?

Ms. STEWART. Yes. I would also point out, just because it has come up a couple of times here, that crime rates that have been mentioned—crime rates in this country do not include drug crimes. When they are calculating crime rates they do not include drug crimes, and certainly in the Federal system, the majority of people in prison there are serving drug offenses.

Mr. SCOTT. Thank you.

Judge Carnes, much has been said about the safety valve. How often is it used, and how effective is it?

Judge CARNES. Well, the incidents that it is used in depends on exercise of the prosecutorial discretion, the kinds of people that are being prosecuted. In Atlanta, it is used a decent amount of time. As Ms. Stewart says, it has helped a great deal, and it was something Congress did and we appreciate it.

But it does still cover the person that has the gun, and it also still covers the person that has more than one criminal history point and who might have one misdemeanor or two. So it still has offered some help, but a lot of people still get covered under the mandatory law.

Mr. SCOTT. Now, how does the safety valve work? Does the prosecution have to agree to it?

Judge CARNES. Not technically. It should be self-executing. If you have only one criminal history point, you don't have a gun, you are not a leader, essentially you are a first offender, the only interaction of the prosecution is that the defendant has to tell the prosecutor everything about his offense, and that is where you get some problems.

Sometimes the prosecutor will indicate, "Well, judge, I don't think he told everything." But at that point, I am the judge, and I have discretion, and if I say, "It sounds to me like he told you everything," I still have discretion to accept the vow.

Mr. SCOTT. And does it apply to things other than drug offenses?

Judge CARNES. I am not aware that it applies to anything but drug offenses, sir.

Mr. SCOTT. So if you are stuck with a mandatory minimum on some other basis you are just stuck, whether it is bizarre or not?

Judge CARNES. Correct.

Mr. SCOTT. Thank you.

Okay, Judge Poe.

Mr. POE. Thank you, Mr. Chairman. Thank you once again for all of you being here.

Mr. Norquist, do you have any idea how many Federal laws there are?

Mr. NORQUIST. Yes, I actually was working with some think tanks on that, and we came up with estimates of about 2,000 that you could get in trouble for. I would be very interested in a list of the Federal laws, and would actually recommend a base-closing commission approach to try to cull them out because nobody is going to want to legalize carjacking, but I do think at some point that is something that most of the 50 States are perfectly capable of handling without Federal supervision.

So I don't know. I have asked around, and I am told 2,000 but I am also told nobody knows. So if that is not right and there is list, I would love to see it.

Mr. POE. I think it is at least 2,000, maybe closer to 3,000 or 4,000. And used to be, under our system in this country, criminal law was punished by the States and the rarer cases were prosecuted under Federal law, but we have moved a long way from that.

Mr. Bonner, I want to ask you a couple of questions about your comments. I agree with everything you said. The case of, you know, Ramos and Compean had not just unintended consequences for their families, but other border agents.

But would you agree, also, that it has consequences for, for example, the sheriffs that work on the border when they hesitate to pull a firearm because they are afraid they are going to be prosecuted by the feds, local police, and not just on the border but just throughout the country?

Mr. BONNER. Well, absolutely. You had the case of Gilmer Hernandez down in Rocksprings, Texas, which is a classic example of a deputy sheriff being prosecuted by the Federal Government, but I have heard from a number of other law enforcement officers

throughout the country, not isolated to the border, expressing the same fears.

Mr. POE. Gilmer Hernandez's case, was it not that he was—the first time he ever used his weapon a van is coming at him. He turned to fire at the van, shot out the tire, like they do in the movies, and then he was prosecuted for firing his gun and went to jail for that, sent there by the Federal Government. Is that basically the facts of his case?

Mr. BONNER. That is basically the facts. I would only add that that case was investigated by the Texas Rangers, and they found no basis for prosecution. So the State of Texas declined to prosecute, and the U.S. Attorneys Office jumped in.

Mr. POE. Luis Aguilar, are you familiar with that name?

Mr. BONNER. Yes.

Mr. POE. Was he not a Border Patrol agent who was assigned to the Tucson sector, two vehicles come into the United States, a Humvee and a pickup truck. The Border Patrol gives chase. They then head back to Mexico with their load of drugs. He, rather than pull his firearm, throws spikes in the road, gets off the road, and the Humvee goes off the road and runs over and kills him. Was that the facts of his case?

Mr. BONNER. That is correct. He was actually assigned to the Yuma, Arizona sector, and the incident happened right across in the California side of their area of responsibility.

But again, it highlights how violent some of these drug offenders are, that they have absolutely no regard for human life, and in that drug smuggler's quest to get back into Mexico without being caught, he was willing to take another human life.

Mr. POE. And he did get back to Mexico, and the Mexican government arrested him, and our U.S. Attorneys Office never requested extradition, and they let him go after 6 months incarceration in Mexico. Isn't that the rest of the story?

Mr. BONNER. He was finally recaptured, and I believe that they are still trying to work out the details for extradition, so that story is far from over.

Mr. POE. Well, I am just—the point being that Luis Aguilar, since we don't know his state of mind, maybe hesitated, threw out the spikes rather than defend himself with his weapon, all because of this problem of mandatory sentencing of additional time for using a firearm or possession of firearms, at the time of the offense. Is that correct?

Mr. BONNER. That is a distinct possibility. I mean, as you said, we will never know what went through his mind in those last few seconds of his life.

Mr. POE. Last question, Judge Carnes, thank you for being here. If judges, under the Federal system, could have the discretion to go below the minimum and use the same guidelines and justify it, allow the appeal by the State or the Federal Government rather, in appropriate cases, do you think that that would be an abuse of power of judges?

Judge CARNES. Abuse of power for—I am sorry, I don't understand

Mr. POE. For judges to do that?

Judge CARNES. If that was the system under which we were operating?

Mr. POE. Yes. Do you think judges would abuse that authority?

Judge CARNES. Oh, would judges abuse the power? We have hundreds of judges in the country, and they will exercise discretion in different ways. That is obvious. But we are accustomed, at this point, from many years of having judges' departures examined by courts of appeals, we have now had variances examined since *Booker*, and it is something we are familiar with, and it is something the courts of appeal are familiar with, and I think it is a system that we could all adjust to quite readily.

Mr. POE. All right. Thank you, Mr. Chairman. I am out of time, but not out of questions.

Mr. SCOTT. Thank you.

Ms. Waters?

Ms. WATERS. Thank you very much, Mr. Chairman. I would like, Judge Carnes, to understand, if there is such a thing, the profile of these low level offenders who have five grams of crack cocaine and end up with 5 years mandatory minimums.

And despite the safety valve, we still appear to have the sentencing of what appears to be young, first time offenders, oftentimes silly enough to believe that maybe they can get away with selling crack cocaine or they are users of crack. Could you discuss what this profile is of the minimum possession person, who ends up getting 5 years mandatory sentence?

Judge CARNES. Well, I think, again, it is if one size doesn't fit all, that is because there are a myriad of circumstances, so there are all sorts of low level offenders. I couldn't list all of them for you today.

There is the young person who is dealing small quantities. There is my example, in the written testimony, the off-loader, who is off-loading a big boat full of drugs, and the quantity is going to kick him up high, in my example because he had a small marijuana prior conviction, he is looking at 20 years in prison. That is an example.

But I think your example with crack and—the crack penalties are so askew and so out of whack I think with what is appropriate that you almost have to set that aside from everything, and as you know, the Conference has for a long time indicated our belief that the disproportion between powder cocaine and crack is not supportable. And before we deal with anything else, I think that one is one we have to attack.

Ms. WATERS. The other question that I have is this business of the so-called distrust of judges to make good decisions, judges who have been elected, appointed and whose discretion, obviously, is taken away with mandatory minimums. Do you have any suggestions about what we should be doing about that?

I mean—and I think it was alluded to here today, that perhaps this is political posturing, taking away the discretion of judges, saying that judges are too lenient. There needs to be, in my estimation, some kind of movement to deal with that issue. Have you thought about that?

Judge CARNES. Well, again, there are hundreds of judges in the country. There are some judges whose decisions I don't agree with,

and they don't agree with mine. When you have discretion, you are going to have difference of opinion.

But the question is because you may have a handful of outlier judges who sentence in a way that creates an uproar now and then, do you create this whole unwieldy system, this wooden, inflexible system that we have seen now for many years which create such harsh and sometimes irrational consequences, and my answer is no, you don't.

Ms. WATERS. And judges on the Federal bench are all determined to be competent or incompetent, what have you—

Judge CARNES. We hope competent most of the time. [Laughter.]

Ms. WATERS. We hope competent. But in the assessment of judges prior to appointment is this ever discussed, whether or not they can be trusted to use discretion on the bench once they are appointed to the bench?

Judge CARNES. Well, I think you know each appointment is different, and I can't say what has been discussed with every judge who has been appointed. I don't believe it was discussed with me, but many people knew that I had a background in sentencing, so I don't know that I can really answer that question.

Ms. WATERS. Thank you very much. I yield back.

Mr. SCOTT. Do you yield back?

Ms. WATERS. Yes.

Mr. SCOTT. Thank you.

Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman, and sorry I had to step out for a moment, but I really appreciate the input everyone has had here and had a chance to review statements before the hearing today as well.

The comment "mandatory minimums are the least effective way to reduce drug crimes," it doesn't mean you will necessarily eliminate a bottom threshold for what drugs are. I appreciate what Mr. Norquist said, when he said, "Let us look at some of these sentence ranges, and see if they should come down." He said, "Let us look at some of them and see if they should come down."

And that is my thought. Let us look at ones that are too high and bring them down. You all—I don't know if it was mentioned but you may be pleased to learn that there is one effort where Mr. Scott, Chairman Scott, and I are working together, the Heritage Foundation and ACLU is working together, and it is on this issue of over-criminalization and Federal laws.

I would—and I have talked to Chairman Scott about it—I would love to bring all the criminal laws into one code where we can start cleaning the mess up, but apparently there is no political appetite for doing something that big.

But it has been a matter—and I hope the gentlelady from California was not referring down this way on political posturing to take away discretion of judging. To me, it is not an issue of political posturing. I have seen sentences that I just thought were outrageous.

And judges should have discretion and just as the Congress should never say, "Oh, here, Mr. Secretary of the Treasury, here is \$700 billion, do what you want with it." We should also not say, "Oh, here, Mr. or Ms. Judge, here is the, you know, keys to the

prison, just do or not do." There ought to be a range. That is a legislative function, and that is my point. Have a range. Adjust them if necessary, but don't throw the whole system out.

Mr. Sullivan, in your experience, what extent did mandatory minimums help prosecutors in securing cooperation of lower level criminals though?

Mr. SULLIVAN. They are used on a regular basis, especially at the Federal level, for some of the low level drug dealers that Ms. Waters was talking about, to try to go up the organization. So not only are they safety valve eligible, but then they would also be eligible for their cooperation and get a substantial reduction.

And without the minimum mandatory, a lot of the regional, national, international drug investigations would stall as you are trying to develop evidence against the organization itself.

Mr. GOHMERT. You get the little guys, but you could never get up and get the big guys.

Mr. SULLIVAN. The little guys are the easiest ones to get, quite candidly. I think everybody recognizes that.

Mr. GOHMERT. Right.

Mr. SULLIVAN. They are the ones that are most visible. they are the ones that typically are caught with the drugs and the guns, and they are looking at some very substantial sentences.

Congress has built in a real incentive for those folks to cooperate with the government to take a look at a much bigger organization, so many Federal investigations have been launched as a result of cooperation at the lowest level.

Mr. GOHMERT. Oh, and I appreciate Mr. Bonner's point about the abuses previously in previous testimony about the major problem is the misapplication by law enforcement personnel using the mandatory minimums within the scope of their duties. That appears exactly what happened with Ramos and Compean.

You had somebody that I think used the law that was never ever intended to be used against law enforcement to raise the bottom floor there for their sentence. It just seemed outrageous.

And I did want to make one note for the record. My friend from Texas had pointed out that there are felonies that could be reduced to misdemeanors, and for those of you that don't he mentioned there are State jail felonies.

It is a hybrid between felony and misdemeanors created, I think, in 1992, and so it is basically misdemeanors but they can be treated as misdemeanor or as State jail, but it doesn't allow you to go to prison. There is no way to bring down in the State system of Texas a true felony down to a misdemeanor, and that was my point there.

But anyway, we do need to do something about over-criminalization. It does get handled better most often at the State level, and that is what the tenth amendment and ninth amendment were talking about.

And I did want to make the point, there is so much discussion about the disparity between the sentencing ranges of crack and powder. And our friend Dan Lungren was here when that sentencing range came into being and the disparity was created, and I have gone back and looked at the testimony of Congressman now Chairman Rangel.

He was the one pushing it and he said if you care—basically I am paraphrasing—if you care about at all the African American community, you will help us end this blight, this crack cocaine.

And I can understand why he would feel that way and that maybe the harsher sentences, dramatically harsher sentences, might help clean up the drugs in the African American community. It didn't work.

We do need to take a new look at it, but it certainly wasn't done for racial reasons but because of proponents trying to clean up the African American community. Otherwise I can't imagine Congress ever having that big a disparity.

So anyway, let me ask one other thing. Judge Carnes, wouldn't the safety valve provision, the minimal participant provision, the substantial assistant provision, be an appropriate solution rather than completely eliminating the floor of a range?

Judge CARNES. Are you talking just about drug cases?

Mr. GOHMERT. Well, actually it could be applied to lots of cases but particularly drug; that is the focus more today.

Judge CARNES. Well, as we indicated, the safety valve still covers some people that perhaps shouldn't be covered. The example Ms. Stewart gave about the fellow that had the gun in the car, more than one criminal history point, and so you still get some injustice.

To do that you would have to expand the safety valve, and then I would have to hear how the legislation would be written. How would you do a safety valve, for example? some of the other offenses that have nothing to do with drugs, what would your standards be.

If it is an offense that is committed by only one person how would calling them a minor person really be applicable, but I understand what—

Mr. GOHMERT. Well, you can imagine scenarios whether it is the guy that is with the robbers and things like that, and the Chairman had pointed out some anecdotal situations.

Judge CARNES. Right.

Mr. GOHMERT. But there again, before we pass laws, though, we are supposed to listen to people like you with the experience before we tailor that legislation. So I would hope that we would have your help in doing that.

Judge CARNES. Well, certainly and, you know, we call for the repeal of these laws. We understand, again, there are 170, and that might not be something that happens immediately.

We hope that whatever ameliorating effect you can give to them is something that Congress will consider, and it sounds as if you all are thinking about that, and we appreciate it.

Mr. GOHMERT. Thanks. Thank you, Judge.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

Gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman, and thanks for this hearing, which I think is timely and important. Now, I was struck by your testimony, Judge Carnes, and the young man, the 24-year-old first time offender, who ended up with a 61½-year sentence for marijuana trafficking.

And I am equally attentive, Mr. Sullivan, to your testimony that the role in your view of mandatory sentencing. Do you think, just based on what you heard the judge say that that was a just sentence for that 24-year-old kid?

Mr. SULLIVAN. Well, just based on the facts as relayed by the judge, it seems extremely excessive even to me as a proponent in support of mandatory minimum sentencing. I don't know what the underlying facts are that would warrant the prosecutor to charge multiple offenses relating to a firearm, what appears to be almost a single incident.

So it does seem awfully extreme, but I think that there is enough flexibility and discretion in the system to avoid those outliers with folks making reasonable determinations at the beginning.

Ms. LOFGREN. Let me just try out something because I think that we have ended up in the situation we are in—I wasn't in the Congress when most of the mandatory sentencing acts were initiated. Certainly, I have been here to observe their expansions at times, and you end up with a situation.

Here we are and you have got crime victims who did nothing wrong and there is nothing more appealing to, you know, legislators than a citizen who was so treated so unfairly and to be a crime victim, and our heart goes out to that person.

And we want to do something about it, and I think that has led to these statutes that end up with unjust results, and I also think it has led up to an intrusion of the Federal Government in two areas of the law that have always been the sole purview of State law. And it is not bad motives. It is good motives, but it ends up in a place where we are today that is dysfunctional in many ways.

And I think it is very difficult to change because this is an area where if anything is done to allow judges to judge, somebody will say it is soft on crime. Soft on crime and that is something that nobody in the legislative body wants to be accused of.

So Mr. Norquist, this question I guess is directly to you. To step forward in this political environment we are going to need a broad bipartisan effort willing to take the heat to say no, it is not soft on crime to allow judges to judge and legislators to legislate. Are you willing to be part of that?

Mr. NORQUIST. Yes, I think it is an important step forward and, again, I had suggested the base closing commission concept as a way to take a look at letting you do the same thing with mandatory minimums, but also with Federal crimes in general, what needs to be a Federal crime, and to cease having something be a Federal crime is not an endorsement of the activity. It may very well deserve to be a very serious State crime, but it doesn't have to be a Federal crime.

Ms. LOFGREN. Let me ask you this, and maybe it is an unfair question and if it is you, obviously, won't answer it. But if the papers are correct, you lead a group of thought leaders on the conservative side of the political spectrum on a regular basis to come forward on various issues. Would you be willing to take that position in the leadership group that you have?

Mr. NORQUIST. Well, these issues have come up in Center-Right Coalition meetings and there is a working group of conservatives that are concerned about judicial issues, which is something that,

frankly, some of the folks on the center-right have not focused on. My opening comments were we tend to focus on those parts of government that we think shouldn't be there at all because you want to focus on tamping down the damage done.

But there is a whole bunch of government that is necessary and useful and is actually mentioned from time to time in the Constitution that we need to focus on more and make sure that that is done competently and less expensively and less intrusively.

So I think it is my hope that you see a number of different groups that are more interested and looking at criminal justice reform and how conservatives can play a role in that, and it provides cover from the argument that its all just a bunch of softies being soft on crime.

That is not the case, but I think this is one of those things that in a nonpartisan bipartisan way we can actually make some progress if we don't try and do everything at once and take some bites of the apple.

And again, I like the base closing commission because that was one where we closed down some military bases, which saved money and nobody got accused of being anti-defense and yet real resources were saved and the government became more effective and less expensive.

Ms. LOFGREN. Let me ask the judge this. One of the things, you know, we are the legislative body and we are going to pass statutes from time to time and with sentences attached.

I have never really thought—the guidelines should do it in most cases, but let us say we do what Mr. Gohmert has suggested and we have, you know, your 5-to 10-year sentence like you have. And yet in a case that the judge is seeing that a downward departure seems warranted.

Wouldn't it be a real deterrent for a judge to have to articulate in writing in the sentence why that departure downward was required? Wouldn't that be a sufficient protection for the public against wild and crazy Federal judges doing sentencing?

Judge CARNES. Well, I will leave it to others to decide about the protection against we wild and crazy judges.

Ms. LOFGREN. Most of mine, though, are pretty conservative and pretty staid.

Judge CARNES. But what you suggest is something that is actually we have been doing for a long time with the guidelines system. When we departed downward or upward we were expected to articulate a reason. Now, since *Booker* with variances, or even with no variances, we are expected to articulate a reason. It is what we do. We know how to do that, and I think we would be very comfortable with that process.

Ms. LOFGREN. I know my time is up. I was just struck thinking about this 24-year-old still in prison for marijuana at a time when the governor of California is now asking the State to consider legalizing and taxing that very same product. It is kind of ironic.

So I yield back, Mr. Chairman.

Mr. SCOTT. Thank you.

Mr. NORQUIST. I would just speak on the record against the idea of taxing marijuana. [Laughter.]

Mr. SCOTT. Gentlelady from Florida, Ms. Wasserman Schultz?

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman. Mr. Chairman, I am going to be brief, but I do want to commend you for convening this hearing. I know this is an issue about which you have been passionate for a very long time, as has my colleague, Ms. Waters, and I want to thank all the witnesses for sharing their point of view today.

My point of view is that I believe and always have, in judicial discretion, and our Committee and this Subcommittee in particular is fortunate to have the experience of a number of judges.

One of our Members who is not here with us in the meeting any longer, but my good friend from Texas, Judge Poe, was—how do I put this, renowned for his creativity in sentencing.

And I have heard him speak about some of his more unorthodox sentences, particularly in domestic violence cases, and it impressed upon me just how important it is to give trial judges the latitude that they believe they need to make an impact on criminal defendants.

And I also want to note that his bill, the Ramos and Compean Justice Act, recognizes that there are indeed some cases in which he believes tying judges' hands at sentencing is inappropriate.

And I think that provides us with a foundation to continue to build common ground, and I want to thank him for his leadership and my colleague, Ms. Waters from California's leadership on this as well.

Regardless of how mandatory minimums first started in the past, mandatory minimums basically whether they made sense or not have now, as Mr. Norquist said, become politically popular and they are the hot button on whether you are too soft or going to be hard on crime.

And this whole idea came out of the fact that there was a belief, I think a misguided one, that we had judges that were too soft on crime. We should note that at this point after a Republican president about 60 percent of district court judges have now been appointed by a Republican president and are presumably tough on crime as the definition is written.

So I would hope that we would let these judges be judges. If we look up the word judge in the dictionary, discretion is in there in that definition somewhere. And having said all that, Mr. Norquist, I do have to tell you that it was surprising to see your name on the witness list today and, obviously, you are not someone that I would normally agree with, nor you with me.

But I am pleased to see that you have stepped up on this issue. We agree on this one. My State of Florida, like many, is really in the throws of a desperate budgetary situation. We have had decades of tough on crime legislation, some of which in the legislature I voted for, and I consider myself not someone on the left on these issues.

But mandatory minimums have basically left the taxpayers holding the bag, and I think we have to move away from whether we are tough on crime or soft on crime and focus on whether we are smart on crime. But a one-size-fits-all approach is not working and it is breaking the bank.

And so I think I would like to hear a little bit more from you on your perspective—from your fiscally conservative perspective on

how you reached this conclusion, because normally your organization I don't think would take a position on this, and so I was glad to see you did. And you know, just as an aside if you could also make sure you score this one that would be great, too.

Mr. NORQUIST. I wouldn't overstate my position. I think I am calling for and my recommendation was sunseting each of the mandatory minimums so that they would be revisited every 4 years.

It is not necessary to say that every 4 years you decide to toss them all out, but you may want to look at whether they are too high or whether they need to exist, but I feel the same way about Federal laws that have criminal implications period.

I mean, I think they ought to be sunsetted as a way to thin out the over federalization of law. A lot of things can be perfectly well handled by local governments. This idea that we passed laws in the 1930's because States weren't able to deal with bank robbers, you know, we have gone past that.

A lot of States are very capable of handling these issues and a lot of the crimes that are Federal crimes are not more competently handled by the Federal Government, and it would be fine to have them handled at the State level.

And we ought to be looking, as I said in my opening comment, all government has costs including the good bits, including the let us lock up bad people. It is not free. You may want to do it, but every time you decide to do it there are costs imposed on taxpayers who are kind of by definition victims, you know, they didn't do anything. They are going to be paying for it.

So how much cost do you impose on them? And are there other ways to reduce crime that are less expensive? And there is a whole bunch of stuff done with bracelets and other ideas that people have put forward or different States are trying, I guess. I like 50 States because that is 50 experiments in what works. Really silly ideas can only be imposed at the national level.

Ms. WASSERMAN SCHULTZ. So would you agree with President Obama then on focusing on being smart on crime as opposed to being soft or tough?

Mr. NORQUIST. I don't know what he said on that. I would be stepping into perhaps endorsing something I wasn't aware of. I assume Obama has good intentions and will help us work on reducing both crime and the costs of keeping crime down. But I think the legislature here is the starting point and, again, starting to thin out the number of Federal crimes we have.

It is easier to manage a smaller number of crimes. We are talking 2,000, 3,000 Federal crimes. You know, we make fun of legislatures for voting for legislation they haven't read, but we put people in prison for series of 3,000 laws they can't possibly be aware of. Perhaps we should thin those down.

Ms. WASSERMAN SCHULTZ. Mr. Chairman, just as a historical note my State in the 1990's had, under Democratic leadership in the legislature, had a specific category of legislation that allowed us to file bills but we had a bill limit in our legislature in the House side.

But what didn't count against our limit is when we filed legislation that repealed silly laws. So perhaps we could speak to the

speaker and the Republican leadership as well about we don't have bill limits, but perhaps as a way of reviewing some of those laws that we all know are antiquated and don't belong there and shouldn't be law at the Federal level. Again, allowing States to utilize their discretion. Maybe we could make that suggestion.

I yield back the balance of my time.

Mr. SCOTT. Thank you. The gentleman from Texas and I were just discussing a mechanism, trying to figure out a mechanism for going through what is under our jurisdiction the criminal code, and we will be continuing those discussions. We are going to have a very brief second round, but I just wanted to comment on Mr. Norquist's comment about over-federalization.

If you are a victim of a carjacking, you don't call the FBI. You call the local police, and so some of these things I think would be appropriate for letting the locals deal with it. And one of the problems with mandatory minimums is the sentence is essentially imposed by the prosecutor without any checks and balances.

When a judge imposes a sentence, it is reviewable by appellate courts, and I would like Judge Carnes to briefly comment on the legislation that I have introduced, which is a fairly straightforward statement. It says, "The authority to impose a sentence below a statutory minimum to prevent an unjust sentence."

And says, "notwithstanding any other provisional law, the court may impose a sentence below a statutory minimum if the court finds it necessary to do so in order to avoid violating the requirements of subsection A of 53—excuse me 3553(a), which goes into deterrents, protecting the public, seriousness of the offense, role of the defendant and whatnot.

If this does not repeal a mandatory minimum, and I am going to ask you to kind of comment. If you would rather reflect and comment in writing I can understand that, but if this were to pass, we do not remove any mandatory minimums, would the mandatory minimum be presumed under those circumstances?

Judge CARNES. Well, it is an interesting question. Let me start by saying as you well know from having had Conference witnesses before, I have a client and I am not free to take a position on something that the Conference has not taken. The Conference opposes mandatory minimums. It hasn't taken a position on any of these particular bills so it wouldn't be appropriate for me sitting here to take that position.

But the notion behind the opposition of mandatory minimums is that it is a straightjacket, and that more discretion is called for. So obviously, as Judge Gohmert was saying, as you were saying, anything that helps give us more discretion is something that I sense the Conference would not be adverse to.

Now, as to whether there would be problems with that standard, that presumption, the only thing I could articulate from a legal point of view would be that right now post-*Booker*, post-*Gall* and *Kimrough*, the case law indicated that the guidelines are not presumptively correct. In other words you have to calculate them. You have to calculate them correctly but when you sentence, they are not the presumption. You are going now to 3553 and what is reasonable.

If you have a statute that says this is the mandatory minimum, unless you think 3553 would call for a lower sentence, you could go through that same sort of analysis, but I am not sure right now that you would.

I am not sure that some courts would say well, maybe there is more of a presumption to the mandatory minimum, which may be something I guess that might argue in its favor and that it has got a little more heft to it than a guideline. But it is something that the courts would work through or either you all can make our lives easier by saying very clearly in the legislation what your intent was.

Mr. SCOTT. And if you sentenced under the mandatory minimum that would be reviewable as reversible error by an appellate court?

Judge CARNES. It would be under whatever standards there are now and we are still developing. We are now developing these standards to review 3553 that is evolving now and I would imagine the same standards would control for this.

Mr. SCOTT. Thank you.

Judge Gohmert?

Mr. GOHMERT. Just briefly along those lines, that is my concern. If you completely wipe out the mandatory minimum then you don't have the enforcement or as much power on review to knock out really inappropriate downward departures, than if it is just a guideline that is now, as we know from *Booker*, really just a guideline.

So that is my concern about knocking it out completely. Maybe if the adequate, and my friend, Ms. Lofgren is gone, but if you can have adequate justification then do it. But if the mandatory minimum is there, which, you know, I just always called it the bottom of the range before I got here to Congress, but that is my concern.

Judges, you would most of the time use very good discretion, but there are some that don't, and we just went through the process of impeaching one here whose judgment was not so good.

And I love the comment, "Really silly ideas can only be done effectively at the Federal level," and we have. But as Chairman Scott was indicating I had leaned over to him and I said, "You know, what do you think? Could we work on something like that?" And he is open to the idea because we really do need to do some cleaning up and there are some archaic clause, and I think we could do the whole country a favor in cleaning that up.

One of the things—and Attorney General Ed Meese was really kind of a driving force behind this over-criminalization idea. We have got all these different Federal agencies now who want to have their own arresting authority, their own SWAT team because it is deemed fun to turn on your siren and go slam somebody to the ground and arrest them, and we really need to isolate that to just the law enforcement personnel.

We don't need every Federal agency out there arresting, which is one of the impetus for wanting to combine them in a criminal code, but it would probably take a base closing type commission to get that done. So thank you, and I appreciate the ideas.

And Ms. Stewart, I haven't really talked to you in this hearing but I know the wonderful efforts you have made and what the impetus was, and I appreciate your efforts. Thank you, ma'am.

Ms. STEWART. Thank you.

Mr. SCOTT. Gentlelady from California.

Ms. WATERS. Thank you very much. I would like to ask Ms. Stewart about what she, what she has seen happen over the past, you know, 10, 15 years you have worked on this issue. Do you sense that there is a growing consensus of folks who now understand what they are, what mandatory minimums are and what they are not, and want to get rid of them? What have you learned about all of this?

Ms. STEWART. Yes, I do think that there is a much better understanding nationally of what sentencing is, how it applies, and that something needs to be done about it.

Certainly, when my brother was arrested no one had ever heard of mandatory minimums. It took me a long time to get information about it. Of course, that was 20 years ago and technology today makes it so much easier to get that kind of information. So yes, I think that the public is ready for this.

We actually petitioned a poll a couple of years ago to ask last summer, to ask whether or not the public supported the idea of the courts sentencing or legislators sentencing. And overwhelmingly something like, now I have forgotten the numbers, 70 percent or something said that the courts should sentence people not legislatures.

I also wanted to just make a couple of comments to some of the things I have heard here today. One, I like the idea of sunsets, although I will say we have had mandatory minimums for 20 years so I don't want to wait another 4 years for another sunset review. Could we start that review right now?

And also, the base closing idea is a good one, but also many of those bases, as you may know, were turned into prisons. So let us be careful what we wish for here. [Laughter.]

And thirdly, just one thing we often hear usually from U.S. attorneys and prosecutors that they need mandatory minimums because they are a tool to get people to cooperate. I would simply say that there are a lot of very complicated white-collar cases that are not subject to mandatory minimums.

And most other cases in the Federal system that judges somehow manage to get—prosecutors get convictions and the sentences are very stiff, and so there are ways to bring convictions without mandatory minimum sentences. The guidelines have been proving that for nearly two decades. And that is it. Thank you so much.

Ms. WATERS. Well, let me just thank you very much, again. And I would like to just speak a little bit to Mr. Gohmert's reference to Congressman Rangel and his involvement in helping to give support to mandatory minimums. Let me just say all of that has changed.

Mr. GOHMERT. Will the gentlelady yield?

Ms. WATERS. Yes, I will yield.

Mr. GOHMERT. I wasn't saying that he supported mandatory minimums necessarily, just the harsher sentencing range for crack cocaine.

Ms. WATERS. Well, yes, I guess I can speak to that too. I think that for those people who want to help the African American community, I don't think it is done with unconstitutional measures

where those who are considered committing crimes that would fall into mandatory minimums somehow should be sought out, prosecuted and jailed disproportionately.

Julie Stewart alluded to the white-collar type crimes that are involved with cocaine, crack cocaine, et cetera that are treated differently or may not even be, you know, considered because they are not apprehended, et cetera. But the African American community has been so devastated by college students—in one case that I met with Julie Stewart we have twins who are still serving time.

Ms. STEWART. One of them.

Ms. WATERS. One of them is still—what were they sentenced to, if I may ask?

Ms. STEWART. I think one was 15, and one was 19 years.

Ms. WATERS. And the mother is a big volunteer with FAMM. And she has worked hard for years because, again, it was a case of what appeared to be young folks who were not drug dealers at all just stupid, but not drug dealers who got caught up in the system and ended up with these extraordinary number of years that were given to them.

So I don't want anybody to think that they help the African American community by being tougher somehow. We don't need to have the discretion taken away from judges to be able to determine who this individual is.

Is this a person with a first time offense? Is this a person who, you know, comes from a family that, you know, has contributed mightily to our society who, you know, should be given consideration for the kind of leadership that they could provide once they discover that maybe their child made a mistake, et cetera.

I just want to dispel the notion that any community is being helped by being treated differently.

Mr. SCOTT. Thank you. Let me ask one final question for any of the witnesses that might want to respond. What does it do to public respect for the law if people look up and see someone given what everybody knows is a bizarre sentence under the circumstances?

Mr. NORQUIST. Doesn't help.

Judge CARNES. My answer is the same. Obviously, it does not help.

Mr. SCOTT. Thank you. Gentleman from Texas.

Mr. GOHMERT. Just in response to make sure that my friend from California understands I wasn't attempting to indicate that the tougher sentences had assisted the African American community because I certainly was not indicating that.

I hope my friend agrees because I have gone back and looked at who the proponents were of the tougher sentencing. I agree it does not appear to have helped the African American community.

But those who are in Congress having talked to them, having looked at who the proponents were and who President Reagan thanked for their work and really being the driving force, it was African American Members of Congress that pushed the disparate sentencing for crack versus powder cocaine.

And so the law clearly was not passed with the disparate treatment as a result of any type of racist notion. It was done believing those who said this will help the community, but I agree with my

friend. It does not appear to have helped the African American community at all.

Ms. WATERS. Well, if the gentleman will yield.

Mr. GOHMERT. Certainly.

Ms. WATERS. Let me just say this. I love the idea that the Congress of the United States and even the President at that time would take leadership from the African American community, if that was the case. Now, we want them to take leadership again from the African American community.

We are saying that it has been destructive. It has not helped and now listen to us, and listen to what we are saying. We want discretion given back to the judges and mandatory minimums destroyed. Thank you.

Mr. GOHMERT. I yield back.

Mr. SCOTT. Thank you and I would point out that whatever the rationale was when it passed, we have more information now, and we should legislate on what we know now. I would like to thank all of our witnesses for their testimony.

Members may have additional written questions for the witnesses, which we would ask that you respond to as promptly as possible so that the responses could be made part of the record.

Without objection, the record will include an updated report on mandatory minimums that we received from the U.S. Sentencing Commission on July 10 in a statement from Eric Sterling on behalf of the Criminal Justice Policy Foundation.

[The prepared statement of Mr. Sterling follows:]

PREPARED STATEMENT OF ERIC E. STERLING, PRESIDENT, THE CRIMINAL JUSTICE
POLICY FOUNDATION, ADJUNCT LECTURER IN SOCIOLOGY, THE GEORGE WASH-
INGTON UNIVERSITY

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STATEMENT
SUBMITTED TO THE
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
at a
HEARING ON
MANDATORY MINIMUMS
AND UNINTENDED CONSEQUENCES
JULY 14, 2009

By
Eric E. Sterling
President, The Criminal Justice Policy Foundation
Adjunct Lecturer in Sociology, The George Washington University
Former Assistant Counsel, House Subcommittees on Crime and Criminal Justice,
1979-1989

Chairman Scott, Representative Gohmert, Members of the Subcommittee, I respectfully urge you not to blow this rare opportunity to really improve federal drug enforcement as you revise federal mandatory minimum drug sentencing laws.

From 1979 through 1988, I was Assistant Counsel to this subcommittee. During those years I was the counsel responsible for federal drug laws and oversight of the federal anti-drug effort. In 1986, I was the counsel responsible for developing the Narcotics Penalties and Enforcement Act (reported as H.R. 5394 and enacted as Subtitle A of Title I of the Anti-Drug Abuse Act of 1986, P.L. 99-570) that created 5- and 10-year mandatory minimum sentences for a variety of drug offenses, most infamously for crack and powder cocaine.

The paramount reality you should remember is that when international drug trafficking is more dangerous than ever, your bill will direct the U.S. Department of Justice in its selection of drug cases to investigate and prosecute. The structure of the mandatory minimum sentences is the map the Justice Department follows in selecting federal drug cases.

Before you vote, you should resolve this primary question: **In 2009, what are the proper drug trafficking cases for the U.S. Department of Justice to investigate and prosecute?**

The answer: **Federal drug cases should focus exclusively on the international organizations that use their profits from the manufacture and distribution of cocaine, opium and heroin, methamphetamine and cannabis to finance assassination, terrorism, wholesale corruption and bribery, organized crime generally, and the destabilization of our nation's allies.** No other law enforcement agency in the world has the capacity to take on this

Statement of Eric E. Sterling, House Subcommittee on Crime, July 14, 2009, page 2

necessary responsibility!

Every state in the U.S. has a great capacity to investigate, prosecute and punish the high-level local drug traffickers that operate within their jurisdiction. State and local police and prosecutors outnumber federal agents and prosecutors. State prisons far exceed the capacity of federal prisons. **The federal government should NOT supplement state and local drug investigations and prosecutions, it must complement them with international drug cases.**

Almost none of the crack dealers that proliferate in countless U.S. neighborhoods warrant federal prosecution. They are neighborhood criminals and their crimes are state crimes. If a state's law does not adequately punish the crack dealer, *that is the state's problem. Inadequate state laws do not warrant wasting very scarce, powerful federal resources even on serious neighborhood criminals!* The biggest drug dealer operating in New York, Illinois, West Virginia or New Hampshire should be prosecuted and punished by the authorities of that state. Almost every federal crack case wastes the time and talents of federal agents, assistant U.S. Attorneys, and federal judges.

Today, international drug trafficking is a national security threat to the United States and our allies. The integrity of the international financial system is threatened. We are spending billions of our tax dollars against enemies, such as al Qaeda and the Taliban, who are financed by the profits of illegal drug production and distribution. The Mexican drug trafficking organizations and the FARC and AUC in Colombia threaten the integrity and stability of major allies of the U. S. These criminal organizations are spreading to West Africa. They operate throughout the world. These are the worthy targets of the best investigators and prosecutors in the nation and the world.

Congress should direct the Attorney General to forbid U.S. Attorneys from wasting their time on any drug case that cannot be shown to have national or international significance. The selection of all federal drug cases should be managed in Washington. Congress should direct the DEA to close most of its offices in the United States, and focus on investigating major global drug trafficking criminals. Federal mandatory minimum sentences and prison cells should be reserved for the highest-level, global traffickers and criminals.

If the Subcommittee focuses on the relative harms of crack cocaine versus powder cocaine, or the quantity ratio between crack cocaine and powder cocaine, you will completely miss the point. If you keep crack cocaine in the mandatory minimums, you will have thrown away the opportunity to re-direct federal investigations and kept the world's best investigators at work on the wrong cases.

The proper federal targets are distributing hundreds and thousands of kilos of cocaine! If you continue to authorize mandatory minimums for a mere 5 kilograms (or less) of cocaine, you will have done nothing that threatens organized crime or international terrorists!

The federal effort must be re-focused on the highest-level national and international drug traffickers so that extremely valuable federal law enforcement resources are no longer wasted.

###

Mr. SCOTT. Without objection, the hearing record will remain open for 1 week for the submission of additional materials, and without objection the Subcommittee stands adjourned.

[Whereupon, at 12:30 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF DAVID A. KEENE, CHAIRMAN,
AMERICAN CONSERVATIVE UNION

Thank you Chairman Scott and Ranking Member Gohmert for inviting me to submit this statement for the record of your July 14 hearing, "Mandatory Minimums: Unintended Consequences." This is an important issue to me and not solely because mandatory sentencing offends my notion of sound criminal justice policy.

I am the chairman of The American Conservative Union, the nation's oldest and largest grassroots conservative lobbying organization. I have served as chairman for the past 25 years. ACU is a multi-issue umbrella organization devoted to communicating and advancing the goals and principles of conservatism.

As grateful as I am to serve as head of the ACU and as passionate as I am about promoting the conservative cause in Washington, DC, that is not why I am here today. Rather, I am here today as a father; the father of a young man serving too much time in a federal prison because of a mandatory minimum.

My son was arrested and pled guilty to a federal offense carrying a ten year mandatory minimum sentence nearly eight years ago. The line prosecutors handling the case wanted to charge him under a different statute that would have carried a five year mandatory sentence, but their superior rejected this and demanded that he plead to the offense carrying the heavier penalty.

He had no choice but to accept the "deal" because he had, in fact, violated the law. Neither he nor his mother and I could afford the expense of a trial that would probably result in a conviction despite the fact that various medical experts were convinced and were willing to testify that they believed the loss of control resulting in his offense was the result of a chemical imbalance that could be corrected medically.

It turns out that they were right. The court had no choice as to his sentence, but ordered that he have access to the medication needed to alleviate the problem. It's worked, but he's still in prison.

Before this happened to my family, I was aware of the debate over mandatory minimums but was not a participant. My instinct then as always was that one-size-fits-all policies rarely work, and so I was inclined to believe the adoption of mandatory sentencing laws was well-intentioned but ultimately unwise.

Since all this happened, I have taken the time to study the issue more closely and concluded that my instinct was correct: mandatory minimum sentences are unwise.

And, Mr. Chairman, though I am not speaking on behalf of the ACU, my opposition to mandatory minimums, while informed by my family's loss, is rooted in conservative principles; namely, reverence for the Constitution and contempt for government action that ignores the differences among individuals.

Mandatory minimums won support for the best of reasons. Sentences of different lawbreakers for the same offense differed widely not just on a state by state basis which is acceptable on federalist principles, but within the same state and across the country in the case of federal crimes.

There was a popular belief in the seventies, eighties and nineties that some judges were simply too lenient and that disparate sentencing policies from jurisdiction to jurisdiction did an injustice to many. In some cases this was true, but, as is often the case, the attempt to solve one problem created new problems.

I believe the United States Constitution is the greatest charter for self-government ever devised. Committed to protecting individual freedom, the Founders ingeniously designed a government of co-equal branches with separate powers.

James Madison, for one, believed that a clear separation of powers was more vital to protecting freedom than the Bill of Rights. Yet mandatory minimums undermine this important protector of liberty by allowing the legislature to steal jurisdiction

over sentencing, which has historically been a judicial function. The attempt by legislatures and the Congress to address perceived problems in the justice system by transferring power from judges to prosecutors and the executive branch violate these principles and have, in the process, given prosecutors unreviewable authority to influence sentences through their charging decisions and plea bargaining power.

Admittedly, the letter of the Constitution does not prohibit the legislative branch from usurping sentencing authority, but its spirit and common sense should. My conservative brethren and I have long argued that responsibilities should be shouldered by the branch of government, and the level of government, that is closest to the problem.

Former Senator Phil Gramm (R-TX) used to tell a story about an argument he had with a bureaucrat from the Department of Education in Washington, DC. The senator told the women from the agency that her office was imposing too many federal rules on local schools. He said that teachers in his local schools and the children's parents knew better what their children needed than some bureaucrat in Washington.

The bureaucrat wouldn't budge. She argued that the government just wanted to do what was best for all children. Exasperated, the senator said, "I know what my kids need more than you do because I love them more than you do." In an apparent attempt to show her dedication, the official replied, "No, you don't, Senator, I care about your children as much as you do." The Senator stood upright, cocked his head, and said, "Oh yeah? Then tell me their names."

It was an effective story because the American public seems to agree that many problems are best addressed by the people on the ground closest to the source. What's true for many issues is certainly true for sentencing, and the American people get it. A poll taken last year revealed that nearly 80 percent of Americans believe that courts and judges—not politicians in Washington, DC (or in state capitals)—should determine sentences in individual cases.

This reflects common sense. Because of the cases and defendants that come before them, local judges (including nearby federal judges) are the first to know when a new crime wave is forming or a new drug has gained favor. These judges see first the arrival of new gangs and usually know who controls them. And, after presiding over trials and pleas, local judges know better than anyone the motivations of the defendants who commit certain crimes and of the prosecutors who charge them.

Those of us on the right have been most skeptical of wasteful government spending and inefficient regulation. Perhaps the most successful weapon in the budget hawk's arsenal is cost-benefit analysis. We might agree with our friends on the left that we could have cleaner air if we impose massive regulations on emissions but we have always insisted that government must consider the economic and social costs of such regulations. Oddly, we have not always insisted on such analysis in criminal justice matters, including sentencing.

We need to start. It's time to realize that we could lock up everyone and throw away the key—and, according to a recent Pew Foundation finding that one out of every hundred Americans is in jail, it seems we are well on our way to doing just that—but who is measuring the social and economic costs of this policy? We know something of the economic cost; from 1982 to 2008, federal corrections spending rose from \$641 million to \$5.4 billion, and state spending rose from \$6 billion to \$50 billion. Spending on corrections is rising faster across the states than spending on education, transportation and every other budget category except Medicaid. These are just the direct economic costs. There are high social costs, as well. I know the anguish and hardship of living without a son nearby. I can't fathom the effects on society of the more than 1.5 million children being raised without mothers or fathers.

And what do we get for it? Research has shown no direct correlation between incarceration rates and crime rates. We know, for example, that while our prison and jail populations are five times what they were in the 1960s, crime rates today, averaged across major crime categories, are about 250 percent of 1962 rates. Indeed, between 1985 and 1993, when harsh mandatory minimums were reinstated, that murder and robbery rates increased by 25 percent. Mandatory minimums do not make us safer.

There are some criminals any sane American would classify as habitually dangerous. Such individuals, depending on the crimes they commit, deserve the harshest of sentences if only to protect the rest of us from them, but not everyone who breaks even our criminal laws falls into this category. Judges should make distinctions based on individual circumstances and those who officials believe have been truly rehabilitated prior to the expiration of a sentence should be eligible for early release.

There is an old Tom T. Hall song in which the singer urges the townspeople to "hang 'em all" because that way they'll be sure to get the guilty, but the song made

it clear that doing so would be neither fair to the town nor those who were innocent and didn't deserve hanging.

The idea of the mandatory minimum while originally adopted for the best of reasons is the non lethal equivalent of hanging 'em all.

Put simply, Mr. Chairman, there is nothing conservative about mandatory minimum sentences. They represent a radical departure from the traditional conservative approach to criminal justice—an approach that said if you commit the crime, you will do the time.

The argument that mandatory minimums have solved the problem they were meant to address is laughable. To be sure, many Americans were frightened about escalating drug use and drug-induced violence in the mid-1980s. But the last-minute addition of mandatory minimums to the legislative response was anything but considered. There was not a single hearing on mandatory sentences in either chamber. No expert testimony was sought, no debates were held.

Years later, the late Chief Justice William Rehnquist commented on the lack of legislative forethought. In the same speech in which he famously described mandatory minimums as “a good example of the law of unintended consequences,” Rehnquist noted the following: “Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’ Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole.”

As I mentioned, I have taken more time since my son's sentencing to better understand the evidence regarding mandatory minimums. During this period, I have also come to realize that my skepticism is shared by like-minded friends. Indeed, it seems that opposition to mandatory minimums among conservatives is growing. The committee heard directly from my friend and fellow conservative Grover Norquist about his concerns with mandatory sentences.

There are other voices on the right speaking out. The ACU hosts the premier annual gathering of conservative leaders in Washington, the Conservative Political Action Conference (CPAC). This year's CPAC included a panel discussion entitled “How Many Crimes Did You Commit Today?” The impetus for the panel was the growing concern among many conservatives about mass federalization of crime. Two of the speakers, constitutional scholar Tim Lynch of the Cato Institute and Pat Nolan of Prison Fellowship Ministries, strongly oppose mandatory minimums.

On July 22nd, this subcommittee will examine the same issue “Over-Criminalization of Conduct/Over-Federalization of Criminal Law” and hear testimony from experts on the right and left. Clearly, there is growing consensus that we are federalizing too many crimes easily handled by the states, including small-time drug and gun cases subject to stiff federal mandatory minimum sentences.

Lawmakers in Washington, like the education department bureaucrat who Senator Gramm confronted, did not know my son's name. But they presumed nonetheless to sentence him. I believe in punishment. I believe that there should be consequences when someone breaks the law. But depriving an individual of his freedom is the ultimate power of the state and it must be done judiciously. The punishment must be meted, based on all the factors of the crime, the defendant's role in it, and the unique circumstances of the individual.

Above all, punishment should be imposed, not by Washington lawmakers, but by judges doing the job we gave them in the constitution.





NATIONAL BORDER PATROL COUNCIL

of the

American Federation of Government Employees

Affiliated with AFL-CIO



July 28, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
2409 Rayburn House Office Building
Washington, D.C. 20515-4321

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
2409 Rayburn House Office Building
Washington, D.C. 20515-4321

Dear Chairman Conyers and Ranking Member Smith:

Countless Americans were shocked and dismayed by the lengthy prison sentences received by Border Patrol Agents Ignacio Ramos and José Alonso Compean for using their duty firearms to defend themselves against a known drug smuggler who they reasonably believed to be armed. In addition to the considerable distress suffered by these two innocent men and their families, those harsh sentences have had a decided chilling effect on other Border Patrol agents and law enforcement officers across the Nation, who now fear that they could suffer the same fate for simply doing their jobs.

Allowing judges to exercise discretion and downwardly depart from mandatory minimum sentences when necessary to prevent unjust sentences would alleviate some of these concerns. Law enforcement officers who are found guilty of using a firearm to commit a crime of violence related to their employment would no longer automatically be subject to the mandatory minimum penalties contained in 18 U.S.C. § 924(c) for using or carrying a firearm during and in relation to a crime of violence. It is highly unlikely that Congress intended that those provisions of the Gun Control Act be applied to law enforcement officers who are using firearms – one of the most important tools of their trade – while acting within the scope of their authority. It is important to recognize that this legislative proposal would not shield rogue officers from the full consequences of their illegal actions, but at the same time would properly presume that the overwhelming majority of our Nation's law enforcement officers carry out their duties honorably under extremely difficult circumstances, and must often make split-second decisions with incomplete information. Forcing judges who preside over cases involving those issues to mechanically apply minimum sentences can easily result in gross miscarriages of justice.

For the foregoing reasons, the National Border Patrol Council, which represents 17,000 front-line Border Patrol employees, supports H.R. 3327, the "Ramos and Compean Justice Act of 2009."

Sincerely,



T.J. Bonner
President
National Border Patrol Council
AFGE, AFL-CIO
P.O. Box 678
Campo, CA 91906



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

August 24, 2009

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to express the support of the Judicial Conference of the United States for the Ramos-Compean Justice Act of 2009, H.R. 3327, recently approved by the Subcommittee on Crime, Terrorism, and Homeland Security. If signed into law, this Act would provide federal judges with a valuable mechanism to ameliorate the most pernicious effects of mandatory minimum sentencing provisions and would allow judges to tailor individual sentences using the factors required under the Sentencing Reform Act of 1984, Pub. L. No. 98-473, and enumerated at 18 U.S.C. § 3553(a). I also offer a technical recommendation to the legislation.

The Judicial Conference has vigorously and consistently opposed mandatory minimum sentencing provisions for more than fifty years. It is the view of the Conference that mandatory minimum sentences improperly limit judges' discretion to impose fair sentences that take into account the purposes of sentencing, which Congress has set out in 18 U.S.C. § 3553(a). For this reason, the Conference has concluded that "Congress should be encouraged not to prescribe mandatory minimum sentences." JCUS-SEP 95, p. 47.

Although the Ramos-Compean Justice Act of 2009 would not fully realize the Conference's goal of repealing mandatory minimum sentences (JCUS-SEP 91, p. 56), it would mitigate many of the worst injustices imposed by mandatory minimum sentences. On several occasions, the Judicial Conference has supported legislation that would not eliminate mandatory minimum sentences altogether, but would limit their impact. While the Ramos-Compean Justice Act of 2009 likewise does not constitute the wholesale

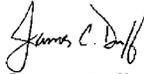
Honorable John Conyers, Jr.
Page 2

repeal of mandatory minimum sentences that the Judicial Conference seeks, it would allow federal judges to impose sentences in a "system that is fair, workable, transparent, predictable, and flexible." JCUS-MAR 05, p. 15. It would allow judges to avoid situations in which they are forced to impose sentences they find to be unjust, irrational, and contrary to the sentencing policies set forth by Congress itself.

Although we strongly support this legislation, we have a drafting recommendation. In the proposed 18 U.S.C. § 3553(g), paragraph 2, we recommend adjusting the language to say the court is "contemplating" a certain type of sentence rather than stating that a judge "intends" to impose a sentence prior to the sentencing hearing. This change would recognize that judges may well be affected by the information and argument presented at the sentencing hearing.

Thank you for the opportunity to provide the position of the Judicial Conference on this legislation. If we may be of any additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,



James C. Duff
Secretary

Identical letter sent to: Honorable Lamar S. Smith

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699



July 10, 2009

Honorable Robert C. Scott
Chair
House Committee on the Judiciary
Subcommittee on Crime, Terrorism,
and Homeland Security
U.S. House of Representatives
B370-B Rayburn House Office Building
Washington, D.C. 20515

Honorable Louie Gohmert
Ranking Member
House Committee on the Judiciary
Subcommittee on Crime, Terrorism,
and Homeland Security
U.S. House of Representatives
B351 Rayburn House Office Building
Washington, D.C. 20515

Re: *July 14, 2009 Subcommittee Hearing Entitled "Mandatory Minimums and Unintended Consequences"*

Dear Representatives Scott and Gohmert:

In June 2007, the United States Sentencing Commission testified before your subcommittee at the hearing entitled "Mandatory Minimum Sentencing Laws – The Issues." The Commission provided a statistical overview of statutory mandatory minimum sentencing, including data both on mandatory minimum sentences and the statutory mechanisms created to provide relief to certain defendants from application of the mandatory minimum penalties.

In light of your subcommittee's upcoming hearing entitled "Mandatory Minimums and Unintended Consequences," the Commission has decided to update the statistical information that it provided in June 2007. The update, which uses fiscal year 2008 data, and accompanying appendices are attached for your information.

We hope that you find this information helpful. If you have any questions about these materials, please do not hesitate to contact Lisa Rich in our Office of Legislative and Public Affairs at 202/502-4519.

Sincerely,

A handwritten signature in black ink that reads "Judith Sheon/SEA".

Judith W. Sheon
Staff Director

cc: Members of the Subcommittee

Attachment

Overview of Statutory Mandatory Minimum Sentencing¹

The Commission has identified at least 171 individual mandatory minimum provisions currently in the federal criminal statutes.² In the Commission's fiscal year 2008 datafile, there were 31,239 counts of conviction that carried a mandatory minimum term of imprisonment.³ Because an offender may be sentenced for multiple counts of conviction that carry mandatory minimum penalties, these 31,239 counts of conviction exceed the total number of offenders (21,023 offenders, as reported below) who were convicted of statutes carrying such penalties.

Of these 31,239 counts of conviction, the overwhelming majority (90.7%) were for drug offenses (24,789 counts of conviction, or 79.4%) and firearms offenses (3,527 counts of conviction, or 11.3%). Most of the 171 mandatory minimum provisions rarely, if ever, were used in fiscal year 2008, with 68 such provisions not used at all.

A. Data on Mandatory Minimum Sentencing

In preparation for this analysis, the Commission reviewed data from its fiscal year 2008 datafile. For that fiscal year, the Commission received documentation for 76,478 cases.⁴ Of these 76,478 cases, the Commission received sufficient documentation in 73,497 cases to determine whether the offender was convicted of a statute carrying a mandatory minimum penalty. Of these 73,497 cases, offenders in 21,023 cases (28.6%) were convicted of a statute carrying a mandatory minimum penalty.⁵ Of these 21,023 offenders, 3,078 (14.6%) received a statutory mandatory minimum sentence that was required to be consecutive to any other sentence imposed.⁶

¹ "Mandatory minimums," "mandatory minimum sentencing provisions," and related terms refer to statutory provisions requiring the imposition of a sentence of at least a specified minimum term of imprisonment when criteria set forth in the relevant statute have been met.

² See Appendix A, listing current mandatory minimum sentencing provisions as defined in footnote 1 of this report.

³ See Appendix B.

⁴ The Commission is required to receive five sentencing documents from the district courts: the charging document, written plea agreement (if any); the presentence investigation report; the judgment and commitment order; and the statement of reasons form. See 28 U.S.C. § 994(w)(1). For fiscal year 2008, the Commission received 99.1% of all such documents. See USSC FY2008 Sourcebook, Table 1. The Commission also is required to analyze these documents and to compile data on federal sentencing trends and practices. See 28 U.S.C. §§ 994(w)(3), 995.

⁵ For purposes of this analysis, an offender was considered to have been convicted under a statute carrying a mandatory minimum penalty if the court indicated the presence of a mandatory minimum on the statement of reasons form or other sentencing documentation received by the Commission conclusively established that one or more of the statutes of conviction carried such a penalty.

⁶ See, e.g., 18 U.S.C. § 924(c)(requiring mandatory consecutive terms of imprisonment for certain firearms offenses).

I. Demographics

Table 1 provides demographic data for all cases in the Commission's fiscal year 2008 datafile, as well as for those cases in which an offender was convicted of a statute carrying a mandatory minimum penalty.

As Table 1 indicates, of offenders sentenced in fiscal year 2008 for which the relevant sentencing documentation was received to determine race or ethnicity,⁷ nonwhite offenders comprised 74.0 percent of offenders convicted of a statute carrying a statutory mandatory minimum penalty. This is slightly higher than the percentage of nonwhite offenders in the Commission's overall fiscal year 2008 datafile, which was 70.2 percent. Black offenders are the only racial/ethnic group that comprised a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty (35.7%) than their percentage in the overall fiscal year 2008 offender population (24.0%).

Table 1: Demographic Characteristics for All Cases and Mandatory Minimum Cases Fiscal Year 2008

	All Cases		All Mandatory Minimum Cases	
	N	%	N	%
Race/Ethnicity				
White	20,770	29.8	5,439	26.0
Black	16,767	24.0	7,466	35.7
Hispanic	29,471	42.2	7,492	35.8
Other	2,806	4.0	534	2.5
Total	69,814	100.0	20,931	100.0
Citizenship				
U.S. Citizen	43,521	59.5	15,632	74.5
Non-Citizen	29,658	40.5	5,345	25.5
Total	73,179	100.0	20,977	100.0
Gender				
Male	63,515	87.2	18,947	90.2
Female	9,302	12.8	2,052	9.8
Total	72,817	100.0	20,999	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2008 Datafile, USSCFY08.

⁷ As indicated in Table 1, the Commission did not receive sufficient demographic information for all 76,748 cases in its overall fiscal year 2008 datafile or all 21,023 offenders convicted of an offense carrying a statutory mandatory minimum penalty.

For purposes of assessing the demographic impact of mandatory minimums, however, it is helpful to remove the federal immigration caseload from the analysis. Immigration offenders, 84.3 percent of whom in fiscal year 2008 were Hispanic, comprise a relatively large percentage of offenders in the overall federal caseload (19,333 out of the 70,786 cases or 27.3%), but comprise a relatively small percentage of the offenders convicted of a statute carrying a mandatory minimum sentence (1.2%). Therefore, inclusion of these offenders may skew the analysis of the impact of mandatory minimums by race and ethnicity. Table 2, accordingly, presents demographic data excluding immigration cases.

Excluding immigration cases, both Hispanic offenders and black offenders comprised a greater percentage of non-immigration offenders convicted of a statute carrying a mandatory minimum penalty than their percentage in the overall fiscal year 2008 offender population. As Table 2 indicates, Hispanic offenders convicted of a non-immigration statute carrying a mandatory minimum had a higher differential in this regard, comprising 35.4 percent of offenders convicted of a non-immigration statute carrying a mandatory minimum penalty but only 27.9 percent of the overall non-immigration offender population. Black offenders comprised 35.9 percent of offenders convicted of a non-immigration statute carrying a mandatory minimum penalty but only 31.5 percent of the overall non-immigration offender population.

**Table 2: Demographic Characteristics for Non-Immigration Cases and Mandatory Minimum, Non-Immigration Cases
Fiscal Year 2008**

	Non-Immigration Cases		Mandatory Minimum Non-Immigration Cases	
	N	%	N	%
Race/Ethnicity				
White	18,574	35.7	5,405	26.1
Black	16,394	31.5	7,436	35.9
Hispanic	14,545	27.9	7,320	35.4
Other	2,579	4.9	531	2.6
Total	52,092	100.0	20,692	100.0
Citizenship				
U.S. Citizen	41,619	77.1	15,588	75.2
Non-Citizen	12,395	22.9	5,147	24.8
Total	54,014	100.0	20,735	100.0
Gender				
Male	46,079	85.3	18,739	90.3
Female	7,927	14.7	2,017	9.7
Total	54,006	100.0	20,756	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2008 Datafile, USSC FY2008.

2. Trial Rates

In the Commission's fiscal year 2008 data file, there were 76,427 cases for which the Commission received sufficient documentation to determine whether an offender pled guilty or was convicted after a trial. In these 76,427 cases, there were 73,617 offenders (96.3%) who pled guilty and 2,810 offenders (3.7%) who were convicted after a trial.⁸ By comparison, of the 21,023 offenders convicted under a statute carrying a mandatory minimum penalty, 19,713 offenders (93.8%) pled guilty and 1,310 offenders (6.2%) were convicted after a trial.

⁸ See USSC FY2008 Sourcebook, Fig. C, which provides guilty plea and trial rates for fiscal years 2004-2008.

B. Mechanisms for Relief from Mandatory Minimum Sentences

Before discussing the use of mandatory minimums for different types of offenses, it is important to note that Congress has provided two mechanisms by which offenders may be sentenced without regard to the otherwise applicable statutory mandatory minimum provisions: 18 U.S.C. § 3553(e)⁹ and 18 U.S.C. § 3553(f).¹⁰ Section 3553(e), upon motion of the Government,¹¹ authorizes the court to impose “a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” Section 3553(e) may be applied to any qualifying offender, without regard to the type of offense involved.

⁹ 18 U.S.C. § 3553(e) provides:

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum.— Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

¹⁰ 18 U.S.C. § 3553(f) provides:

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

¹¹ After the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), a government motion is still required in order for 18 U.S.C. § 3553(e) to apply. See, e.g., *United States v. Rivera*, 170 Fed. App’x 209, 211 (2d Cir. 2006) (rejecting defendant’s argument that the government motion requirement be applied as advisory in light of *Booker*).

Section 3553(f), commonly referred to as the “safety valve,” provides an additional mechanism by which certain drug offenders¹² may be sentenced without regard to the otherwise applicable drug mandatory minimum provisions. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994,¹³ concluding that the “integrity and effectiveness of controlled substance mandatory minimums could in fact be strengthened if a limited ‘safety valve’ from operation of these penalties was created and made applicable to the least culpable offenders.” The Act created section 3553(f) to permit offenders “who are the least culpable participants in drug trafficking offenses, to receive strictly regulated reductions in prison sentences for mitigating factors” recognized in the federal sentencing guidelines.¹⁴

1. 18 U.S.C. § 3553(e): The Substantial Assistance Provision

Of the 21,023 offenders convicted under a statute carrying a mandatory minimum penalty, the Commission received sufficient sentencing documentation to determine whether the statutory substantial assistance provision applied in 19,628 cases. Of these 19,628 offenders, there were 3,831 (19.5%) offenders eligible to be sentenced without regard to the statutory mandatory minimum solely because a motion under 18 U.S.C. § 3553(e) was filed. Of these 3,831 eligible offenders, 2,714 offenders (13.8% of the 19,628 offenders) were sentenced without regard to and below the statutory mandatory minimum. The remaining 1,117 offenders (5.7% of the 19,628 offenders) received a sentence at or above the statutory mandatory minimum. Table 3 provides information regarding application of the substantial assistance provision per offense type.

¹² For purposes of 18 U.S.C. § 3553(f), the term “drug offenders” means offenders convicted under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. § 841, § 844, or § 846, respectively) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. § 960 or § 963, respectively).

¹³ Pub. L. No. 102-322 (1994).

¹⁴ See H. Rep. No. 103-460, 103rd Cong. 2nd Sess. (1994). As with the statutory substantial assistance provision, after *Booker* courts still are required to apply the statutory safety valve provision when its criteria are met. See, e.g., *United States v. Krumnow*, 476 F.3d 294, 297 (5th Cir. 2007) (a district court may sentence below a statutory minimum only if “(1) the Government makes a motion . . . asserting the defendant’s substantial assistance [18 U.S.C. 3553(e)]; or (2) the defendant meets the ‘safety valve’ criteria set forth in 18 U.S.C. § 3553(f)” (citations omitted); *United States v. Barrera*, 562 F.3d 899, 902-04 (8th Cir. 2009) (defendant was not entitled to safety-valve relief from statutory minimum sentence when he did not meet the statutory requirements).

**Table 3: Application of Substantial Assistance Provision
(18 U.S.C. § 3553(e)) by Offense Type for Fiscal Year 2008**

Offenses	Total Number of Offenders ¹⁵	Number of Offenders Convicted of Mandatory Minimums	Number of Offenders Eligible for Mandatory Minimum Relief Due to § 3553(e) (Substantial Assistance)	Number of Offenders Sentenced without regard to and below Mandatory Minimum Due to § 3553(e) (Substantial Assistance)
Drugs ¹⁶	24,321	16,198 (66.6% of 24,321)	3,266 (20.2% of 16,198)	2,381 (14.7% of 16,198)
Immigration ¹⁷	18,820	237 (1.3% of 18,820)	48 (20.3% of 237)	41 (17.3% of 237)
Fraud ¹⁸	8,189	525 (6.4% of 8,189)	91 (17.3% of 525)	33 (6.3% of 525)
Firearms ¹⁹	6,212	751 (12.1% of 6,212)	126 (16.8% of 751)	101 (13.4% of 751)
Criminal Sexual Abuse/Pornography/Prostitution ²⁰	2,034	920 (45.2% of 2,034)	42 (4.6% of 920)	27 (2.9% of 920)
Other ²¹	8,311	997 (12.0% of 8,311)	258 (25.9% of 997)	131 (13.1% of 997)
Total	67,887	19,628 (28.9% of 67,887)	3,831 (19.5% of 19,628)	2,714 (13.8% of 19,628)

¹⁵ Of the 76,748 cases sentenced in fiscal year 2008, 70,786 cases had sufficient sentencing documentation to permit classification of offenders by the type of offense. Of these 70,786 cases, 67,887 had sufficient sentencing documentation for the remaining analysis in this table.

¹⁶ Of the 70,786 cases referred to in footnote 15, *supra*, 25,337 (or 35.8%) were drug cases. Of those 25,337 cases, 24,321 cases had sufficient sentencing documentation to permit the remaining analysis in this table.

¹⁷ Of the 70,786 cases referred to in footnote 15, *supra*, 19,333 (or 27.3%) were immigration cases. Of those 19,333 cases, 18,820 cases had sufficient sentencing documentation to permit the remaining analysis in this table.

¹⁸ Of the 70,786 cases referred to in footnote 15, *supra*, 8,591 (or 12.1%) were fraud cases. Of those 8,591 cases, 8,189 cases had sufficient sentencing documentation to permit the remaining analysis in this table.

¹⁹ Of the 70,786 cases referred to in footnote 15, *supra*, 6,673 (or 9.4%) were firearms cases. Of those 6,673 cases, 6,212 cases had sufficient sentencing documentation to permit the remaining analysis in this table.

²⁰ Of the 70,786 cases referred to in footnote 15, *supra*, 2,087 (or 3.0%) were criminal sexual abuse/pornography/prostitution cases. Of those 2,087 cases, 2,034 cases had sufficient sentencing documentation to permit the remaining analysis in this table.

²¹ Of the 70,786 cases referred to in footnote 15, *supra*, 8,765 (or 12.4%) were categorized as "other." Of those 8,765 cases, 8,311 cases had sufficient sentencing documentation to permit the remaining analysis in this table.

2. 18 U.S.C. § 3553(f): The Safety Valve Provision

Of the 25,337 drug offenders sentenced in fiscal year 2008, there were 24,321 offenders for which the Commission received sufficient information to determine whether the statutory safety valve provision at 18 U.S.C. § 3553(f) applied. Of those 24,321 drug offenders, there were 16,198 offenders convicted under a statute carrying a mandatory minimum penalty. As Table 4 indicates, of those 16,198 drug offenders, there were 4,112 (25.4%) offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the statutory safety valve applied. Of these 4,112 offenders, there were 3,803 offenders (23.5% of the 16,198 offenders) for whom 18 U.S.C. § 3553(f) was the sole statutory mechanism by which they were sentenced without regard to and below the mandatory minimum penalty. The remaining 309 offenders (1.9% of the 16,198 offenders) received a sentence at or above the statutory mandatory minimum.

Table 4: Application of Safety Valve and Safety Valve/Substantial Assistance Provision for Drug Offenders

Total Number of Drug Offenders	Number of Drug Offenders Convicted of Mandatory Minimums	Numbers of Drug Offenders Eligible for Mandatory Minimum Relief Due to § 3553(f) (Safety Valve)	Number of Drug Offenders Sentenced Without Regard to and Below Mandatory Minimum Due to § 3553(f) (Safety Valve)	Number of Drug Offenders Eligible for Mandatory Minimum Relief Due to Both § 3553(e) (Substantial Assistance) & § 3553(f) (Safety Valve)	Number of Drug Offenders Sentenced Without Regard to and Below Mandatory Minimum Due to Both § 3553(e) (Substantial Assistance) & § 3553(f) (Safety Valve)
24,321 ²²	16,198 ²³ (66.6%)	4,112 (25.4% of 16,198)	3,803 (23.5% of 16,198)	1,669 (10.3% of 16,198)	1,634 (10.1% of 16,198)

As Table 4 also indicates, in some instances, a drug offender may receive the benefit of both the substantial assistance and safety valve statutory provisions. In the Commission's fiscal year 2008 datafile, there were 16,198 drug offenders for whom the Commission received sufficient sentencing documentation to determine whether both the substantial assistance provision under 18 U.S.C. § 3553(e) and the safety valve provision

²² Of the 25,337 drug offenders sentenced in fiscal year 2008, there were 24,321 offenders for which the Commission received sufficient information to determine whether the statutory safety valve provision at 18 U.S.C. § 3553(f) applied.

²³ Of the 16,933 drug offenders convicted of a statute carrying a mandatory minimum penalty in fiscal year 2008, sufficient sentencing documentation was received for 16,198 cases.

under 18 U.S.C. §3553(f) could have applied. Of these 16,198 drug offenders, there were 1,669 (10.3%) offenders who were eligible to be sentenced below the mandatory minimum because both the statutory substantial assistance and safety valve provisions applied. Of these 1,669 offenders, there were 1,634 drug offenders (10.1% of the 16,198 drug offenders) sentenced without regard to and below the mandatory minimum pursuant to these statutory provisions. The remaining 35 offenders (0.2% of the 16,198 drug offenders) received a sentence at or above the mandatory minimum sentence.

Table 4A provides a summary of the information contained in Tables 3 and 4 regarding the total number of drug offenders who were eligible to be sentenced, and who were sentenced, without regard to and below the statutory mandatory minimum because of the substantial assistance provision and the safety valve provision, either alone or in combination with one another. As shown in Table 4A, there were 9,047 drug offenders (55.9% of the 16,198 drug offenders) who were eligible to be sentenced without regard to and below the statutory mandatory minimum because of either or both of these provisions. Of those 9,047 offenders, 7,818 offenders (or 48.3% of the 16,198 drug offenders) were sentenced without regard to and below the statutory mandatory minimum.

Table 4A: Application of Safety Valve and Substantial Assistance Provisions for Drug Offenders

Total Number of Drug Offenders with Sufficient Sentencing Documentation	Number of Drug Offenders Convicted of Mandatory Minimums	Total Number of Drug Offenders Eligible for Mandatory Minimum Relief Due to Substantial Assistance and Safety Valve, Alone or in Combination with One Another	Total Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to Substantial Assistance and Safety Valve, Alone or in Combination with One Another
24,321	16,198 (66.6%)	9,047 (55.9% of 16,198)	7,818 (48.3% of 16,198)

C. Distribution of Mandatory Minimum Sentences by Offense Type

Table 3 provides information regarding distribution of mandatory minimum sentences by five major offense types. Of the 21,023 offenders convicted of a statute carrying a mandatory minimum penalty, the Commission received sufficient sentencing documentation to classify the offense type of which the offender was convicted in 19,628 cases. Of these 19,628 cases, 18,394 (93.7%) were distributed among four offense categories: drugs, firearms, fraud, and criminal sexual abuse/pornography/prostitution. As previously stated, the overwhelming majority of

offenders convicted of a statute which carries a mandatory minimum penalty committed a drug trafficking offense (16,198 offenders, or 82.5%).²⁴

1. Drug Offenses

Drug cases represented a large portion of the federal caseload in fiscal year 2008, accounting for 35.8 percent of the overall caseload in that fiscal year.²⁵ Drug offenders also represented the vast majority of those offenders convicted under a statute carrying a mandatory minimum penalty in fiscal year 2008, with 16,198 (82.5%) of the 19,628 offenders convicted under such statutes having committed a drug offense as classified by the Commission.

As previously indicated, however, a significant portion (9,047 of the 16,198 drug offenders, or 55.9%) of drug offenders convicted under a statute carrying a mandatory minimum penalty were eligible to be sentenced without regard to and below the mandatory minimum through substantial assistance under 18 U.S.C. § 3553(e), the safety valve under 18 U.S.C. § 3553(f), or a combination of substantial assistance and the safety valve. Of these 9,047 offenders, 7,818 (48.3%) were sentenced without regard to and below mandatory minimum provisions as follows: substantial assistance applied to 2,381 drug offenders (14.7%), the safety valve applied to 3,803 drug offenders (23.5%), and both substantial assistance and the safety valve applied to an additional 1,634 drug offenders (10.1%).

Table 5 illustrates the demographic characteristics of drug offenders convicted under a statute carrying a mandatory minimum penalty relative to the demographic characteristics of the overall federal drug offender population in fiscal year 2008.²⁶ As Tables 5 and 6 indicate together, the impact of drug mandatory minimum penalties on black drug offenders is largely driven by crack cocaine offenses. As shown in Table 6, if crack cocaine cases are excluded from the analysis, black drug offenders in fiscal year 2008 comprised 15.8 percent of the remaining drug cases and 15.8 percent of the remaining drug cases in which a drug mandatory minimum applied.

²⁴ For purposes of this analysis, the overall number of firearms offenders and the number of firearms offenders convicted of a statute carrying a mandatory minimum penalty do not include cases that were sentenced under a drug guideline in Chapter Two, Part D of the Guidelines Manual but also contained a count of conviction for a firearms offense, including 1,023 cases in which the defendant was sentenced under a drug guideline but was also convicted under 18 U.S.C. § 924(c).

²⁵ See Table 3 and accompanying footnotes, *supra*.

²⁶ As indicated in Tables 5 and 6, the Commission did not receive sufficient demographic information for all 25,337 drug offenders sentenced in fiscal year 2008.

**Table 5: Demographics for Drug Cases
and Mandatory Minimum Drug Cases
Fiscal Year 2008**

	All Drug Cases		All Mandatory Minimum Drug Cases	
	N	%	N	%
Race/Ethnicity				
White	6,395	25.3	3,650	22.6
Black	7,929	31.4	5,592	34.6
Hispanic	10,163	40.2	6,532	40.4
Other	786	3.1	393	2.4
Total	25,273	100.0	16,167	100.0
Citizenship				
U.S. Citizen	18,154	71.7	11,647	71.9
Non-Citizen	7,162	28.3	4,542	28.1
Total	25,316	100.0	16,189	100.0
Gender				
Male	22,223	87.7	14,514	89.6
Female	3,109	12.3	1,684	10.4
Total	25,332	100.0	16,198	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2008 Datafile, USSCFY08.

Table 6: Demographics for Non-Crack Drug Cases and Non-Crack, Mandatory Minimum Drug Cases Fiscal Year 2008

	Non-Crack Drug Cases		Mandatory Minimum Non-Crack Drug Cases	
	N	%	N	%
Race/Ethnicity				
White	5,758	30.1	3,218	27.9
Black	3,018	15.8	1,818	15.8
Hispanic	9,621	50.3	6,131	53.2
Other	722	3.8	349	3.0
Total	19,119	100.0	11,516	100.0
Citizenship				
U.S. Citizen	12,199	63.7	7,159	62.1
Non-Citizen	6,949	36.3	4,367	37.9
Total	19,148	100.0	11,526	100.0
Gender				
Male	16,622	86.7	10,211	88.5
Female	2,524	13.3	1,324	11.5
Total	19,164	100.0	11,535	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2008 Datafile, USSCFY08.

2. Firearms Offenses

Firearms offenses comprised 9.4 percent of the overall federal caseload in fiscal year 2008 and 3.8 percent (751 of the 19,628 offenders) of cases in which offenders were convicted of a statute carrying a mandatory minimum penalty. Of the 6,673 firearms cases in which the offender was sentenced in fiscal year 2008, the Commission received sufficient guideline information on 6,212 cases. As indicated in Table 3, of these 6,212 cases, in 751 (12.1%) cases the offender was convicted of a statute carrying a mandatory minimum penalty. Of those 751 offenders, 126 (16.8%) were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the statutory substantial assistance provision applied. Of these eligible offenders, 101 (13.4% of the 751 offenders) were sentenced without regard to and below the applicable statutory mandatory minimum penalty. The remaining 25 offenders (3.3% of the 751 offenders) received a sentence at or above the statutory mandatory minimum.

For purposes of this analysis, the overall number of firearms cases and the number of firearms offenders convicted of a statute carrying a mandatory minimum penalty do not include cases that were sentenced under a drug guideline in Chapter Two, Part D of the Guidelines Manual but also contained a count of conviction for a firearms offense. Those cases, including 1,023 cases in which the defendant was sentenced under a drug guideline but was also convicted under 18 U.S.C. § 924(c), were counted as drug offenders for this analysis. The number of firearms offenders considered to be convicted of a firearms statute carrying a mandatory minimum penalty under this analysis would more than double if such offenders were included in the firearms, rather than the drug, mandatory minimum offender population.

Table 7 shows demographic characteristics of firearms offenders convicted of a statute carrying a mandatory minimum penalty relative to the demographic characteristics of all firearms offenders in the overall fiscal year 2008 caseload.²⁷

Table 7: Demographic Characteristics for Firearms Cases and Firearms Cases with a Mandatory Minimum Fiscal Year 2008

	Firearms Cases		Mandatory Minimum Firearms Cases	
	N	%	N	%
Race/Ethnicity				
White	2,187	32.9	211	28.1
Black	3,272	49.2	474	63.1
Hispanic	1,020	15.4	53	7.1
Other	167	2.5	13	1.7
Total	6,646	100.0	751	100.0
Citizenship				
U.S. Citizen	6,142	92.2	738	98.3
Non-Citizen	522	7.8	13	1.7
Total	6,664	100.0	751	100.0
Gender				
Male	6,443	96.6	747	99.5
Female	224	3.4	4	0.5
Total	6,667	100.0	751	100.0

This table excludes cases missing information for the variables required for analysis. Summary Percentages may not equal 100 percent due to rounding.

²⁷ As indicated in Table 7, the Commission did not receive sufficient demographic information for all 6,673 firearms offenders sentenced in fiscal year 2008.

3. Immigration, Fraud, and Criminal Sexual Abuse/Pornography/Prostitution Offenses

Immigration offenses, fraud offenses, and offenses involving criminal sexual abuse, pornography, and prostitution, together accounted for 8.6 percent (1,682 of the 19,628 offenders) of the offenders who were convicted of a statute carrying a mandatory minimum penalty in fiscal year 2008.

Immigration offenses accounted for 27.3 percent of the overall federal caseload in fiscal year 2008²⁸ but just over one percent of all convictions under mandatory minimum statutes (237 of the 19,628 offenders). Of the 19,333 immigration cases in which the offender was sentenced in fiscal year 2008, the Commission received complete guideline information on 18,820 cases. As Table 3 indicates, of those 18,820 cases, in 237 cases (1.3%) the offender was convicted of a statute carrying a mandatory minimum penalty sentence. Of these 237 immigration offenders, 48 offenders (20.3%) were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied. Of these 48 offenders, 41 offenders (17.3% of the 237 offenders) were sentenced without regard to and below the statutory mandatory minimum penalty. The remaining 7 offenders (3.0% of the 237 offenders) received a sentence at or above the statutory mandatory minimum.

In fiscal year 2008, fraud offenses accounted for 12.1 percent of the overall federal caseload²⁹ but only 2.7 percent of the offenders convicted of an offense carrying a statutory mandatory minimum penalty. Of the 8,591 fraud cases in which the offender was sentenced in fiscal year 2008, the Commission received complete guideline information on 8,189 cases. As Table 3 indicates, of those 8,189 cases, in 525 cases the offender was convicted of a statute carrying a mandatory minimum penalty sentence. Of these 525 fraud offenders, 91 offenders (17.3%) were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied. Of these 91 offenders, 33 offenders (6.3% of the 525 offenders) were sentenced without regard to and below the statutory mandatory minimum penalty. The remaining 58 offenders (11.0% of the 525 offenders) received a sentence at or above the statutory mandatory minimum.

In fiscal year 2008, criminal sexual abuse, pornography, and prostitution offenses represent 3.0 percent of the overall federal caseload but 4.7% of the offenders convicted of an offense carrying a statutory mandatory minimum penalty. Of the 2,087 criminal sexual abuse/pornography/prostitution cases in which the offender was sentenced in fiscal year 2008, the Commission received complete guideline information on 2,034 cases. As indicated on Table 3, of those 2,034 cases, in 920 cases the offender was convicted of a statute carrying a mandatory minimum penalty sentence. Of these 920 offenders, 42 offenders (4.6%) were eligible to be sentenced without regard to the

²⁸ See Table 3, *supra*.

²⁹ *Id.*

statutory mandatory minimum penalty because the substantial assistance provision applied. Of these 42 offenders, 27 offenders (2.9% of the 920 offenders) were sentenced without regard to and below the statutory mandatory minimum penalty. The remaining 15 offenders (1.6% of the 920 offenders) received a sentence at or above the statutory mandatory minimum.

APPENDIX A

U.S. Code Section	Description of Crime	Minimum Term of Imprisonment
2 USC § 192 (No Guidelines reference in Appendix A)	Refusing to testify before Congress	1 month
2 USC § 390 (No Guidelines reference in Appendix A)	Failure to appear, testify, or produce documents when subpoenaed for contested election case before Congress	1 month
7 USC § 13a (\$2B1.1)	Disobeying cease and desist order by registered entity	6 months
7 USC § 13b (No Guidelines reference in Appendix A)	Disobeying cease and desist order by person other than a registered entity	6 months
7 USC § 15b(k) (No Guidelines reference in Appendix A)	Violating provisions of cotton futures contract regulation	30 days
7 USC § 195(3) (\$2A2.1)	Violation of court order by packer or swine contractor concerning packers and stockyards	6 months
7 USC § 2024(b)(1) (\$2B1.1)	Second and subsequent offense; illegal food stamp activity; value of \$100 to \$4,999	6 months
7 USC § 2024(c) (\$2B1.1)	Second and subsequent offense; presentation of illegal food stamp for redemption; value of \$100 or more	1 year
8 USC § 1324(a)(2)(B)(i) (\$2L1.1)	First or second offense, bringing in or harboring certain aliens where the offense was committed with the intent or with reason to believe that the unlawful alien will commit a felony	3 years
8 USC § 1324(a)(2)(B)(i) (\$2L1.1)	Third or subsequent offense, bringing in or harboring certain aliens where the offense was committed with the intent or with reason to believe that the unlawful alien will commit a felony	5 years
8 USC § 1324(a)(2)(B)(ii) (\$2L1.1)	First or second offense, bringing in or harboring certain aliens where the offense was committed for the purpose of commercial advantage or private financial gain	3 years
8 USC § 1324(a)(2)(B)(ii) (\$2L1.1)	Third or subsequent offense, bringing in or harboring certain aliens where the offense was committed for the purpose of commercial advantage or private financial gain	5 years
8 USC § 1326(b)(3) (\$2L1.2)	Reentry of an alien removed on national security grounds	10 years

12 USC § 617 (No Guidelines reference in Appendix A)	Commodities price fixing	1 year
12 USC § 630 (No Guidelines reference in Appendix A)	Embezzlement, fraud, or false entries by banking officer	2 years
15 USC § 8 (No Guidelines reference in Appendix A)	Trust in restraint of import trade	3 months
15 USC § 1245(b) (No Guidelines reference in Appendix A)	Possession/use of a ballistic knife during commission of federal crime of violence	5 years
18 USC § 1225(a)(2)(c) (No Guidelines reference in Appendix A)	Killing of horse official	Death or life
16 USC § 414 (No Guidelines reference in Appendix A)	Trespassing on federal land for hunting or shooting	5 days
18 USC § 33(b) (§§2A2.1, 2A2.2, 2B1.1, 2K1.4)	Damage to or destruction of a motor vehicle carrying high-level radioactive waste or spent nuclear fuel with intent to endanger safety of person	30 years
18 USC § 115(b)(3) (§§2A1.1, 2A1.2, 2A2.1, 2X1.1)	First degree murder of a federal official's family member	Death or life
18 USC § 225(a) (§§2B1.1, 2B4.1)	Organizes/manages/supervises a continuing financial crime enterprise which receives \$5M or more within any 24-month period	10 years
18 USC § 229(a)(2)	Develop/produce/acquires/transfer/possess/use any chemical weapon that results in the death of another person	Death or life
18 USC § 351(a) (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	First degree murder of a member of Congress, Cabinet, or Supreme Court	Life
18 USC § 844(f) (§§2K1.4, 2X1.1)	Maliciously damages, or attempts to damage, property of the U.S. by means of fire or explosives	5 years
18 USC § 844(h) (§2K2.4 (§2K1.4 for offenses committed prior to November 18, 1988))	First offense involving the use of fire or explosives to commit a felony, penalty enhancement	10 year enhancement

18 USC § 844(h) (§2K2.4) (§2K1.4 for offenses committed prior to November 18, 1988)	Second or subsequent offense involving the use of fire or explosives to commit a felony; penalty enhancement	20 year enhancement
18 USC § 844(i) (§2K1.4)	Use of fire or explosives to destroy property used in interstate commerce	5 years
18 USC § 844(o) (§2K2.4)	First offense involving the transfer of explosive materials to be used to commit crime of violence or drug trafficking crime	10 year enhancement
18 USC § 844(o) (§2K2.4)	Second or subsequent offense involving the transfer of explosive materials to be used to commit crime of violence or drug trafficking crime	20 year enhancement
18 USC § 924(c)(1)(A)(i) (§2K2.4)	First offense, using or carrying a firearm during a crime of violence or drug trafficking crime; penalty enhancement provision	5 years
18 USC § 924(c)(1)(A)(ii) (§2K2.4)	First offense, brandishing a firearm during a crime of violence or drug trafficking crime; penalty enhancement provision	7 years
18 USC § 924(c)(1)(A)(iii) (§2K2.4)	First offense, discharging a firearm during a crime of violence or drug trafficking crime; penalty enhancement provision	10 years
18 USC § 924(c)(1)(B)(i) (§2K2.4)	First offense, firearm is a short-barreled rifle, short-barreled shotgun	10 years
18 USC § 924(c)(1)(B)(ii) (§2K2.4)	First offense, firearm is a machinegun or destructive device or the firearm is equipped with a silencer or muffler	30 years
18 USC § 924(c)(1)(C)(i) (§2K2.4)	Second or subsequent conviction under § 924(c)(1)(A)	25 years
18 USC § 924(c)(1)(C)(ii) (§2K2.4)	Second or subsequent conviction under § 924(c)(1)(A) and firearm is a machinegun or destructive device or the firearm is equipped with a silencer or muffler	Life
18 USC § 924(c)(5)(A) (§2K2.4)	Possession or use of armor piercing ammunition during a crime of violent or drug trafficking crime; penalty enhancement provision	15 years
18 USC § 924(e)(1) (§2K2.1 (see also §4B1.4))	Possession of a firearm or ammunition by a fugitive or addict who has three convictions for violent felonies or drug offenses	15 years
18 USC § 929(a)(1) (§2K2.4)	Carrying firearm during violent crime/drug trafficking; penalty enhancement	5 year enhancement
18 USC § 930(c) (§2K2.5)	First degree murder involving the possession or use of a firearm or other dangerous weapon in a Federal Facility.	Death or life

18 USC § 1028A(e)(1) (§2B1.6)	Aggravated identity theft	2 years
18 USC § 1028A(e)(2) (§2B1.6)	Aggravated identity theft in relation to any offense listed at 18 USC 2332b(g)(5)(B) (Federal Crime of Terrorism)	5 years
18 USC § 1111(a) (§§2A1.1, 2A1.2)	First degree murder	Death or life
18 USC § 1114 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of federal officers	Death or Life
18 USC § 1116 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of foreign officials, official guests, or internationally protected persons	Death or Life
18 USC § 1118 (§§2A1.1, 2A1.2)	Murder in a federal correctional facility by inmate sentenced to a term of life imprisonment	Death or life
18 USC § 1119(b) (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1)	First degree murder of a U.S. national by a U.S. national while outside the United States	Death or Life
18 USC § 1120 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	Murder committed by a person who escaped from a Federal correctional institute	Death or Life
18 USC § 1121(a)(1) (§§2A1.1, 2A1.2)	First degree murder of a state or local law enforcement officer or any person assisting in a federal criminal investigation	Death or Life
18 USC § 1121(b)(1) (§§2A1.1, 2A1.2)	Killing of a state correctional officer by an inmate	20 years
18 USC § 1122 (No Guidelines reference in Appendix A)	Selling or donating, or the attempt to do so, of HIV positive tissue or bodily fluids to another person for subsequent use other than medical research	1 year
18 USC § 1201(g)(1) (No Guidelines reference in Appendix A)	Kidnapping of a minor (under the age of eighteen)	20 years
18 USC § 1203(e) (§§2A4.1, 2X1.1)	Hostage taking resulting in the death of any person	Death or life
18 USC § 1466A(a) (§2C2.2)	Production/possession/transport of obscene visual representations of the sexual abuse of children	Mandatory minimum term of imprisonment specified at section 2252A(b)(1)
18 USC § 1503(b)(1) (§2J1.2)	First degree murder of an officer of the court or a juror	Death or life
18 USC § 1512(a)(1) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	First degree murder of any person with the intent to prevent their attendance or testimony in an official proceeding	Death or life

18 USC § 1512(e)(2) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	Obstructing justice by using, or attempting to use, physical force against another.	Death or life
18 USC § 1512(e)(3)(A) (§§2A1.1, 2A1.2, 2A1.3, 2A2.1)	Obstructing justice by tampering with a witness, victim, or an informant	Death or life
18 USC § 1591(b)(1) (§§ 2G1.1, 2D2.1, 2G1.3)	Sex trafficking of children under the age of 14 by force, fraud or coercion	15 years
18 USC § 1591(b)(2) (§§2G1.1, 2D2.1, 2G1.3)	Sex trafficking of children, over the age of 14 but below the age of 18, by force, fraud or coercion	10 years
18 USC § 1651 (No Guidelines reference in Appendix A)	Piracy under the laws of nations	Life
18 USC § 1652 (No Guidelines reference in Appendix A)	Piracy by a citizen of the United States	Life
18 USC § 1653 (No guideline reference)	Piracy against the United States by an alien	Life
18 USC § 1655 (No Guidelines reference in Appendix A)	Piracy in the form of assault on a commander	Life
18 USC § 1658(b) (No Guidelines reference in Appendix A)	Preventing escape from a sinking vessel OR holding out a false light, or extinguishing a true light with intent to cause distress to a sailing vessel	10 years
18 USC § 1661 (No Guidelines reference in Appendix A)	Robbery ashore by a pirate	Life
18 USC § 1751(a) (§§2A1.1, 2A1.2, 2A1.3, 2A1.4)	Killing the President of the United States, the next in the order of succession to the Office of the President, or any person who is acting as the President of the United States, or any person employed in the Executive Office of the President or Office of the Vice President	Life
18 USC § 1917 (§251.1)	Interference with Civil Service Examinations	10 days
18 USC § 1958(n) (§251.1)	Racketeering; conspiracy to commit any offense listed in sections 1956 or 1957	Mandatory minimum term of imprisonment applicable to the underlying offense
18 USC § 1958(e) (§2E1.4)	Causing death through the use of interstate commerce facilities in the commission of a murder-for-life	Death or life
18 USC § 2113(e) (§§2A1.1, 2B3.1)	Bank robbery; avoiding apprehension for bank robbery; escaping custody after a bank robbery; causing death in the course of a bank robbery	10 years; but if death results, death or life

18 USC § 2241(c) (\$2A3.1)	First offense, engaging in a sexual act with a child under the age of 12, or engaging in a sexual act by force with a child who is above the age of 12, but under the age of 16	30 years
18 USC § 2241(c) (\$2A3.1)	Second or subsequent offense, engaging in a sexual act with a child under the age of 12, or engaging in a sexual act by force with a child who is above the age of 12, but under the age of 16	Life
18 USC § 2250(c) (\$2A3.6)	Fails to register as a sex offender and commits a crime of violence	5 years
18 USC § 2251(a) (\$2G2.1)	Engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct	15 years; if the offender has one prior conviction for sexual exploitation, 25 years; if the offender has two or more prior convictions for sexual exploitation, 35 years; if death results, 30 years
18 USC § 2251(b) (\$2G2.1)	Engagement in explicit conduct by a parent or legal guardian with a child for the purpose of producing any visual depiction of such conduct	15 years; if the offender has one prior conviction for sexual exploitation, 25 years; if the offender has two or more prior convictions for sexual exploitation, 35 years; if death results, 30 years
18 USC § 2251(c) (\$2G2.1, 2G2.2)	Enticing a minor to engage in explicit conduct for the purpose of producing any visual depiction of such conduct	15 years; if the offender has one prior conviction for sexual exploitation, 25 years; if the offender has two or more prior convictions for sexual exploitation, 35 years; if death results, 30 years
18 USC § 2251(d) (\$2G2.2)	Producing or publishing a notice or advertisement seeking or offering a visual depiction of a child engaging in an illicit sexual act	15 years; if the offender has one prior conviction for sexual exploitation, 25 years; if the offender has two or more prior convictions for sexual exploitation, 35 years; if death results, 30 years
18 USC § 2251(e) (\$2G2.1, 2G2.2)	Sexual exploitation of children, penalties	15 years; if the offender has one prior conviction for sexual exploitation, 25 years; if the offender has two or more prior convictions for sexual exploitation, 35 years; if death results, 30 years
18 USC § 2251A(a) (\$2G2.3)	Sale of a child by a parent or legal guardian for the purpose of sexual exploitation	30 years
18 USC § 2251A(b) (\$2G2.3)	Purchasing a child for the purpose of sexual exploitation	30 years

18 USC § 2252(a)(1)-(3) (\$2G2.2)	Interstate transportation of visual depictions of a minor engaging in sexually explicit conduct; receipt, sale, or possession with intent to sell visual depictions of a minor engaging in sexually explicit conduct	5 years; if the offender has a prior conviction for sexual exploitation of children, 15 years
18 USC § 2252(a)(4) (\$2G2.2)	Possession of visual depictions of a minor engaging in sexually explicit conduct	10 years if the offender has a prior conviction for sexual exploitation of children
18 USC § 2252(b) (\$2G2.2)	Certain activities relating to material involving the sexual exploitation of minors; penalties	5 years for violations of sections 2252(1)-(3); 15 years for a second or subsequent violation of section 2252(1)-(3); 10 years for a second or subsequent violation of section 2252(4)
18 USC § 2252A(a)(1)-(4),(6) (\$2G2.2)	Interstate transportation of child pornography	5 years; 15 years for a second or subsequent violation
18 USC § 2252A(a)(5) (\$2G2.2)	Possession of child pornography	10 years if the offender has a prior conviction for possession of child pornography
18 USC § 2252A(b) (\$2G2.2)	Child pornography, penalties	5 years for violations of sections 2252A(1)-(4),(6); 15 years for second or subsequent violations of sections 2252A(1)-(4), (6); 10 years for second or subsequent violations of section 2252A(5)
18 USC § 2252A(g) (\$2G2.2)	Child exploitation enterprise	20 years
18 USC § 2257(f) (\$2G2.6)	Failure to keep records of sexually explicit depictions	2 years
18 USC § 2260(a) (\$2G2.1)	Use of a minor in the production of sexually explicit depictions of a minor for importation into the United States	Mandatory minimum term of imprisonment, specified at section 2257(e)
18 USC § 2260(b) (\$2G2.2)	Use of a visual depiction of a minor engaging in sexually explicit conduct with the intent of importing the visual depiction into the United States	Mandatory minimum term of imprisonment, specified at section 2252(b)(1)
18 USC § 2260A (\$2A3.6)	Penalty enhancement for registered sex offenders who commit specified offenses involving a minor	10 year enhancement
18 USC § 2261(b)(6) (\$2A6.2)	Stalking in violation of a restraining order, or other order described in 18 USC § 2266	1 year
18 USC § 2381 (\$2M1.1)	Treason	5 years
18 USC § 2422(b) (\$2G1.1, 2G1.3)	Coercion, via mail or any facility of interstate commerce, of a minor for illegal sexual activity	10 years

18 USC § 2423(a) (§2G1.3)	Transporting a minor across state lines for the purpose of prostitution or another sexual activity which can be charged as a criminal offense.	10 years
18 USC § 2423(e) (§2G1.3)	Attempt or conspiracy to transport a minor across state lines for the purpose of prostitution or another sexual activity which can be charged as a criminal offense.	10 years
18 USC § 3559(c)(1) (No Guidelines reference in Appendix A)	Sentence enhancement; upon conviction for a serious violent felony, if offender has two or more prior serious violent felony convictions, or one or more prior serious violent felony convictions and one or more prior serious drug offense convictions, apply enhancement.	Life
18 USC § 3559(d)(1) (No Guidelines reference in Appendix A)	Sentence enhancement; if the death of a child of less than 14 years results from a serious violent felony as described in section 3591(a)(2), apply enhancement.	Life
18 USC § 3559(e)(1) (No Guidelines reference in Appendix A)	Sentence enhancement; where a federal sex offense committed against a minor and the offender was has a prior sex conviction in which a minor was the victim, apply enhancement.	Life
18 USC § 3559(f)(1) (No Guidelines reference in Appendix A)	Sentence enhancement; murder of child less than 18	30 years
18 USC § 3559(f)(2) (No Guidelines reference in Appendix A)	Sentence enhancement; kidnapping or maiming of child less than 18	25 years
18 USC § 3559(f)(3) (No Guidelines reference in Appendix A)	Sentence enhancement; crime of violence resulting in serious bodily injury or if a dangerous weapon is used during and in relation to the crime of violence.	10 years
19 USC § 283 (§2T3.1)	Failure to report seaboard saloon purchases to customers	3 months
21 USC § 212 (petty offense)	Practice of pharmacy and sale of poisons in China	1 month
21 USC § 481(c) (§2N2.1)	Killing any person engaged in or on account of performance of his official duties as a poultry or poultry products inspector.	Death or life
21 USC § 622 (§2C1.1)	Bribery of meat inspectors and acceptance of bribes	1 year
21 USC § 675 (§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3)	Killing any person engaged in or on account of performance of his official duties as a meat inspector	Death or life
21 USC § 841(a) (§2D1.1)	Manufacturing, distributing, dispensing, or possessing a controlled substance or counterfeit substance with intent to distribute.	Mandatory minimum term of imprisonment specified at section 841(b)

21 USC § 841(b)(1)(A) (§2D1.1)	Third offense, manufacturing, distributing, or possessing with intent to distribute	Life
21 USC § 841(b)(1)(A) (§2D1.1)	Second offense, manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	Life
21 USC § 841(b)(1)(A) (§2D1.1)	Second offense, manufacturing, distributing, or possessing with intent to distribute; no death or serious bodily injury	20 years
21 USC § 841(b)(1)(A) (§2D1.1)	First offense, manufacturing, distributing, or possessing with intent to distribute; death or serious bodily injury results	20 years
21 USC § 841(b)(1)(A) (§2D1.1)	First offense, manufacturing, distributing, or possessing with intent to distribute; no death or serious bodily injury	10 years
21 USC § 841(b)(1)(B) (§2D1.1)	Second or any subsequent offense; manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	Life
21 USC § 841(b)(1)(B) (§2D1.1)	First offense; manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results	20 years
21 USC § 841(b)(1)(B) (§2D1.1)	Second and all subsequent offenses; manufacture, distribution, or possession with intent to distribute, no death or serious bodily injury results	10 years
21 USC § 841(b)(1)(B) (§2D1.1)	First offense; manufacture, distribution, or possession with intent to distribute, no death or serious bodily injury results	5 years
21 USC § 841(b)(1)(C) (§2D1.1)	Second or any subsequent offense; manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results from use	Life, fine
21 USC § 841(b)(1)(C) (§2D1.1)	First offense; manufacturing, distributing, or possessing with intent to distribute, death or serious bodily injury results from the use	20 years
21 USC § 844(a) (§2D2.1)	First offense; simple possession of a controlled substance, substance contains cocaine base and weighs more than 5 grams	5 years
21 USC § 844(a) (§2D2.1)	Second offense; simple possession, substance contains cocaine base and weighs more than 3 grams	5 years
21 USC § 844(a) (§2D2.1)	Third and all subsequent offenses; simple possession, substance contains cocaine base and weighs more than 1 gram	5 years
21 USC § 844(a) (§2D2.1)	Third and all subsequent offenses, simple possession (other than cocaine base)	90 days

21 USC § 844(a) (§2D1.1)	Second offense; simple possession (other than cocaine base)	15 days	
21 USC § 846 (§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2)	Attempt and conspiracy under Chapter 13 -- Drug Abuse Prevention and Control; Subchapter -- Offenses and Penalties	Mandatory minimum term of imprisonment applicable to the underlying offense	
21 USC § 848(a) (§2D1.5)	Second and all subsequent convictions; continuing criminal enterprise	30 years	
21 USC § 848(a) (§2D1.9)	First offense; continuing criminal enterprise	20 years	
21 USC § 848(b) (§2D1.5)	Any offense; principal administrator, organizer, or leader ("kingpin") of continuing criminal enterprise	Life	
21 USC § 848(e)(1) (§2A1.1)	Engaged in a continuing criminal enterprise and intentionally kills an individual or law enforcement officer	20 years	
21 USC § 851 (No Guidelines reference in Appendix A)	Proceedings to establish prior convictions; sentence enhancement provisions	1 year	
21 USC § 859(a) (§2D1.2)	First offense; distribution to persons under the age of 21 years	1 year	
21 USC § 859(b) (§2D1.2)	Second and subsequent offenses; distribution to persons under the age of 21 years	1 year	
21 USC § 860(a) (§2D1.2)	First offense; distribution of a controlled substance near a school or similar facility	1 year	
21 USC § 860(b) (§2D1.2)	Second offense; distribution of a controlled substance near a school or similar facility	3 years	
21 USC § 860(b) (§2D1.2)	Third offense; distribution of a controlled substance near a school or similar facility	Mandatory minimum term of imprisonment specified at section 841(b)(1)(A)	
21 USC § 861(a) (§2D1.2)	Employment or use of persons under 18 years of age in drug operations	Mandatory minimum term of imprisonment specified at section 841(b)	
21 USC § 861(b) (§2D1.2)	First offense; knowingly and intentionally employing or using a person under 18 years of age in drug operations	1 year	
21 USC § 861(c) (§2D1.2)	Second and subsequent offenses; knowingly and intentionally employing or using a person under 18 years of age in drug operations	1 year	
21 USC § 861(c) (§2D1.2)	Third offense; knowingly and intentionally employing or using a person under 18 years of age in drug operations	Mandatory minimum term of imprisonment specified at section 841(b)(1)(A)	

21 USC § 861(f) (§2D1.2)	Knowingly or intentionally distributing a controlled substance to a pregnant individual	1 year	
21 USC § 960(a) (§2D1.1)	Importing or exporting controlled substances	Mandatory minimum term of imprisonment specified at section 960 Life	
21 USC § 960(b)(1) (§2D1.1)	Second or any subsequent offense; unlawful import or export, death or serious bodily injury results	20 years	
21 USC § 960(b)(1) (§2D1.1)	Second or any subsequent offense; unlawful import or export, no death or serious bodily injury results	20 years	
21 USC § 960(b)(1) (§2D1.1)	First offense; unlawful import or export, death or serious bodily injury results	10 years	
21 USC § 960(b)(1) (§2D1.1)	First offense; unlawful import or export, no death or serious bodily injury results	Life, fine	
21 USC § 960(b)(2) (§2D1.1)	Second or any subsequent offense; unlawful import or export, death or serious bodily injury results	10 years	
21 USC § 960(b)(2) (§2D1.1)	Second or any subsequent offense; unlawful import or export, no death or serious bodily injury results	20 years	
21 USC § 960(b)(2) (§2D1.1)	First offense; unlawful import or export, death or serious bodily injury results	5 years	
21 USC § 960(b)(2) (§2D1.1)	First offense; unlawful import or export, no death or serious bodily injury results	Life	
21 USC § 960(b)(3) (§2D1.1)	Second or any subsequent offense; unlawful import or export, death or serious bodily injury results	20 years	
21 USC § 960(b)(3) (§2D1.1)	Second or any subsequent offense; unlawful import or export, no death or serious bodily injury results	Mandatory minimum term of imprisonment applicable to the underlying offense	
21 USC § 963 (§§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2)	Attempt and conspiracy under Chapter 13 -- Drug Abuse Prevention and Control; Subchapter -- Import and Export		
21 USC § 1041(b) (No Guidelines reference in Appendix A)	Killing any person engaged in or on account of performance of his official duties under Chapter 15 -- Egg Products Inspection	Death or life	
22 USC § 4221 (§2B1.1)	Forgery of notary seal	1 year	
33 USC § 410 (No Guidelines reference in Appendix A)	Navigable water regulation violation	30 days	
33 USC § 411 (§2C1.3)	Deposit of refuse or obstruction of navigable waterway	30 days	

33 USC § 441 (No Guidelines reference in Appendix A)	New York and Baltimore harbors, deposit of refuse	30 days
33 USC § 447 (No Guidelines reference in Appendix A)	Bribery of Inspector of New York or Baltimore harbors	6 months
42 USC § 2272(b) (\$2M6.1)	Violation of prohibitions governing atomic weapons; no death resulting	25 years
42 USC § 2272(b) (\$2M6.1)	Using, attempting to use, or threatening while possessing, an atomic weapon	30 years
42 USC § 2272(b) (\$2M6.1)	Violation of prohibitions governing atomic weapons; death of another resulting	Life
46 USC § 58109(a) (No Guidelines reference in Appendix A)	Individual convicted of violating merchant marine act	1 year
47 USC § 13 (No Guidelines reference in Appendix A)	Refusal to operate railroad or telegraph lines	6 months
47 USC § 220(e) (No Guidelines reference in Appendix A)	Falsely entering or destroying books or accounts of common carrier	1 year
49 USC § 46502(a)(2)(A) (\$2A5.1, 2X1.1)	Committing or attempting to commit aircraft piracy in special aircraft jurisdiction of the United States; no death of another individual	20 years
49 USC § 46502(a)(2)(B) (\$2A5.1, 2X1.1)	Committing or attempting to commit aircraft piracy in special aircraft jurisdiction of the United States; resulting in death of another individual	Death or life
49 USC § 46502(b)(1)(A) (\$2A5.1, 2X1.1)	Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of United States; no death of another individual	20 years
49 USC § 46502(b)(1)(B) (\$2A5.1, 2X1.1)	Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of United States; resulting in death of another individual	Death or life
49 USC § 46506(1) (\$2A5.3)	Application of certain criminal laws to acts on aircraft in special maritime and territorial jurisdiction of the United States	Mandatory minimum term of imprisonment applicable to the underlying offense

*This table lists federal criminal statutes that require the imposition of at least a specified minimum term of imprisonment when certain criteria specified in the statute are met. Statutes that provide for imprisonment for "any term of years" or require only a minimum specified term of supervised release or a minimum specified fine are not included.

APPENDIX B

Appendix B

COUNTS OF CONVICTION UNDER STATUTES REQUIRING
MANDATORY MINIMUM TERMS OF IMPRISONMENT
Fiscal Year 2008

Statute ¹	Number of Counts of Conviction
2 U.S.C. § 192	0
2 U.S.C. § 390	0
7 U.S.C. § 13a	0
7 U.S.C. § 13b	0
7 U.S.C. § 15b(k)	0
7 U.S.C. § 195(3)	0
7 U.S.C. § 2024	0
8 U.S.C. § 1324(a)(2)(B)	239
8 U.S.C. § 1326(b)(3)	0
12 U.S.C. § 617	0
12 U.S.C. § 630	0
15 U.S.C. § 8	0
12 U.S.C. § 1245(b)	0
15 U.S.C. § 1825(a)(2)(C)	0
16 U.S.C. § 414	0
18 U.S.C. § 33(b)	0
18 U.S.C. § 115(b)(3)	0
18 U.S.C. § 225(a)	0
18 U.S.C. § 229A(a)(2)	0
18 U.S.C. § 351(a)	0
18 U.S.C. § 844(f)	6
18 U.S.C. § 844(h)	23
18 U.S.C. § 844(i)	62
18 U.S.C. § 844(o)	0
18 U.S.C. § 924(e)(1)	749
18 U.S.C. § 924(e)	2,778
18 U.S.C. § 929(a)(1)	0
18 U.S.C. § 930(c)	0
18 U.S.C. § 1028A	1,156
18 U.S.C. § 1111	11
18 U.S.C. § 1114	0

Statute	Number of Counts of Conviction
18 U.S.C. § 1116	0
18 U.S.C. § 1118	0
18 U.S.C. § 1119(b)	0
18 U.S.C. § 1120(b)	0
18 U.S.C. § 1121(a)	0
18 U.S.C. § 1121(b)	0
18 U.S.C. § 1122	0
18 U.S.C. § 1201(g)(1)	1
18 U.S.C. § 1203(a)	0
18 U.S.C. § 1466A(a)	29
18 U.S.C. § 1503(b)(1)	0
18 U.S.C. § 1512(a)	3
18 U.S.C. § 1591	15
18 U.S.C. § 1651	0
18 U.S.C. § 1652	0
18 U.S.C. § 1653	0
18 U.S.C. § 1655	0
18 U.S.C. § 1658(b)	0
18 U.S.C. § 1661	0
18 U.S.C. § 1751(a)	0
18 U.S.C. § 1917	0
18 U.S.C. § 1956(h)	3
18 U.S.C. § 1958(a)	1
18 U.S.C. § 2113(e)	7
18 U.S.C. § 2241(c)	15
18 U.S.C. § 2250	0
18 U.S.C. § 2251	245
18 U.S.C. § 2252	878
18 U.S.C. § 2260(a)	5
18 U.S.C. § 2260A	0
18 U.S.C. § 2261(b)(6)	0
18 U.S.C. § 2381	0
18 U.S.C. § 2422(b)	153
18 U.S.C. § 2423(a)	55
18 U.S.C. § 2423(e)	11
18 U.S.C. § 3559(c)	2

Statute	Number of Counts of Conviction
18 U.S.C. § 3559(d)	0
18 U.S.C. § 3559(e)	2
18 U.S.C. § 3559(f)	1
21 U.S.C. § 212	0
21 U.S.C. § 461	0
21 U.S.C. § 622	0
21 U.S.C. § 675	0
21 U.S.C. § 841	13,158
21 U.S.C. § 844	95
21 U.S.C. § 846	9,736
21 U.S.C. § 848	49
21 U.S.C. § 851	423
21 U.S.C. § 859	10
21 U.S.C. § 860	328
21 U.S.C. § 861	13
21 U.S.C. § 960	474
21 U.S.C. § 963	503
21 U.S.C. § 1041(b)	0
22 U.S.C. § 4221	0
33 U.S.C. § 407	0
33 U.S.C. § 408	0
33 U.S.C. § 409	0
33 U.S.C. § 410	0
33 U.S.C. § 414	0
33 U.S.C. § 415	0
33 U.S.C. § 441	0
33 U.S.C. § 447	0
42 U.S.C. § 2272(b)	0
42 U.S.C. § 3631	0
46 U.S.C. § 58101	0
46 U.S.C. § 58103	0
46 U.S.C. § 58105	0
47 U.S.C. § 13	0

Statute	Number of Counts of Conviction
47 U.S.C. § 220	0
49 U.S.C. § 46502	0
49 U.S.C. § 46506	0
TOTAL²	31,239

¹This table lists federal criminal statutes that require the imposition of at least a specified minimum term of imprisonment when certain criteria specified in the statute are met. Statutes that provide for imprisonment for "any term of years" or require only a minimum specified term of supervised release or a minimum specified fine are not included. The total number of statutory entries listed on this table is than listed in Appendix A because some statutory provisions listed in Appendix A were collapsed for data collection purposes.

²This table reports the number of counts of conviction under each statute providing a mandatory minimum term of imprisonment. Because an offender may be sentenced for multiple counts of conviction which carry mandatory minimum penalties, the total number of counts of conviction reported in this table exceeds the total number of offenders subject to a mandatory minimum as reported elsewhere in the testimony.

SOURCE: U.S. Sentencing Commission 2008 Datafile, FY2008.



Mandatory Minimums Fail to Achieve Justice

Judges should have discretion in issuing sentences, says Constitution Project

FOR IMMEDIATE RELEASE: July 14, 2009

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WASHINGTON – The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security has scheduled a hearing today to examine mandatory minimum sentencing. The Subcommittee will consider three different proposed pieces of legislation that seek to provide judges with more discretion to avoid unjust outcomes when handing down sentences. The Constitution Project applauds the Subcommittee for today’s hearing and for moving forward with these much-needed fixes to our nation’s sentencing policies.

“The Constitution Project’s bipartisan Sentencing Initiative Committee found that mandatory minimum penalties run counter to a system of sentencing guidelines,” said Virginia Sloan, president of the Constitution Project. “The Committee, co-chaired by Edwin Meese, President Reagan’s attorney general, and Philip Heymann, President Clinton’s deputy attorney general, concluded that our system of justice is best served when judges, after looking at all the facts and arguments of a case, can determine what a fair and sensible punishment is for the guilty party. The current sentencing guidelines are overly complex, while continuing to rely heavily on quantifiable conduct not centrally related to the offense of conviction. We must trust the judges we have elevated as the arbiters of justice. The Subcommittee on Crime and Chairman Bobby Scott should be applauded for addressing the vital issues of fairness and discretion in our criminal justice system.”

The Constitution Project’s Sentencing Initiative Committee, a bipartisan collection of current and former judges, prosecutors, defense attorneys, scholars, and other sentencing experts, issued two reports on criminal sentencing, “Principles for the Design and Reform of Sentencing Systems,” and “In A Post-Booker World.” Among its recommendations were calls for guideline simplification, an end to the crack and powder cocaine sentencing disparity, and providing meaningful due process protections and reliable fact-finding mechanisms.

To view a copy of “Principles for the Design and Reform of Sentencing Systems,” go to:
<http://www.constitutionproject.org/manage/file/35.pdf>

To view a copy of “In a Post-Booker World,” go to:
<http://www.constitutionproject.org/manage/file/33.pdf>

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