MANDATORY MINIMUM SENTENCING LAWS—THE ISSUES

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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MANDATORY MINIMUM SENTENCING LAWS—THE ISSUES

TUESDAY, JUNE 26, 2007

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

The Subcommittee met, pursuant to notice, at 9:30 a.m., in Room 2141, Rayburn House Office Building, the Honorable Robert C. Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Johnson, Jackson Lee, Davis, Forbes, Gohmert, Coble and Lungren.

Also present: Representatives Conyers, Ellison and Jones of North Carolina.

Staff Present: Bobby Vassar, Subcommittee Chief Counsel; Rachel King, Majority Counsel; Veronica Eligan, Professional Staff Member; Michael Volkov, Minority Counsel; Caroline Lynch, Minority Counsel; and Kelsey Whitlock, Minority Staff Assistant.

Mr. SCOTT. Thank you. I would like to call the meeting of the Subcommittee on Crime, Terrorism, and Homeland Security to order. We have many excellent witnesses today. We will get to them as soon as possible, so I will keep my statement brief. But in the meanwhile we have the gentleman from North Carolina, Walter Jones, with us today who wanted to drop in. He is in the middle of another hearing and has to leave, but he wanted to greet us.

Mr. JONES. Mr. Chairman, I want to thank you and the Judiciary Committee Chairman, Mr. Conyers, for holding this hearing. And the reason that I am here and my involvement is that for the last—since August of last year I have joined many of my colleagues in the United States Congress who have been concerned about the indictment of Border Agents Ramos and Compean and feel that they should never have been brought to trial. So therefore I hope that this hearing today will bring many, many sunshine to many aspects of the law itself, as well as the fact that these men, in our opinion, should not have been prosecuted by the Federal D.A. In west Texas. And thank you for letting me say thank you.

Mr. SCOTT. Thank you. And thank you for being with us today.

One of the motivations for today's hearing, as has just been stated, is the conviction and sentencing of the two Border Patrol agents, Ramos and Compean, who were sentenced to 11 years and 1 day and 12 years of incarceration respectively. Regardless of

what you think of these two agents or whether they were rightfully prosecuted, the fact remains that the U.S. District court was restrained when it came to sentencing the two men. The judge had to sentence them to at least 10-year minimum sentences.

Mandatory minimum sentences have been studied extensively and have been shown to be ineffective in preventing crime. They have been effective in distorting the sentencing process. They discriminate against minorities in their application, and they have been shown to waste the taxpayers' money. In a study, a report entitled, quote, Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money, the RAND Corporation concluded that mandatory minimum sentences were less effective than either discretionary sentencing or drug treatment in reducing drug-related crime and far more costly than either.

And the Judicial Conference of the United States has reiterated its opposition to mandatory minimum sentencing over a dozen times to this Congress, and noting that they severely distort and damage the Federal sentencing system, undermine the sentencing guideline regiment established by Congress to promote fairness and proportionality, and destroy honesty in sentencing by encouraging charge and fact plea bargains.

The Judicial Center, in its report entitled General Effects of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed, and the Sentencing Commission, United States Sentencing Commission, in its study entitled Mandatory Minimum Penalties in the Federal Criminal Justice System, found that minorities were substantially more likely than Whites under comparable circumstances to receive mandatory minimum sentences. The Sentencing Commission also reflected that mandatory minimum sentences increased the disparity in sentencing of like defendants because they were not applied in 40 percent of the cases, and at the same time increased the cost as a result of the rate of trials rising from 13 percent of the defendants to 19 percent of the defendants with no evidence that mandatory minimum sentencing had more crime reduction impact than discretionary sentences.

Former Chief Justice Rehnquist spoke often and loudly about these wasteful cost increases, and he said mandatory minimums are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders, particularly for mules who played only a minor role in drug distribution in a drug distribution scheme. Be that as it may, the mandatory minimums have also led to an inordinate increase in the prison population and will require huge expenditures to build new prison space.

He went on to say that mandatory minimums are frequently the result of floor amendments to demonstrate emphatically that legislators want to get tough on crime just as frequently as they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole.

The Federal Judicial Conference has studied mandatory minimums and has written the House Judiciary Committee over a dozen times in the last 10 years urging us not to adopt the manda-

tory minimum sentences, stating that they distort attempts to enforce an orderly and proportionate sentencing regimen in the Federal system, and they violate common sense by requiring vastly different defendants to get identical sentences simply because they technically violated the same section of the criminal code. And we know that the title of the offense often is not a good description of the seriousness of the crime.

It also creates a bizarre situation where the decision of when to release a defendant is made not at a parole hearing just before the person is released and you can review the sentence, what he has done to better himself, where he is going to go and what he is going to do. It is not even made at the sentencing where the judge makes a decision based on the seriousness of the crime and the particular defendant before him and all the facts in evidence in that case. But it is made when the legislature passes the criminal code. That is of the three opportunities, I guess, about the worst time to make that decision.

With that thought I would lead to my distinguished colleague, my colleague from Virginia, the Ranking Member of the Subcommittee, Mr. Forbes from the Fourth Congressional District of Virginia.

Mr. FORBES. Thank you, Chairman Scott. And I appreciate your scheduling this hearing so that we can fairly assess the importance of mandatory minimum sentences in the criminal justice system.

Mandatory minimum penalties are an effective means to ensure consistency in sentencing and to promote the public safety by deterring others from committing crimes and preventing recidivism. The need for mandatory minimum penalties has taken on a greater significance given the advisory nature of the Federal sentencing guidelines. The Supreme Court's 2005 decision in *United States v. Booker* invalidated the mandatory sentencing requirement of the sentencing guidelines. The U.S. Sentencing Commission's March 13, 2006, report on *Booker*'s impact identified substantial concerns about unrestrained judicial discretion. Such discretion undermines the very purpose of the Sentencing Reform Act to provide certainty and fairness in meeting the purposes of sentencing and avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.

The Sentencing Commission's data updated through the second quarter of 2007 shows continuing sentencing disparities, including a steady rate of nongovernment-sponsored below-guideline sentences for defendants; geographic disparities among the judicial circuits; and sentencing reductions in a significant number of drug-trafficking cases, immigration cases, firearms offenses, pornography and prostitution offenses and white collar. Advisory sentencing guidelines that result in lower penalties for the worst offenders only increase the significance of mandatory minimum sentences.

Beginning in 1984, Democrat Congresses passed important mandatory minimums, along with other sentencing reforms, including the Federal sentencing guidelines. Prior to the 1984 Sentencing Reform Act, Federal judges had unfettered discretion to sentence a criminal defendant as they pleased. This unbridled discretion resulted in enormous disparity in sentences for similarly situated de-

fendants. Senator Kennedy, one of the principal advocates of the Federal sentencing guidelines, stated that the existing sentencing disparity was a national scandal. He noted that the Federal Criminal Code invites disparity by conferring unlimited discretion on the sentencing judge.

The shameful disparity in criminal sentences imposed in the Federal courts is a major flaw which encourages the potential criminal to play the odds and beat the sentence. Sentencing disparity is unfair. Aside from ensuring consistency in sentencing, mandatory minimum penalties provide prosecutors the tools to secure the cooperation of criminals to dismantle criminal enterprises, gangs and other organizations. Without such a penalty, for example, gang members will not cooperate with law enforcement. They will simply turn their back on cooperation, do the time, and gang violence will continue to expand and threaten our communities.

While some complain about mandatory sentencing schemes there is research to show that such penalties have been a significant factor in the reduction of violent crime over the last 30 years. Some would say that is coincidence. Statistical researchers have shown to the contrary. Increases in prison population have incapacitated recidivists and deterred others from committing crime. Professor Steven Levitt conducted a study to show that a significant part of the decline in violent crime is attributable to increased incarceration. In a more recent study, Joanna Shepherd demonstrated that truth-in-sentencing laws have a dramatic impact on reducing serious violent crimes. Other studies confirmed the obvious point. Incarcerating an offender prevents him from repeating his crimes while he is in prison.

Balanced against these reductions in crime from deterrence and incapacity, there is significant cost savings to society from reducing the occurrence of crime. Mandatory minimum penalties, however, need to be specifically tailored and fairly applied. The Sentencing Commission's recent study on the disparity between crack cocaine and powder cocaine demonstrated again the need for reform in this area. And I commend the Commission for its study and look forward to hearing more about it and possible solutions.

I am also glad that we are taking the time to examine the Government's prosecution of the Border Patrol agents' case. The controversy surrounded this prosecution is significant. I have many questions and concerns about the manner in which the Government conducted this prosecution. To me the question is not the penalties that were imposed in that case, but rather whether the case should have been brought at all.

Mr. Chairman, I look forward to hearing from today's witnesses, and I yield back the balance of my time.

Mr. SCOTT. Thank you.

Do any of the other panelists have a statement?

Mr. CONYERS. Mr. Chairman.

Mr. SCOTT. I recognize the Chairman of the full Committee Mr. Conyers.

Mr. CONYERS. Thank you so much. I want to commend you and the Ranking Member, both from Virginia, for bringing us together and to bring such a distinguished set of panelists. We don't usually

have two judges, a U.S. attorney and a future attorney all with us at the same time.

Marc Mauer is well known in his work here. He has been before the Committee perhaps more than anyone else. This is a—of all cases, I can't understand—we could have a hearing on this case, and I know it is on appeal, but there are circumstances in it that are so incredible that I find it breathtaking.

I suppose the main reason we are here is because we have been trying to get mandatory minimum sentences in some kind of a different position, and so I just can't fathom why Border Patrol agents working for the Government, doing their job, end up being charged and prosecuted under a law that to me seems to be very inspecific. And, of course, the case is under appeal. But since it is before us, I think that it is something that we really have to deal with.

I find that mandatory sentences—and I join both the Chairman and the Subcommittee Ranking Member—that during mandatory minimums we have witnessed a fivefold increase in the number of women currently entangled in our criminal justice system as a result of their minimal involvement in some drug-related crime. In two States we have almost 20 percent of the people incarcerated are serving mandatory minimum terms. We are incarcerating people at a rate higher than any other Nation on the planet. And so this brings together some very important considerations.

I want to thank our colleague from North Carolina, Congressman Jones, for having brought this matter to the attention of the Committee. Walter Jones has been unrelenting in his support for hearings in this Committee. He is chairing another meeting, and he will be back shortly, I'm sure. And so I thank the Committee for allowing me to welcome all of the witnesses and ask unanimous consent that my remarks be included in the record.

Mr. SCOTT. Thank you. We have a distinguished panel of witnesses here to help us consider the important issues before us. And we have been joined by the gentleman from Georgia Mr. Johnson. I thank you.

Our first witness will be the Honorable Ricardo H. Hinojosa, Chair of the U.S. Sentencing Commission since 2003 and judge of the U.S. District Court in the Southern District of Texas since 1983. He is a graduate of Harvard Law School. And before becoming appointed judge, he was in private practice in McAllen, Texas.

Our second witness is the Honorable Paul C. Cassell, judge of the U.S. District Court for the District of Utah since May 2002. He is a graduate of Stanford Law School. Prior to that he was a professor at the Utah College of Law where he worked in many cases, and particularly well known for his work with the National Victims Constitutional Amendment Network.

Our next witness is Richard B. Roper, III, U.S. District Attorney, Northern District of Texas. In Dallas, Texas, he served as the assistant U.S. attorney since 1987 until he was sworn in as interim U.S. attorney on June 29, 2004. Prior to that he served as the Tarrant County assistant district attorney for 5 years. He received his law degree from Texas Tech.

Our fourth witness is Marc Mauer, executive director of the Sentencing Project, a national nonprofit organization engaged in research and advocacy on criminal justice issues. He has been en-

gaged in this work for 30 years and has authored two books and many journal articles on various aspects of crime policy. He received his B.A. From the State University of New York in Stony Brook, and has a master's in social work from the University of Michigan.

Next is T.J. Bonner, who is the national president of the National Border Patrol Council of the American Federation of Government Employees of the AFL-CIO. He represents the concerns of approximately 11,000 front-line Border Patrol employees.

And lastly we have Serena Nunn. She served more than a decade in Federal prison for her participation as a low-level nonviolent conspirator in a cocaine sale organized by her boyfriend. Her case received attention in the Minneapolis Star Tribune, which featured her in an article about mandatory minimum sentencing. A young lawyer brought her case to the attention of President Clinton, who commuted her sentence on July 7, 2000. After being released from prison after more than a decade, she has finished her bachelor's degree at Arizona State University and then was accepted at the University of Michigan Law School, from which she graduated last year.

Each of the witnesses' written statements will be made part of the record in its entirety. I would ask that each witness summarize his or her testimony in 5 minutes or less. To help stay within that time, there is a timing device at your table. When 1 minute is left, the light will switch from green to yellow and then finally to red when your 5 minutes are up.

We will now begin with our witnesses. Judge Hinojosa.

TESTIMONY OF RICARDO H. HINOJOSA, CHAIR, UNITED STATES SENTENCING COMMISSION, WASHINGTON, DC

Judge HINOJOSA. Chairman Scott, Ranking Member Forbes and Members of the Subcommittee, I appreciate the opportunity to testify before you today on behalf of the United States Sentencing Commission regarding mandatory minimum sentencings generally and Federal cocaine sentencing policy specifically. My written testimony provides information on Federal statutory mandatory minimum sentencing compiled from the Commission's fiscal year 2006 data file. My testimony does not focus on any particular case. The Commission does not generally comment on individual cases, particularly when pending appeal.

The Commission firmly believes that the sentencing guideline system remains the best mechanism for assuring that the statutory purposes of sentencing as set forth in 18 U.S.C. Section 3553(a) are met, and it has worked consistently with Congress to identify alternatives within the guideline system in lieu of mandatory minimums.

The Sentencing Reform Act of 1984 specifically directed the Commission to develop guidelines that would achieve those statutory purposes. And as the Supreme Court last week recognized in *Rita v. United States,* 'the result is a set of guidelines that seek to embody the Section 3553(a) considerations both in principle and in practice."

The Commission identified at least 171 mandatory minimum provisions in Federal criminal statutes. In fiscal year 2006, of the

60,627 Federal offenders for which the Commission received sufficient documentation to conduct this analysis, 20,737 offenders or 29.8 percent, were convicted of a statute carrying a mandatory minimum penalty. Of the 33,636 counts of conviction that carried a mandatory minimum, 94.4 percent were for drug offenses and firearms offenses. Offenders other than Whites comprise 74.0 percent of offenders convicted of a statutory mandatory minimum penalty compared to 70.9 percent of those offenders in the overall offender population. Black offenders were the only racial or ethnic group that comprised a greater percentage of offenders convicted of a statutory mandatory minimum penalty, which was 32.9 percent, than the percentage in the overall offender population, which was 23.8 percent.

To gauge the demographic impact of mandatory minimums, however, it proved helpful to extract the Federal immigration caseload from the analysis. Immigration offenders comprise 23.8 percent of offenders in the overall caseload, but only 0.8 percent of the offenders convicted of a statute carrying a mandatory minimum sentence. The demographic data excluding immigration cases shows that Hispanic offenders comprise 38.1 percent of the nonimmigration offenders convicted of a statutory mandatory minimum penalty, but 29.7 percent of the overall offender population. And Black offenders comprise 33 percent of the nonimmigration offenders convicted of a statutory mandatory minimum penalty, but 29.8 percent of the overall offender population.

Many offenders convicted of a statute carrying a mandatory minimum are being sentenced without regard to and below the mandatory minimum because of a substantial assistance provision under 18 U.S.C. Section 3553(a) and, for drug offenders, because of the substantial assistance provision and/or the safety valve provision under 18 U.S.C. Section 3553(f). Of the 18,987 mandatory minimum offenders for whom the Commission had sufficient information for the analysis, 13.6 percent, or 2,591 offenders, were sentenced without regard to and below the mandatory minimum because of the statutory substantial assistance provision. Of the 16,334 drug mandatory minimum offenders for whom the Commission had sufficient information for the analysis, 7,812 offenders, or 47.8 percent, were sentenced without regard to and below the mandatory minimum because of the substantial assistance provision and/or the safety valve provision; 84.2 percent of the offenders convicted of statutes carrying a mandatory minimum sentence were drug offenders.

The impact of drug mandatory minimum penalties on Black offenders is largely driven by crack cocaine offenses. Black offenders comprise 32 percent of offenders convicted of drug mandatory minimum statutes, but 29.2 percent of the overall drug offender population. If crack cocaine cases are excluded from the analysis, Black offenders comprise 14.4 percent of the remaining drug cases in which a drug mandatory minimum applied and 14.8 percent of the remaining drug cases overall.

I would like to address briefly the issue of Federal cocaine sentencing policy. This past year the Commission undertook an extensive review of the issues associated with Federal cocaine sentencing policy. The Commission received public comment showing almost

universal criticism of current cocaine sentencing policy. The Commission's efforts culminated in the issuance of its fourth report to Congress on the subject in which the Commission again unanimously and strongly urged Congress to act promptly to address the problem of unwarranted crack cocaine sentencing disparity.

On May 1, the Commission submitted to Congress an amendment to the drug trafficking guideline that would reduce the base offense level for all crack cocaine offenders by two levels. The Commission firmly believes this is only a partial remedy and that a comprehensive solution to the problem of Federal cocaine sentencing policy must be legislated by Congress.

The Commission stands ready to work with Congress as it continues to study the issues of mandatory minimums and Federal cocaine sentencing policy. The Commission is committed to working with Congress to maintain a just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act of 1984.

Thank you for the opportunity to testify so quickly before you today. I look forward to answering your questions, and I appreciate your letting me have a little bit of extra time, but that is about the fastest I have ever talked.

Mr. SCOTT. Thank you, Judge.

[The prepared statement of Judge Hinojosa follows:]

PREPARED STATEMENT OF RICARDO H. HINOJOSA

Statement of Ricardo H. Hinojosa
Chair, United States Sentencing Commission
Before the House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security

June 26, 2007

Chairman Scott, Ranking Member Forbes, and members of the Subcommittee, I appreciate the opportunity to testify before you today on behalf of the United States Sentencing Commission regarding mandatory minimum[1] sentencing generally and federal cocaine sentencing policy specifically.

Part I of my testimony provides a statistical overview of statutory mandatory minimum sentencing, including data both on mandatory minimum sentences and on the statutory mechanisms created to provide relief to certain defendants from application of mandatory minimum provisions. Part II discusses the application of mandatory minimum provisions in the context of crack cocaine offenses, with a specific focus on the Commission's recent activity regarding crack cocaine sentencing.

Because this hearing is about mandatory minimum sentencing, my testimony does not focus on the operation of the federal sentencing guidelines.[2] It is important to note, however, that the sentencing guidelines must be consistent with all pertinent provisions of federal law.[3] Such consistency should not be misunderstood to mean that the sentencing guidelines system and mandatory minimums are one and the same as there are important differences between the two. For example, the federal sentencing guideline system is designed to take into account many more offense and offender characteristics, both aggravating and mitigating, than mandatory minimum provisions typically do.

The Commission firmly believes that the federal sentencing guideline system remains the best mechanism for assuring that the statutory purposes of sentencing, as set forth in 18 U.S.C. § 3553(a), are met. The Sentencing Reform Act of 1984[4] specifically directed the Commission to develop guidelines that would achieve those statutory purposes and, as the Supreme Court last week recognized, "[t]he result is a set of Guidelines that seek to embody the section 3553(a) considerations, both in principle and in practice."[5] The Commission has worked consistently with Congress over the years to identify alternatives within the federal sentencing guideline system in lieu of mandatory

[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] My testimony also does not focus on any particular case, as the Commission generally does not comment on individual cases, particularly when pending appeal.

[3] *See* 28 U.S.C. § 994(a).

[4] Title II, Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat. 1837 (1984).

[5] *Rita v. United States*, No. 06-5754, Slip Op. at 6 (S.Ct. June 21, 2007).

minimums. The Commission strongly believes that the guideline system most effectively provides for sentences in a manner consistent with the statutory purposes of sentencing set forth in the Sentencing Reform Act of 1984.

I. Overview of Statutory Mandatory Minimum Sentencing

The Commission has identified at least 171 individual mandatory minimum provisions currently in the federal criminal statutes.[6] In the Commission's fiscal year 2006 datafile, there were 33,636 counts of conviction that carried a mandatory minimum term of imprisonment.[7] Because an offender may be sentenced for multiple counts of conviction that carry mandatory minimum penalties, these 33,636 counts of conviction exceed the total number of offenders (20,737 offenders, as reported below) who were convicted of statutes carrying such penalties.

Of these 33,636 counts of conviction, the overwhelming majority (94.4%) were for drug offenses (27,898 counts of conviction, or 82.9%) and firearms offenses (3,864 counts of conviction, or 11.4%). Most of the 171 mandatory minimum provisions rarely if ever were used in fiscal year 2006, with 68 such provisions not used at all.

A. Data on Mandatory Minimum Sentencing

In preparation for this hearing, the Commission reviewed data from its fiscal year 2006 datafile. For that fiscal year, the Commission received documentation for 72,585 cases.[8] Of these 72,585 cases, the Commission received sufficient documentation in 69,627 cases to determine whether the offender was convicted of a statute carrying a mandatory minimum penalty. Of these 69,627 cases, offenders in 20,737 cases (29.8%) were convicted of a statute carrying a mandatory minimum penalty.[9] Of these 20,737 offenders, 2,716 (13.1%) received a statutory mandatory minimum sentence that was required to be consecutive to any other sentence imposed.[10]

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[6] *See* Appendix A, listing current mandatory minimum sentencing provisions as defined in footnote 1 of this testimony.

[7] *See* Appendix B.

[8] 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). 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. For fiscal year 2006, the Commission received 98.7% of all such documents. *See* USSC FY2006 Sourcebook, Table 1.

[9] 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 such 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.

[10] *See, e.g.*, 18 U.S.C. § 924(c), requiring mandatory consecutive terms of imprisonment for certain firearms offenses.

1. Demographics

Table 1 provides demographic data for all cases in the Commission's fiscal year 2006 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 2006 for which the relevant sentencing documentation was received, offenders other than those categorized as white offenders comprised 74.0 percent of offenders convicted of a statute carrying a statutory mandatory minimum penalty.[11] This is slightly higher than the percentage of offenders other than those categorized as white offenders in the Commission's overall fiscal year 2006 datafile, which was 70.9 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 (32.9%) than their percentage in the overall fiscal year 2006 offender population (23.8%).

Table 1: Demographic Characteristics for All Cases and Mandatory Minimum Cases Fiscal Year 2006

	All Cases		All Mandatory Cases	
	N	%	N	%
Race/Ethnicity				
White	20,072	29.1	5,366	26.0
Black	16,399	23.8	6,803	32.9
Hispanic	29,670	43.1	7,906	38.2
Other	2,769	4.0	603	2.9
Total	68,910	100.0	20,678	100.0
Citizenship				
U.S. Citizen	43,696	62.9	15,089	73.2
Non-Citizen	25,816	37.1	5,526	26.8
Total	69,512	100.0	20,615	100.0
Gender				
Male	61,517	86.7	18,794	90.7
Female	9,477	13.3	1,932	9.3
Total	70,994	100.0	20,726	100.0

This table excludes cases missing information for the variables required for analysis.
SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

[11] Of the 20,737 cases in which the offender was identified as convicted of a statute carrying a mandatory minimum penalty, 20,678 cases had sufficient demographic information regarding the offender's race or ethnicity for purposes of this analysis.

For purposes of gauging the demographic impact of mandatory minimums, however, it is helpful to extract the federal immigration caseload from the analysis. Immigration offenders, 89.3 percent of whom in fiscal year 2006 were Hispanic, comprise a relatively large percentage of offenders in the overall federal caseload (23.8%, as reported in Table 5, below), but comprise a relatively small percentage of the offenders convicted of a statute carrying a mandatory minimum sentence (0.8%, as reported in Table 5, below). 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 2006 offender population. As Table 2 indicates, Hispanic offenders had a higher differential in this regard, comprising 38.1 percent of offenders convicted of a non-immigration statute carrying a mandatory minimum penalty but only 29.7 percent of the overall non-immigration offender population. Black offenders comprised 33 percent of offenders convicted of a non-immigration statute carrying a mandatory minimum penalty but only 29.8 percent of the overall non-immigration offender population.

Table 2: Demographic Characteristics for Non-Immigration Cases and Mandatory Minimum, Non-Immigration Cases

Fiscal Year 2006

	Non-Immigration Cases		Mandatory Minimum Non-Immigration Cases	
	N	%	N	%
Race/Ethnicity				
White	19,098	35.7	5,343	26.0
Black	15,938	29.8	6,775	33.0
Hispanic	15,867	29.7	7,810	38.1
Other	2,550	4.8	589	2.9
Total	53,453	100.0	20,517	100.0
Citizenship				
U.S. Citizen	41,863	78.4	15,045	73.6
Non-Citizen	11,550	21.6	5,407	26.4
Total	53,413	100.0	20,452	100.0
Gender				
Male	46,787	85.1	18,663	90.8
Female	8,218	14.9	1,900	9.2
Total	55,005	100.0	20,563	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSC FY2006.

2. Trial Rates

Of the 20,737 offenders convicted under a statute carrying a mandatory minimum penalty, 19,328 offenders (93.2%) pled guilty and 1,409 offenders (6.8%) were convicted after a trial. By comparison, 69,403 offenders (95.7%) in the Commission's fiscal year 2006 datafile pled guilty and 3,107 offenders (4.3%) in the Commission's fiscal year 2006 datafile were convicted after a trial.[12]

[12] *See* USSC FY2006 Sourcebook, Fig. C, which provides guilty pleas and trial rates for fiscal years 2002-2006.

B. Mechanisms for Relief from Mandatory Minimum Sentences

As a prelude to discussion about 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) and 18 U.S.C. § 3553(f). Section 3553(e), commonly referred to as "substantial assistance", is available upon motion of the Government,[13] and allows 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.

Section 3553(f), commonly referred to as the "safety valve", provides an additional mechanism by which only drug offenders[14] 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,[15] 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."[16] The Act created section 3553(f)[17] to permit offenders "who are the least culpable participants in drug trafficking

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[13] After the Supreme Court's 2005 decision in *United States v. Booker*, 542 U.S. 220 (2005), a government motion is still required in order for 18 U.S.C. § 3553(e) to apply. *See United States v. Rivera*, 170 Fed. Appx 209, 211 (2d Cir. 2006) (rejecting defendant's argument that the government motion requirement be applied as advisory in light of *Booker*); *United States v. Vasquez*, 433 F.3d 666, 670 (8th Cir. 2006) (affirming that, post-*Booker*, district courts cannot review the Government's refusal to make a § 5K1.1 motion where the defendant does not argue that the refusal was based on an unconstitutional motive or was not rationally related to a legitimate government interest).

[14] For purposes of 18 U.S.C. § 3553(f), the term "drug offenders" means offenders 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).

[15] Pub. L. No. 102–322 (1994).

[16] *Id.* 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 United States v. Barrero*, 425 F.3d 154, 157 (2d Cir. 2005) (because *Booker* did not excise 18 U.S.C. § 3553(f)(1), the district court is still required to apply it when calculating the defendant's advisory guideline range); *United States v. Cardenas-Juarez*, 469 F.3d 1331, 1334 (9th Cir. 2006); *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006).

[17] 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;

offenses, to receive strictly regulated reductions in prison sentences for mitigating factors" recognized in the federal sentencing guidelines.[18]

1. 18 U.S.C. § 3553(e): Substantial Assistance

Of the 20,737 offenders convicted under a statute carrying a mandatory minimum penalty, the Commission received complete sentencing documentation to determine whether the substantial assistance provision could have applied. Of the 18,987 offenders for whom the Commission received complete information to determine whether the substantial assistance provision could have applied, there were 2,591 offenders (13.6%) for whom 18 U.S.C. § 3553(e) alone was the statutory mechanism by which they were sentenced without regard to and below the statutory mandatory minimum. Although there were 3,736 offenders who were eligible to be sentenced without regard to the statutory mandatory minimum because of substantial assistance, 1,145 of these offenders (30.6%) received a sentence at or above the same level as the mandatory minimum sentence. Table 3 provides information regarding application of the substantial assistance provision for five offense types.

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(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.

[18] *See* H. Rep. No. 103–460, 103rd Cong. 2nd Sess. (1994).

Table 3: Application of Substantial Assistance Provision (18 U.S.C. § 3553(e)) by Offense Type

Offenses	Total Number of Offenders[19]	Percentage of Total Federal Caseload[20]	Number of Offenders Convicted of Mandatory Minimums	Percent of Offenders Convicted of Mandatory Minimums	Number of Offenders Sentenced without regard to and below Mandatory Minimum Due to § 3553(e) (Substantial Assistance)
Immigration	16,199	23.8%	163	0.8%	34
Fraud	8,431	12.4%	187	0.9%	9
Criminal Sexual Abuse/ Pornography/Prostitution	1,569	2.3%	605	2.9%	13
Firearms	7,038	10.4%	1,130	5.5%	70
Drug Offenses	25,824	38.0%	17,338	84.2%	2,325

2. 18 U.S.C. § 3553(f): The Safety Valve

As Table 4 indicates, of the 20,737 offenders convicted under a statute carrying a mandatory minimum penalty, the Commission received information sufficient to determine the type of offense for 20,582 offenders. Of these 20,582 offenders, 17,338 were drug offenders.[21] Of these 17,338 drug offenders, there were 16,334 drug offenders for whom the Commission received sufficient sentencing documentation to determine whether 18 U.S.C. § 3553(f) could have applied. Of these 16,334 drug offenders, there were 3,837 drug offenders (23.5%) for whom 18 U.S.C. § 3553(f) alone was the statutory mechanism by which they were sentenced without regard to and below the mandatory minimum penalty. Although there were 4,377 offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the safety valve provision applied, 540 of these offenders (12.3%) received a sentence at or above the same level as the mandatory minimum sentence.

[19] Of the 72,585 cases sentenced in fiscal year 2006, 67,945 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

[20] Of the 20,737 cases in which the offender was convicted of a statute carrying a mandatory minimum penalty, 20,582 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

[21] For purposes of this analysis, the overall number of drug offenders and the number of drug offenders sentenced without regard to a mandatory minimum because of the safety valve provision at 18 U.S.C. § 3553(f) differ from the numbers reported for these groups in Tables 43 and 44 of the Commission's FY2006 Sourcebook because, unlike Tables 43 and 44, the analysis contained herein includes 165 drug offenders who were sentenced under a mandatory minimum provision carrying a minimum term of imprisonment of less than five years and also includes cases lacking sufficient information about the type of drug involved in the offense.

Table 4: Application of Safety Valve and Substantial Assistance for Drug Offenders

Total Number of Drug Offenders[22]	Number of Drug Offenders Convicted of Mandatory Minimums	Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to § 3553(e) (Substantial Assistance)	Number of Drug Offenders Sentenced without regard to and below Mandatory Minimum Due to § 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)	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
25,824	17,338	2,325	3,837	1,650	7,812

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 2006 datafile, there were 16,334 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 under 18 U.S.C. §3553(f) could have applied. Of these 16,334 drug offenders, 1,650 drug offenders (10.1%) were sentenced without regard to and below the mandatory minimum pursuant to the operation of both provisions. Although there were 1,696 offenders who were eligible to be sentenced without regard to the statutory mandatory minimum due to both substantial assistance and the safety valve, 46 of these offenders (2.8%) received a sentence at or above the same level as the mandatory minimum sentence.

As shown in Table 4, the safety valve provision alone applied to 3,837 of these 16,344 drug offenders (23.5%), and the substantial assistance provision alone applied to 2,325 of these 16,344 drug offenders (14.2%). When these offenders are added to 1,650 drug offenders described in the preceding paragraph, 7,812 drug offenders altogether (or 47.8% of the 16,334 drug offenders) were sentenced without regard to and below the mandatory minimum because of the substantial assistance provision and the safety valve provision, either alone or in combination with one another.

C. Distribution of Mandatory Minimum Sentences by Offense Type

Table 5 provides information regarding distribution of mandatory minimum sentences by five major offense types. Of the 20,737 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 20,582 cases. As indicated in Table 5, 19,260 (93.6%) of these 20,582 cases were distributed among four offense categories: drugs, firearms, fraud, and criminal sexual abuse/pornography/prostitution. As previously stated, the overwhelming majority of

[22] Of the 72,585 cases sentenced in fiscal year 2006, 67,945 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

offenders convicted of a statute which carries a mandatory minimum penalty committed a drug trafficking offense (17,338 offenders, or 84.2%) or a firearms offense (1,130 offenders, or 5.5%).[23]

Table 5: Distribution of Mandatory Minimum Sentences by Major Types of Offense

Offenses[24]	Total Number of Offenders[25]	Percentage of Total Federal Caseload	Number of Offenders Convicted of Mandatory Minimums[26]	Percentage of Offenders Convicted of Mandatory Minimums
Immigration	16,199	23.8%	163	0.8%
Fraud	8,431	12.4%	187	0.9%
Criminal Sexual Abuse/ Pornography/Prostitution	1,569	2.3%	605	2.9%
Firearms	7,038	10.4%	1,130	5.5%
Drug Offenses	25,824	38.0%	17,338	84.2%

1. Drug Offenses

Drug cases represented a large portion of the federal caseload in fiscal year 2006, accounting for 38.0 percent of the overall caseload in that fiscal year.[27] Drug offenders also represented the vast majority of those offenders convicted under a statute carrying a mandatory minimum penalty in fiscal year 2006, with 17,338 (84.2%) of all offenders

[23] 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 1,128 cases in which the defendant was sentenced under a drug guideline but was also convicted under 18 U.S.C. § 924(c).

[24] The number of cases in each type of offense differs in this analysis from Table 3 and Figure A of the Commission's FY2006 Sourcebook because in this analysis, the offense classification is based upon the primary guideline used at sentencing (i.e., the guideline controlling the sentence). This differs from the method used in Table 3 and Figure A of the Commission's FY2006 Sourcebook, which bases offense classification on statutory maxima and minima. In the present analysis, the offense classifications are as follows: (A) Immigration offenses include any case with a primary guideline in Chapter Two, Part L of the Guidelines Manual; (B) Fraud offenses include any case with a primary guideline of §§2B1.1, 2B1.4, 2B1.6, or 2F1.1; (C) Criminal Sexual Abuse/Pornography/Prostitution offenses include any case with a primary guideline of §§2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.1, 2G1.2, 2G1.3, 2G2.1, 2G2.2, 2G2.3, 2G2.4, 2G2.5, 2G3.1, or 2G3.2; (D) Drug offenses include any case with a primary guideline of §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, or 2D2.1; and (E) Firearms offenses include any case with a primary guideline of §§2K2.1, 2K2.2, 2K2.3, 2K2.4 (including offenses under 18 U.S.C. § 924(c)), 2K2.5, or 2K2.6.

[25] Of the 72,585 cases sentenced in fiscal year 2006, 67,945 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

[26] Of the 20,737 cases in which the offender was convicted of a statute carrying a mandatory minimum penalty, 20,582 cases had complete sentencing documentation to permit this classification of offenders by the type of offense.

[27] *See* footnote 24, *supra*.

convicted under such statutes having committed a drug offense as classified by the Commission.

As previously indicated, however, a significant portion (47.8%) of drug offenders convicted under a statute carrying a mandatory minimum penalty were 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 the 16,334 drug offenders convicted under a statute carrying a mandatory minimum penalty and for whom the Commission received sufficient documentation for this analysis, 7,812 drug offenders (47.8%) were sentenced without regard to and below the mandatory minimum. As illustrated above, these 7,812 offenders were sentenced without regard to and below mandatory minimum provisions as follows: substantial assistance applied to 2,325 drug offenders (14.2%), the safety valve applied to 3,837 drug offenders (23.5%), and both substantial assistance and the safety valve applied to an additional 1,650 drug offenders (10.1%).

Table 6 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 2006. As Tables 6 and 7 indicate together, however, the impact of drug mandatory minimum penalties on black drug offenders is largely driven by crack cocaine offenses. As shown in Table 7, if crack cocaine cases are excluded from the analysis, black drug offenders in fiscal year 2006 comprised 14.8 percent of the remaining drug cases and 14.4 percent of the remaining drug cases in which a drug mandatory minimum applied.

Table 6: Demographics for Drug Cases and Mandatory Minimum Drug Cases
Fiscal Year 2006

	All Drug Cases		All Mandatory Minimum Drug Cases	
	N	%	N	%
Race/Ethnicity				
White	6,651	25.8	3,957	22.9
Black	7,531	29.2	5,531	32.0
Hispanic	10,757	41.7	7,347	42.4
Other	834	3.2	477	2.8
Total	25,773	100.0	17,312	100.0
Citizenship				
U.S. Citizen	18,403	71.6	12,114	70.2
Non-Citizen	7,287	28.4	5,149	29.8
Total	25,690	100.0	17,263	100.0
Gender				
Male	22,656	87.8	15,599	90.0
Female	3,157	12.2	1,735	10.0
Total	25,813	100.0	17,334	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

Table 7: Demographics for Non-Crack Drug Cases and Non-Crack, Mandatory Minimum Drug Cases
Fiscal Year 2006

	Non-Crack Drug Cases		Mandatory Minimum Non-Crack Drug Cases	
	N	%	N	%
Race/Ethnicity				
White	6,128	30.4	3,615	28.2
Black	2,979	14.8	1,848	14.4
Hispanic	10,273	51.0	6,944	54.1
Other	774	3.8	431	3.4
Total	20,154	100.0	12,838	100.0
Citizenship				
U.S. Citizen	12,989	64.7	7,818	61.1
Non-Citizen	7,084	35.3	4,973	38.9
Total	20,073	100.0	12,791	100.0
Gender				
Male	17,536	86.9	11,459	89.1
Female	2,654	13.2	1,399	10.9
Total	20,190	100.0	12,858	100.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

2. Firearms Offenses

As indicated in Table 5, firearms offenses comprised 10.4 percent of the overall federal caseload in fiscal year 2006 and 5.5 percent of cases in which offenders were convicted of a statute carrying a mandatory minimum penalty. In fiscal year 2006, 1,130 firearms offenders were convicted of a statute carrying a mandatory minimum penalty. Of those 1,130 offenders, 70 offenders (6.2%) were sentenced without regard to and below the applicable statutory mandatory minimum penalty due to application of the statutory substantial assistance provision at 18 U.S.C. § 3553(e). Although there were 93 firearms offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 23 of these offenders (24.7%) received a sentence at or above the same level as the mandatory minimum sentence.

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 1,128 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 under this analysis to be convicted of a firearms statute carrying a mandatory minimum penalty would approximately double if such offenders were included in the firearms, rather than the drug, mandatory minimum offender population.

Table 8 shows demographic characteristics of firearms offenders convicted of a statute carrying a mandatory minimum penalty relative to the demographic characteristics of firearms offenders in the overall fiscal year 2006 caseload.

Table 8: Demographic Characteristics for Firearms Cases and Firearms Cases with a Mandatory Minimum

Fiscal Year 2006

	Firearms Cases		Mandatory Minimum Firearms Cases	
	N	%	N	%
Race/Ethnicity				
White	2,513	35.9	371	33.1
Black	3,200	45.7	582	51.9
Hispanic	1,056	15.1	135	12.0
Other	240	3.4	33	2.9
Total	7,009	100.0	1,121	100.0
Citizenship				
U.S. Citizen	6,500	92.8	1,071	95.9
Non-Citizen	504	7.2	46	4.1
Total	7,004	100.0	1,117	100.0
Gender				
Male	6,793	96.7	1,110	98.5
Female	233	3.3	17	1.5
Total	7,026	100.0	1,127	100.0

This table excludes cases missing information for the variables required for analysis. Summary Percentages may not equal 100 percent due to rounding.

SOURCE: U.S. Sentencing Commission, 2006 Datafile, USSCFY06.

3. Immigration, Fraud, and Criminal Sexual Abuse/Pornography/Prostitution Offenses

Immigration offenses, fraud offenses, and offenses involving criminal sexual abuse, pornography, and prostitution, combined, accounted for 4.6 percent of the offenders who were convicted of a statute carrying a mandatory minimum penalty in fiscal year 2006. Immigration offenses accounted for 23.8 percent of the overall federal caseload in fiscal year 2006[28] but less than one percent of all convictions under mandatory minimum statutes. Only 163 offenders of the 16,199 immigration offenders in fiscal year 2006 were convicted of statutes carrying a mandatory minimum penalty sentence, which represents only 0.8 percent of the 20,582 offenders convicted of a statute carrying a mandatory minimum penalty and only 1 percent of the 16,199 immigration offenders in fiscal year 2006. Of these 163 immigration offenders, 34 offenders (20.9%) were sentenced without regard to and below the statutory mandatory minimum penalty because of a substantial assistance motion by the government under 18 U.S.C. § 3553(e). Although there were 38 immigration offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 4 of these offenders (10.5%) received a sentence at or above the same level as the mandatory minimum sentence.

Fraud offenses accounted for 12.4 percent of the overall federal caseload in fiscal year 2006.[29] Of the 8,431 fraud offenders sentenced in fiscal year 2006, 187 offenders were convicted of statutes carrying a mandatory minimum penalty, which represents less than one percent of the 20,582 offenders convicted under such statutes and only 2.2 percent of the 8,431 fraud offenders in fiscal year 2006. Of these 187 fraud offenders, 9 offenders (4.8%) were sentenced without regard to and below the statutory mandatory minimum penalty because of a substantial assistance motion by the government pursuant to 18 U.S.C. § 3553(e). Although there were 21 fraud offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 12 of these offenders (57.1%) received a sentence at or above the same level as the mandatory minimum sentence.

Criminal sexual abuse, pornography, and prostitution offenses represent a small percentage of the overall federal caseload. In fiscal year 2006, 605 criminal sexual abuse, pornography, and prostitution offenders were convicted of statutes carrying a mandatory minimum penalty, which represents 2.9 percent of all offenders convicted of such statutes and 38.6 percent of the 1,569 criminal sexual abuse, pornography, and prostitution offenders in fiscal year 2006. Of these 605 offenders, 13 offenders (2.1%) were sentenced without regard to and below the statutory mandatory minimum penalty because of a substantial assistance motion by the government under 18 U.S.C. § 3553(e). Although there were 31 criminal sexual abuse/pornography/prostitution offenders who were eligible to be sentenced without regard to the statutory mandatory minimum penalty because the substantial assistance provision applied, 18 of these offenders

[28] *See* Table 5, *supra*.

[29] *Id.*

(58.1%) received a sentence at or above the same level as the mandatory minimum sentence.

II. Federal Cocaine Sentencing Policy

The Anti-Drug Abuse Act of 1986[30] established the basic framework of statutory mandatory minimum penalties currently applicable to federal drug trafficking offenses. The quantities triggering those mandatory minimum penalties differ for various drugs and, in some cases (including cocaine), for different forms of the same drug.

In establishing the mandatory minimum penalties for cocaine, Congress differentiated between two principal forms of cocaine – cocaine hydrochloride (commonly referred to as "powder cocaine") and cocaine base (commonly referred to as "crack cocaine") – and provided significantly higher punishment for crack cocaine offenses. As a result of the 1986 Act, federal law requires a five-year mandatory minimum penalty for a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, and a ten-year mandatory minimum penalty for a first-time trafficking offense involving 50 grams or more of crack cocaine, or 5,000 grams or more of powder cocaine. Because it takes 100 times more powder cocaine than crack cocaine to trigger the same mandatory minimum penalty, this penalty structure is commonly referred to as the "100-to-1 drug quantity ratio."

When Congress passed the 1986 Act, the Commission was in the process of developing the initial sentencing guidelines. The Commission responded to the legislation by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses involving five grams or more of crack cocaine or 500 grams or more of powder cocaine, as well as all other drug offenses carrying a five-year mandatory minimum penalty, were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine, as well as all other drug offenses carrying a 10-year mandatory minimum penalty, were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.

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[30] Pub. L. 99–570, 100 Stat. 3207 (1986), hereinafter "the 1986 Act".

This past year the Commission undertook an extensive review of the issues associated with federal cocaine sentencing policy. The Commission examined sentencing data from fiscal years 2005 and 2006, conducted two public hearings, received considerable written public comment, and reviewed relevant scientific and medical literature. Comment received in writing and at the public hearings showed that federal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.

The Commission's efforts culminated in the issuance of its fourth report to Congress on the subject in May 2007. Data presented in the report, compiled from the Commission's fiscal year 2006 datafile, indicated that the average sentence length for crack cocaine offenders was approximately 122 months, whereas the average sentence length for powder cocaine offenders was approximately 85 months.[31] The differences in sentences between powder cocaine offenses and crack cocaine offenses have increased over time. In 1992, crack cocaine sentences were 25.3 percent longer than those for powder cocaine. In 2006, the difference was 43.5 percent.[32] Blacks still comprise the majority of crack cocaine offenders, but that is decreasing, from 91.4 percent in 1992 to 81.8 percent in 2006. White offenders now comprise 8.8 percent of crack cocaine offenders, up from 3.2 percent in 1992.[33]

Consistent with its prior reports, the Commission in its May 2007 report strongly and unanimously concluded that there is no empirical justification for the current 100-to-1 statutory ratio between crack and powder cocaine penalties. The Commission also concluded, among other things, that the quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine and fail to provide adequate proportionality.

Accordingly, the Commission again unanimously and strongly urged Congress to act promptly on the following recommendations:

- Increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to focus the penalties more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act.

- Repeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.

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[31] *See* Fig. 2-2, *Report to Congress:* Cocaine and Federal Sentencing Policy, USSC May 2007 (hereinafter "the USSC 2007 Cocaine Report").

[32] *See* Fig. 2-3, USSC 2007 Cocaine Report.

[33] *See* Table 2-1, USSC 2007 Cocaine Report.

- Reject addressing the 100-to-1 drug quantity ratio by decreasing the five-year and ten-year statutory mandatory minimum threshold quantities for powder cocaine offenses, as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses.

The Commission further recommended that any legislation implementing these recommendations include emergency amendment authority[34] for the Commission to incorporate the statutory changes in the federal sentencing guidelines. Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.

The Commission also concluded that a partial remedy to the unwarranted sentencing disparity for crack cocaine offenders would be to reset the sentencing guideline ranges for these offenders. Accordingly, on May 1, 2007, the Commission submitted to Congress an amendment to the drug trafficking guideline that would move the base offense level for all crack cocaine offenders two levels down the sentencing grid. Under the amendment, an offender convicted of an offense involving between 5 and 20 grams of crack cocaine would receive a base offense level 24, instead of level 26. This move would result in a guideline range sentence of 51-63 months, instead of 63-78 months. In so doing, the Commission was mindful to maintain consistency between the guidelines and the statutory mandatory minimum penalties.

The amendment to the federal sentencing guidelines, which will become effective November 1, 2007, absent congressional action to the contrary, would result in an overall decrease in crack cocaine sentences from an average of about 122 months to an average of about 106 months. This guideline amendment is only a partial remedy to the problem of crack cocaine sentencing disparity. The Commission strongly believes that any comprehensive solution to the problem of federal cocaine sentencing policy must be legislated by Congress. The Commission again encourages Congress to take quick legislative action on this important issue.

[34] "Emergency amendment authority" allows the Commission to promulgate amendments outside of the normal amendment cycle described in footnote 3, *supra*.

Conclusion

As stated at the outset, the Commission firmly believes that the federal sentencing guideline system remains the best mechanism for achieving the statutory purposes of sentencing, as set forth in 18 U.S.C. § 3553(a). The Commission stands ready to work with Congress as it continues to study the issue of mandatory minimums and urges Congress to rely on the Commission and the federal guideline system in this regard. The Commission also is committed to working with Congress on other issues of importance to the federal criminal justice community, including federal cocaine sentencing policy, and all other issues related to maintaining just and effective national sentencing policy in a manner that preserves the bipartisan principles of the Sentencing Reform Act of 1984.

Thank you for the opportunity to testify before you today and I look forward to answering your questions.

Statutory Provisions Requiring Mandatory Minimum Terms of Imprisonment*		
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) (§2N2.1)	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
15 USC § 1825(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) [petty offense]	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 § 229A(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(a)(1) (§2B1.6)	Aggravated identity theft	2 years
18 USC § 1028A(a)(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(a) (§§2A4.1, 2X1.1)	Hostage taking resulting in the death of any person	Death or life
18 USC § 1466A(a) (§2G2.2)	Production/possession/receipt/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(a)(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(a)(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 g/l 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	Interference with Civil Service Examinations	10 days
18 USC § 1956(h) (§2S1.1)	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(a) (§2E1.4)	Causing death through the use of interstate commerce facilities in the commission of a murder-for-hire	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) 18 USC § 2251(a) (§2G2.1)	Fails to register as a sex offender and commits a crime of violence Engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct	5 years 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) 18 USC § 2251(e) (§§2G2.1, 2G2.2)	Producing or publishing a notice or advertisement seeking or offering a visual depiction of a child engaging in an elicit sexual act 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 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 explotation enterprise	20 years
18 USC § 2257(i) (§2G2.5)	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 imporation into the United States	Mandatory minimum term of imprisonment specified at section 2251(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) 18 USC § 3559(d)(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 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 Life
18 USC § 3559(e)(1) (No Guidelines reference in Appendix A) 18 USC § 3559(f)(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 Sentence enhancement; murder of child less than 18	Life 30 years
18 USC § 3559(f)(2) (No Guidelines reference in Appendix A) 18 USC § 3559(f)(3) (No Guidelines reference in Appendix A)	Sentence enhancement; kidnapping or maiming of child less than 18 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	25 years 10 years
19 USC § 283 (§2T3.1)	Failure to report seaboard saloon purchases to customers	3 months
21 USC § 212 [petty offense] 21 USC § 461(c) (§2N2.1)	Practice of pharmacy and sale of poisons in China Killing any person engaged in or on account of performance of his official duties as a poultry or poultry products inspector	1 month Death or life
21 USC § 622 (§2C1.1) 21 USC § 675 (§§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3) 21 USC § 841(a) (§2D1.1)	Bribery of meat inspectors and acceptance of bribes Killing any person engaged in or on account of performance of his official duties as a meat inspector Manufacturing, distributing, dispensing, or possessing a controlled substance or counterfeit substance with intent to distribute	1 year Death or life 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) (§2D2.1)	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) (§2D1.5)	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 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)	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
21 USC § 960(b)(1) (§2D1.1)	Second or any subsequent offense; unlawful import or export, death or serious bodily injury results	Life
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) 21 USC § 960(b)(1) (§2D1.1) 21 USC § 960(b)(2) (§2D1.1)	First offense; unlawful import or export, death or serious bodily injury results First offense; unlawful import or export, no death or serious bodily injury results Second or any subsequent offense; unlawful import or export, death or serious bodily injury results	20 years 10 years Life, fine
21 USC § 960(b)(2) (§2D1.1) 21 USC § 960(b)(2) (§2D1.1) 21 USC § 960(b)(2) (§2D1.1)	Second or any subsequent offense; unlawful import or export, no death or serious bodily injury results First offense; unlawful import or export, death or serious bodily injury results First offense; unlawful import or export, no death or serious bodily injury results	10 years 20 years 5 years
21 USC § 960(b)(3) (§2D1.1)	Second or any subsequent offense; unlawful import or export, death or serious bodily injury results	Life
21 USC § 960(b)(3) (§2D1.1) 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)	First offense; unlawful import or export, death or serious bodily injury results Attempt and conspiracy under Chapter 13 -- Drug Abuse Prevention and Control: Subchapter -- Import and Export	20 years Mandatory minimum term of imprisonment applicable to the underlying offense
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 (§2Q1.3)	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) 42 USC § 2272(b) (§2M6.1) 46 USC § 58109(a) (No Guidelines reference in Appendix A)	Using, attempting to use, or threatening while possessing, an atomic weapon Violation of prohibitions governing atomic weapons; death of another resulting Individual convicted of violating merchant marine act	30 years Life 1 year
47 USC § 13 (No Guidelines reference in Appendix A) 47 USC § 220(e) (No Guidelines reference in Appendix A)	Refusal to operate railroad or telegraph lines Falsely entering or destroying books or accounts of common carrier	6 months 1 year
49 USC § 46502(a)(2)(A) (§§2A5.1, 2X1.1) 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; no death of another individual Committing or attempting to commit aircraft piracy in special aircraft jurisdiction of the United States; resulting in death of another individual	20 years Death or life
49 USC § 46502(b)(1)(A) (§§2A5.1, 2X1.1) 49 USC § 46502(b)(1)(B) (§§2A5.1, 2X1.1) 49 USC § 46506(1) (§2A5.3)	Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of United States; no death of another individual Violation of Convention for the Suppression of Unlawful Seizure of Aircraft outside special aircraft jurisdiction of United States; resulting in death of another individual Application of certain criminal laws to acts on aircraft if in special maritime and territorial jurisdiction of the United States	20 years Death or life 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

COUNTS OF CONVICTION UNDER STATUTES REQUIRING MANDATORY MINIMUM TERMS OF IMPRISONMENT
Fiscal Year 2006

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)	209
8 U.S.C. § 1326(b)(3)	1
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)	8
18 U.S.C. § 844(h)	18
18 U.S.C. § 844(i)	8
18 U.S.C. § 844(o)	0
18 U.S.C. § 924(e)(1)	749
18 U.S.C. § 924(c)	3,115
18 U.S.C. § 929(a)(1)	0
18 U.S.C. § 930(c)	0
18 U.S.C. § 1028A	191
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)	10
18 U.S.C. § 1591	0
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)	4
18 U.S.C. § 1958(a)	5
18 U.S.C. § 2113(e)	7
18 U.S.C. § 2241(c)	75
18 U.S.C. § 2250	0
18 U.S.C. § 2251	169
18 U.S.C. § 2252	949
18 U.S.C. § 2260(a)	0
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)	98
18 U.S.C. § 2423(a)	40
18 U.S.C. § 2423(e)	2
18 U.S.C. § 3559(c)	34

Statute	Number of Counts of Conviction
18 U.S.C. § 3559(d)	0
18 U.S.C. § 3559(c)	0
18 U.S.C. § 3559(f)	0
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	15,575
21 U.S.C. § 844	99
21 U.S.C. § 846	9,700
21 U.S.C. § 848	59
21 U.S.C. § 851	577
21 U.S.C. § 859	13
21 U.S.C. § 860	387
21 U.S.C. § 861	11
21 U.S.C. § 960	1,009
21 U.S.C. § 963	468
21 U.S.C. § 1041(b)	0
22 U.S.C. § 4221	0
33 U.S.C. § 407	2
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	1
49 U.S.C. § 46502	2
49 U.S.C. § 46506	0
TOTAL[2]	33,636

[1]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. The total number of statutory entries listed on this table is less than listed in Appendix A because some statutory provisions listed in Appendix A were collapsed for data collection purposes.

[2]This 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 2006 Datafile, FY2006.

Mr. SCOTT. Judge Cassell.

TESTIMONY OF PAUL G. CASSELL, JUDGE, JUDICIAL CONFERENCE OF THE UNITED STATES, WASHINGTON, DC

Judge CASSELL. Chairman Scott, Ranking Member Forbes and distinguished Members of the Subcommittee, I am pleased to be here today to explain the Judicial Conference's long-standing opposition to mandatory minimum sentencing schemes. The Judicial Conference opposes mandatory minimum sentences because they block judges from considering the individual circumstances of particular cases. Mandatory minimum sentencing schemes create a one-size-fits-all system that requires Federal judges to ignore individual differences in particular cases.

Testimony in today's hearing illustrates the wide range of cases that come before Federal judges. You will hear testimony from Ms. Serena Nunn, a first-time offender who was a minor participant in a drug distribution scheme organized by her boyfriend. You will hear a representative from the Border Patrol Union talking about Ignacio Ramos and Jose Compean, convicted of discharging a firearm while arresting a drug smuggler on the Texas border. And I will talk about Mr. Weldon Angelos, a record producer from Utah who carried a firearm to several marijuana deals.

Obviously these are different cases that require different approaches. They require something other than a cookie-cutter approach to justice. But mandatory minimum sentences force judges to treat cases such as these as essentially indistinguishable.

When Federal judges are forced to follow mandatory minimum sentencing schemes, truly bizarre sentences result, which can seriously undermine public confidence in the system. In my written testimony I talk at length about the 55-year prison sentence I was required to hand down to Mr. Weldon Angelos. His crimes were possessing a firearm during several drug deals, and he certainly deserved to be punished for that. But it made no sense for me to give a sentence to him that was far longer than he would have received for such heinous crimes as aircraft hijacking, terrorist bombing, second degree murder, espionage, kidnapping, aggravated assault, sexual assault on a child and rape.

These are not just hypothetical illustrations. The same day that I sentenced Mr. Angelos to 55 years in prison, I also had before me Mr. Cruz Visinaiz. He was convicted of murder for beating Clara Jenkins, a 68-year-old woman, repeatedly over the head with a log. I gave Mr. Visinaiz the maximum sentence recommended by the guidelines, 22 years in prison. It was hard for me then and remains hard for me to this day to explain to Ms. Jenkins' family and to members of the public why that murderer received a far shorter sentence than a drug dealer who simply carried a firearm to several drug deals. Unfortunately the implicit message to crime victims with such bizarre sentences is that their suffering does not count for as much as the abstract war on drugs.

The public, too, will wonder about whether their hard-earned tax dollars are well spent to imprison Mr. Angelos for essentially the rest of his life. The cost will be in the neighborhood of $1.3 million, and probably much more, as the taxpayers will be required to subsidize his geriatric medical treatment in prison. Every empirical

study with which I am familiar strongly suggests that the taxpayers will get far more bang for their buck by not imprisoning Mr. Angelos while he is a senior citizen and using the money saved to put additional law enforcement officers on the street or extra prosecutors into the Department of Justice.

Because of problems like these, the public favors allowing judges to make the final decision about what sentence should ultimately be imposed. A recent poll shows that three-quarters of all Americans support allowing judges to set aside mandatory sentences if another sentence would be, in their judgment, more appropriate.

On behalf of the Judicial Conference, I urge the Subcommittee to start the legislative process to eliminate inflexible mandatory minimum sentencing schemes. A good place to start would be by unstacking the 924(c) mandatory minimums that produced the irrational 55-year sentence for Mr. Angelos, that I have just discussed, as well as the 159-year sentence for Marian Hungerford, plus we shouldn't forget 3 years of supervised release after that, that I review in my testimony. A more general solution would be to allow judges to go below mandatory minimum sentences whenever the sentencing guidelines advise a lower sentence. The guidelines represent the considered judgment of a congressionally created agency, the Sentencing Commission, about what sentence is usually appropriate and could serve as a signal that a lower sentence is necessary in a particular case.

No doubt there are other solutions that are possible as well, but in closing I urge the Subcommittee to pass something that will allow Federal judges to impose fair and appropriate sentences in each individual case. Unfortunately mandatory minimum sentences require Federal judges to ignore obvious differences in the cases that come before them, to impose absurdly long sentences that lack any connection to a logical system of punishment, and to waste taxpayer dollars by incarcerating offenders for decades when the money could be better spent to fight crime elsewhere. I urge this Subcommittee to start the process which will end mandatory minimum injustices.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

[The prepared statement of Judge Cassell follows:]

PREPARED STATEMENT OF PAUL G. CASSELL

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE PAUL G. CASSELL
UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

BEFORE

THE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

"MANDATORY MINIMUM SENTENCING LAWS – THE ISSUES"

June 26, 2007

STATEMENT ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and Distinguished Members of the Committee,

I am pleased to be here today on behalf of the Judicial Conference of the United States and its Criminal Law Committee to discuss the damage mandatory minimum sentences do to logic and rationality in our nation's federal courts.

Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases, producing what the late Chief Justice Rehnquist has aptly identified as "unintended consequences."[1]

Mandatory minimum sentences not only harm those unfairly subject to them, but do grave damage to the federal criminal justice system – damage that will be the focus of my testimony today. Perhaps the most serious damage is to the public's belief that the federal system is fair and rational. Mandatory minimum sentences produce sentences that can only be described as bizarre. For example, recently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder,

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[1] *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").

espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison – the maximum suggested by the Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

Irrational sentences like Angelos' harm the system in various ways. Such sentences harm crime victims. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract "war on drugs."

Irrational mandatory sentences also misdirect our resources. It will cost the taxpayers more than a $1,000,000 to incarcerate Mr. Angelos (assuming that he doesn't end up needing extra taxpayer dollars to pay for his medical care while he is incarcerated in his elderly years). This money could be far more productively spent to fight crime by putting extra law enforcement officers on the street or prosecutors into courtrooms.

Finally, unduly harsh mandatory sentences bring the system into disrepute in the eyes of the public. When the public learns about illogical federal sentences that span several decades (like the 55 years for Mr. Angelos), they may respond in ways that will harm the ability of the system to do justice. For example, if jury members become convinced that the federal system does not mete out justice, they may refuse to convict even dangerous criminals.

In my testimony today on behalf of the Judicial Conference, I will address four points. In Part I, I will describe the Weldon Angelos case in greater detail, demonstrating how the 55 year sentence in that case was cruel and unusual, unwise and unjust. I will also briefly review the case of Marion Hungerford, sentenced to more than 150 years in federal prison for gun charges,

even though she never actually touched a weapon. In Part II, building from these illustrations, I will explain why the Judicial Conference's has long opposed mandatory minimum sentences. In Part III, I will demonstrate that the Judicial Conference's position is nearly universally shared, particularly by those disinterested observers who have most closely studied the issue such as the United States Sentencing Commission. In Part IV, I will conclude by providing the Committee with some preliminary thoughts about alternatives to prevent the injustices created by mandatory minimum sentences.

I. TWO EXAMPLES OF INJUSTICE: MANDATORY MINIMUM SENTENCES IN THE FEDERAL COURTS

A. The Case of Weldon Angelos

It is hard to explain why a federal judge is required to give a longer sentence to a First-time offender who carried a gun to several marijuana deals than to a man who murdered an elderly woman. Our mandatory minimum sentencing scheme recently forced me to do exactly that.

In 2004, I had to sentence Weldon Angelos. He was a twenty-four-year-old, first-time offender who was a successful music executive with two young children. Because he was convicted of dealing marijuana and related offenses, both the government and the defense agreed that Mr. Angelos should serve about six to eight years in prison. But there were three additional firearms offenses for which I had to impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two $350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government insisted that Mr. Angelos should essentially spend the rest of his life in prison. Specifically, the government urged me to

sentence Mr. Angelos to a prison term of no less than 61½ years–six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relied on a mandatory minimum statute–18 U.S.C. § 924(c)–which requires a court to impose a sentence of five years in prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. Under § 924(c), the three counts produced 55 years of additional punishment for carrying a firearm.

I believed that to sentence Mr. Angelos to prison for the rest of his life was unjust, cruel, and even irrational. Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the congressionally-created expert agency (the United States Sentencing Commission) indicates is appropriate for possessing firearms under the same circumstances. The 55-year sentence substantially exceeded what the jury recommended to me. It was also far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. It exceeded what recidivist criminals will likely serve under the federal "three strikes" provision. At the same time, however, this 55-year additional sentence was decreed by § 924(c).

My role in evaluating § 924(c) was quite limited. A judge can set aside the statute only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment. After careful deliberation, I reluctantly concluded that I had no choice but to impose the 55-year sentence. While the sentence appeared to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties. Under the controlling case law, I had to find either that the statute had no conceivable justification or was so grossly disproportionate to the crime that no reasonable argument could be made on its behalf. Under

controlling precedents in this case, I had to reject Mr. Angelos' constitutional challenges. Accordingly, I sentenced Mr. Angelos to a prison term of 55 years and one day, the minimum that the law allows.

One of the terrible ironies of this case is that this particular mandatory minimum works a special injustice. Our laws frequently require longer sentences for true recidivists: repeat offenders or hardened criminals who do not learn from the punishments imposed for their first and subsequent mistakes. Criminal history plays a role in increasing sentences for example and drug dealers who have been convicted and served time and who reoffend are subject to sentences twice as long or longer depending on the circumstances. But this particular sentencing scheme required that I sentence a first-time offender to a sentence fit for a hardened recidivist. That is because it treated each instance of possessing a weapon in connection with the marijuana deal as a separate conviction, and the law demands that every conviction after the first be punished with a 25-year consecutive sentence.

It is the mandatory nature of the punishment that forbade me from correcting what was so obviously an unjust sentence. To correct what appeared to be an unjust sentence, I called on the President – in whom our Constitution reposes the power to correct unduly harsh sentences – to commute Mr. Angelos' sentence to something that is more in accord with just and rational punishment. In particular, I recommended that the President commute Mr. Angelos' sentence to no more than 18 years in prison, the average sentence that the jurors in this case recommended.

But Mr. Angelos is, of course, not alone and for that reason I also called on Congress to 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 and failed to learn their lesson.

Because of the complexity of these conclusions, it might be useful for me to explain them at greater length.

1. Factual Background of the Angelos *Case*

Weldon Angelos was twenty-four years old. He was born on July 16, 1979, in Salt Lake City, Utah. He was raised in the Salt Lake City area by his father, Mr. James B. Angelos, with only minimal contact with his mother. Mr. Angelos had two young children by Ms. Zandrah Uyan: six-year-old Anthony and five-year-old Jessie. Before his arrest, Mr. Angelos had achieved some success in the music industry. He started Extravagant Records, a label that produces rap and hip hop music. He had worked with prominent hip hop musicians, including Snoop Dogg, on the "beats" to various songs and was preparing to record his own album.

The critical events in his case were three "controlled buys" of marijuana by a government informant from Mr. Angelos. On May 10, 2002, Mr. Angelos met with the informant and arranged a sale of marijuana. On May 21, 2002, Mr. Angelos completed a sale of eight ounces of marijuana to the informant for $350. At that time, the informant observed Mr. Angelos' Glock pistol by the center console of his car. This drug deal formed the basis for the first § 924(c) count.

During a second controlled buy with the informant, on June 4, 2002, Mr. Angelos lifted his pant leg to show him the Glock in an ankle holster. The government informant again purchased approximately eight ounces of marijuana for $350. This deal formed the basis for the second § 924(c) count.

A third controlled buy occurred on June 18, 2002, with Mr. Angelos again selling eight ounces of marijuana for $350. There was no direct evidence of a gun at this transaction, so no § 924(c) count was charged.

On November 15, 2003, police officers arrested Mr. Angelos at his apartment pursuant to a warrant. Mr. Angelos consented to a search. The search revealed a briefcase which contained $18,040, a handgun, and two opiate suckers. Officers also discovered two bags which contained approximately three pounds of marijuana. Officers also recovered two other guns in a locked safe, one of which was confirmed as stolen. Searches at other locations, including the apartment of Mr. Angelos' girlfriend, turned up several duffle bags with marijuana residue, two more guns, and additional cash.

The original indictment issued against Mr. Angelos contained three counts of distribution of marijuana,[2] one § 924(c) count for the firearm at the first controlled buy, and two other lesser charges. Plea negotiations began between the government and Mr. Angelos. On January 20, 2003, the government 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. The government made clear to Mr. Angelos that if he rejected the offer, the government 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. Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years. The

[2] 18 U.S.C. § 841(b)(1).

five § 924(c) counts consisted of two counts for the Glock seen at the two controlled buys, one count for three handguns found at his home, and two more counts for the two guns found at the home of Mr. Angelos' girlfriend.

Perhaps belatedly recognizing the gravity of the situation, Mr. Angelos tried to reopen plea negotiations, offering to plea to one count of drug distribution, one § 924(c) count, and one money laundering count. The government refused his offer, and the case proceeded to trial. The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the three handguns at Mr. Angelos' home. The jury found him not guilty on three counts – including the two additional § 924(c) counts for the two guns at his girlfriends' home. (I dismissed one other minor count.)

After the conviction, Mr. Angelos' sentence was presumptively governed by the Federal Sentencing Guidelines. Under governing Guideline provisions, the bottom line is that all counts but the three § 924(c) counts combine to create a total offense level of 28.[3] Because Mr. Angelos had no significant prior criminal history, he was treated as first-time offender (a criminal history category I) under the Guidelines. The prescribed Guidelines' sentence for Mr. Angelos for everything but the § 924(c) counts was 78 to 97 months.

After the Guideline sentence was imposed, however, I then had add the § 924(c) counts. Section 924(c) prescribed a five-year mandatory minimum for a first conviction, and 25 years for each subsequent conviction.[4] This meant that Mr. Angelos was facing 55 years (660 months) of

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[3] Tr. 9/14/04 at 27 (based on U.S.S.G. § 2D1.1(c)(7) & § 2S1.1(b)(2)(B)).

[4] 18 U.S.C. § 924(c)(1)(A)(i) & (C)(i).

mandatory time for the § 924(c) convictions. In addition, § 924(c) mandated that these 55 years run consecutively to any other time imposed.[5]

2. The Irrationality of § 924(c)

Mr. Angelos contended that § 924(c) effectively sentenced him to life in prison and that the statutory scheme was irrational as applied to him. In particular, Mr. Angelos contended that § 924(c) led to unjust punishment and created irrational distinctions between different offenders and different offenses.

a. Unjust Punishment from § 924(c)

Mr. Angelos argued that his sentence was irrational because the enhancement provided by § 924(c) increased his sentence by 55 years, whereas were the Guidelines alone to be applied, his sentence would be enhanced by only two years.[6] Indeed, one of the pernicious effects illustrated by cases such as *Angelos* is that the government can choose between charging defendants under § 924(c) or relying on the Guidelines' enhancement. As the Eleventh Circuit has noted, "'The relationship between § 924(c) and [the Guidelines enhancement] is an "either/or" relationship at sentencing. If a defendant is convicted [under § 924(c)], he must receive a five year consecutive sentence, but he cannot also have his base offense level enhanced pursuant to [the Guidelines enhancement] because such enhancement would violate the Double Jeopardy Clause of the United States Constitution. However, a defendant who is not convicted of a violation of § 924(c), may receive an enhancement of his base offense level for possession

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[5] 18 U.S.C. § 924(c)(1)(D)(ii).

[6] § 2D1.1(b)(1) (gun enhancement for drug offenses).

of a firearm in connection with a drug offense."[7] The government in the Angelos case chose to pursue § 924(c) counts rather than enhancements under the Guidelines after Mr. Angelos opted to exercise his constitutional right to a trial by jury.

The Guidelines, Mr. Angelos argued, reflect the judgment of experts appointed by Congress to determine "just punishment" for federal criminal offenses. Because his sentence produced by section 924(c) is so at odds with the Guidelines determination of "just punishment," Mr. Angelos argued that such a lengthy sentence would be irrational.

In imposing sentences in criminal cases, a judge is required by the governing statute – the Sentencing Reform Act[8] – to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the Act]."[9] To give some real content to the Sentencing Reform Act's directives, Congress established an expert body – the United States Sentencing Commission – to promulgate sentencing Guidelines for criminal offenses. The Sentencing Commission, after extensive review of sentencing practices across the country established a comprehensive set of sentencing guidelines. The Commission has carefully calibrated the Guidelines through annual amendments, and Congress has had the opportunity to reject and amend Guidelines that were not to its satisfaction.

The Guidelines provide clear guidance on what is just punishment for federal offenses. To be sure, the Guidelines are advisory only.[10] But the substantive content of the Guidelines is what is relevant here. Both sides agreed that the Guidelines should be considered as providing

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[7] *United States v. Mixon*, 115 F.3d 900, 902 (11th Cir. 1997) (citation omitted).

[8] 18 U.S.C. § 3551 et. seq.

[9] 18 U.S.C. § 3553(a).

[10] *United States v. Booker*, 543 U.S. 220 (2005).

guidance on the appropriate penalty. Moreover, Congress has directed that courts must follow the Guidelines in imposing sentence unless some unusual factor justifies a departure.[11] As a result, Congress has in essence instructed the courts that the Guidelines provide "just punishment" for criminal offenses. It could hardly be otherwise, as Congress would not have gone to the trouble of having an expert body promulgate sentencing guidelines if those guidelines failed to prescribe the appropriate sentences. In short, the views of the Sentencing Commission are entitled to "great weight because the Sentencing Commission is the expert body on federal sentencing."[12]

In the *Angelos* case, neither side offered any good reason for concluding that a Guidelines sentence would fail to achieve just punishment. The Guidelines specify sentences for all crimes covered by the federal criminal code, including all the crimes committed by Mr. Angelos. Setting aside the three firearms offenses covered by the § 924(c) counts, all of Mr. Angelos' other criminal conduct resulted in an offense level of 28. Because Mr. Angelos was a first-time offender, the Guidelines then specified a sentence of between 78 to 97 months. It is possible to determine, however, what a Guidelines sentence would be covering all of Mr. Angelos conduct, including that covered by the § 924(c) counts. If this conduct were punished under the Guidelines rather than under § 924(c), the result would have been an additional two-level enhancement,[13] increasing the offense level from a level 28 to a level 30. This, in turn, would have produced a recommended Guidelines sentence for Mr. Angelos of 97 to 121 months. Thus,

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[11] 18 U.S.C. § 3553(b)(1).

[12] *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995); *see also Mistretta v. United States*, 448 U.S. 361, 379 (1989) (noting Commission's status as "an expert body").

[13] U.S.S.G. § 2D1.1(b)(1).

the Guidelines suggested that Mr. Angelos' possession of firearms should increase his sentence by no more than 24 months (from a maximum of 97 months to a maximum of 121 months).

Bearing firmly in mind the conclusion of Congress' expert agency that 121 months is the longest appropriate prison term for all the criminal conduct in this case, it came as a something of a shock to then consider the § 924(c) counts. Because Mr. Angelos' possession of firearms was punished not under the Guidelines but rather under § 924(c), I was required to impose an additional penalty of 660 months (55 years) instead of the 24 month enhancement provided for by the Guidelines. It is not at all clear how to reconcile these two sentences. Knowing that the congressionally-approved Guidelines provide for an additional 24 month penalty for the firearms at issue, could a judge conclude that an additional 660 months is a "just punishment"? One architect of the Guidelines has recognized the problem of the discrepancy:

> The compatibility of the guidelines system and mandatory minimums is also in question. While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. . . . Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the guidelines incorporate a "real offense" approach to sentencing, mandatory minimums are basically a "charge-specific" approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[14]

There is, of course, the possibility that the Sentencing Guidelines are too low in this case and that mandatory minimums specify the proper sentence. The more I investigated, however,

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[14] 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, 194 (1993); *see also Neal v. United States*, 516 U.S. 284, 292 (1996). *See generally* U.S. SENTENCING COMM., MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS 5-15 (1991) (numbers inserted and justifications reordered) (hereinafter SENTENCING COMM. MANDATORY MINIMUM REPORT).

the more I found evidence that the § 924(c) counts led to unjust punishment of Mr. Angelos. For starters, I asked the twelve jurors in this case what they believed was the appropriate punishment for Mr. Angelos. Following the trial – over the government's objection – I sent each of the 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 gave 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. Not one of the jurors recommended a sentence closely approaching the 61½ year sentence created by § 924(c).

At oral argument, I asked the government what it thought about the jurors' recommendations and whether it was appropriate to impose a sentence so much higher than what the jurors thought appropriate. The government's response was quite curious: "Judge, we don't know if that jury is a random representative sample of the citizens of the United States . . . ."[15] Of course, the whole point of the elaborate jury selection procedures used in the case was to assure that the jury was, indeed, such a fair cross section of the population so that the verdict would be accepted with confidence. It was hard to understand why the government would be willing to accept the decision of the jury as to the guilt of the defendant but not it recommendation as to the length of sentence that might be imposed.

More important, the jurors' answers appeared to be representative of what people across the country believe. The crimes committed by Mr. Angelos were not uniquely federal crimes.

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[15] Tr. 9/14/04 at 60.

They could have been prosecuted in state court in Utah or elsewhere across the country. I asked the Probation Office to determine what the penalty would have been in Utah state court had Mr. Angelos been prosecuted there. The Probation Office reported that Mr. Angelos would likely have been paroled after serving about two to three years in prison. The government gives a substantially similar estimate, reporting that on its understanding of Utah sentencing practices Mr. Angelos would have served about five to seven years in prison.[16] Even taking the higher figure from the government, the § 924(c) counts in the *Angelos* case resulted in punishment far beyond what Utah's citizens, through its state criminal justice system, provides as just punishment for such crimes. On top of this, the government conceded that Mr. Angelos' federal sentence after application of the § 924(c) counts is more than he would have received in *any* of the fifty states.[17]

Of course, one way of determining what people across the country believe is to look to the actions of Congress. Congress serves as the nation's elected representatives, so actions taken by Congress presumably reflect the will of the people. The difficulty here is that Congress has taken two actions: (1) it created the Sentencing Commission and (2) adopted § 924(c). As between these two conflicting actions, the sentences prescribed by the Sentencing Commission more closely reflect the views of the country. And, indeed, empirical research has demonstrated that the Sentencing Guidelines generally produce sentences that are at least as harsh as those that the public would wish to see imposed.[18]

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[16] Government's Resp. Mem. Re: Constitutionality of Mandatory Minimum Sentences Pursuant to 18 U.S.C. § 924(c) at 23 n.19 (Apr. 8, 2004).

[17] *Id.* at 23 n.18.

[18] PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1998).

b. Irrational Classifications from § 924(c)

1. Classifications between Offenses

Mr. Angelos contended that his § 924(c) sentence was not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. Perhaps realizing where this evaluation would inevitably lead, the government initially argued that any comparison is futile because, as the Supreme Court suggested in its 1980 decision *Rummel v. Estelle*, different "crimes . . . implicate other societal interests, making any comparison inherently speculative."[19] At some level, this argument is correct; fine distinctions between the relative severity of some kinds of crimes are hard to make. But general comparisons of crimes are possible. As the Supreme Court clarified three years after *Rummel* in *Solem v. Helm*, "stealing a million dollars is viewed as more serious than stealing a hundred dollars."

In evaluating the § 924(c) counts, I started from the premise that Mr. Angelos committed serious crimes. Trafficking in illegal drugs runs the risk of ruining lives through addiction and the violence that the drug trade spawns. But do any of these general rationales provide a rational basis for punishing the *potential* violence which § 924(c) is meant to deter more harshly than *actual* violence that leaves an injured victim in its wake? In other words, is it rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually *does* shoot or harm someone?

As applied in the *Angelos* case, the penalties provided by § 924(c) were simply irrational. Section 924(c) imposed on Mr. Angelos a sentence of 55 years or 660 months. Added to the minimum 78-month Guidelines sentence for a total sentence of 738 months, Mr. Angelos faced a

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[19] *Rummel v. Estelle*, 445 U.S. 263, 282 n.27 (1980).

prison term which more than doubles the sentence of, for example, an aircraft hijacker (293 months),[20] a terrorist who detonates a bomb in a public place (235 months),[21] a racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries (210 months),[22] a second-degree murderer,[23] or a rapist.[24] Table I, *infra*, sets out these and other examples of shorter sentences for crimes far more serious than Mr. Angelos'.

The irrationality of these differences is manifest and can be objectively proven. In the Eighth Amendment context, the Supreme Court has instructed 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."[25] In contrast to the serious violent felonies listed in Table I, the crimes committed by Mr. Angelos had the *potential* for violence, but no *actual* violence occurred. This is not to say that trafficking in illegal drugs is somehow a non-violent offense. Indeed, in *Harmelin*, Justice Kennedy quite properly called such an assertion "false to the point of absurdity."[26] In his case, however, Mr. Angelos would have been completely punished for his marijuana trafficking by the 78-97 month Guidelines sentence. The § 924(c) counts pile on an additional 55 years *solely* for

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[20] U.S.S.G. § 2A5.1 (2003) (base offense level 38). The 2003 Guidelines are used in all calculations in this opinion. All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I.

[21] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

[22] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[23] U.S.S.G. § 2A1.2 (base offense level 33).

[24] U.S.S.G. § 2A3.1 (base offense level 27).

[25] *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy J., concurring).

[26] *Id.* at 1002 (Kennedy J., concurring).

three offenses of possessing firearms in connection with that trafficking. Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape).

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

2. Irrational Classifications between Offenders

Mr. Angelos also argued that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. Section 924(c) increases penalties for a "second or subsequent conviction under this subsection."[27] This language could have been interpreted in two different ways. One construction would have been that an offender who is convicted of a § 924(c) violation, serves his time, and then commits a subsequent violation is subject to an enhanced penalty. This was the construction that the Tenth Circuit (among other courts) originally gave to the statute.[28]

Another, far more expansive construction would have been that an offender who is convicted of two or more counts is subject to an enhanced penalty for each count after the first count of conviction. In 1993 in *Deal v. United States*,[29] the Supreme Court adopted this second construction, reading the "second or subsequent" language in § 924(c) to apply equally to the recidivist who is convicted of violating § 924(c) on separate occasions after serving prison time and to the defendant who is convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. The Court concluded (over the dissents of three Justices) that the unambiguous phrase "subsequent conviction" in the statute permitted no distinction between the times at which the convictions took place.[30] In addition, all time imposed for each

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[27] 18 U.S.C. § 924(c)(1).

[28] *United States v. Abreu*, 962 F.2d 1447, 1450 (10th Cir. 1992) (en banc)(*cert. granted, judg. vacated*, 508 U.S. 935 (1993)).

[29] 508 U.S. 129 (1993).

[30] *Id.* at 132-33.

§ 924(c) count must run consecutively to any other sentence.[31] This is what is known as "count stacking."

When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. As John R. Steer, Vice Chair of the United States Sentencing Commission, has explained:

> [C]onsider the effects if prosecutors pursued every possible count of 18 U.S.C. § 924(c) . . . . The statute provides for minimum consecutive sentence enhancements of 25 years to life for the second and subsequent conviction under the statute, even if all the counts are charged, convicted, and sentenced at the same time. Pursuing multiple § 924(c) charges at the same time has been called "count stacking" and has resulted in sentences of life imprisonment (or aggregate sentences for a term of years far exceeding life expectancy) for some offenders with little or no criminal history.[32]

Consider the way in which the § 924(c) counts stacked up on Mr. Angelos. He was 24 years old when sentenced. He was to receive at least 78 months for the underlying marijuana offenses. Stacked on top of this was another 5 years for the first § 924(c) conviction. Stacked on top of this was another 25 years for the second § 924(c) conviction. And finally, another 25 years was stacked on top for the third § 924(c) conviction. Even assuming credit for good time served, Mr. Angelos will be more than 55-years-old before he even begins to serve the final 25 years his sentence. This happens not because Mr. Angelos "failed to learn his lessons from the initial punishment" and committed a repeat offense. Section 924(c) jumps from a five-year mandatory sentence for a first violation to a 25-year mandatory sentence for a second violation, which may occur just days (or even hours) later.

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[31] 18 U.S.C. § 924(c)(1)(D)(ii).

[32] Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Comm'n before the ABA Justice Kennedy Comm'n 19 (Nov. 13, 2003).

Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first-time offenders and subsequent offenders. California's tough three-strikes-and-you're-out law can serve as a convenient illustration. Prompted by violence from career criminals who had been in prison and released,[33] California passed a law requiring lengthy prison terms for third-time offenders, even where the third offense could be viewed as relatively minor. In *Ewing v. California*,[34] the Supreme Court upheld a twenty-five to life sentence under California's three-strikes law. While defendant Ewing's third offense was merely stealing $399 worth of golf equipment, the controlling opinion noted that the policy of the law was to "incapacitat[e] and deter[] repeat offenders who threaten the public safety. The law was designed 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.'"[35] In the end, the Court concluded that Ewing's sentence was justified "by his own long, serious criminal record [including] numerous misdemeanor and felony offenses . . . nine separate terms of incarceration . . . and crimes [committed] while on probation or parole."[36]

While some might raise theoretical objections to such recidivist statutes, their underlying logic is at least understandable. But no such logic can justify § 924(c), at least when applied to first offenders such as Mr. Angelos. In cases such as his, the statute blindly draws no distinction between recidivists and first-time offenders.

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[33] *See generally* MIKE REYNOLDS & BILL JONES, THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[34] 538 U.S. 11 (2003).

[35] *Id.* at 15 (O'Connor, J.) (quoting Cal. Penal Code Ann. § 667(b)).

[36] *Id.* at 30.

The irrationality only increases when section § 924(c) is compared to the federal "three strikes" provision. Criminals with two prior violent felony convictions who commit a third such offense are subject to "mandatory" life imprisonment under 18 U.S.C. § 3559(c) – the federal "three-strikes" law. But then under 18 U.S.C. § 3582(c)(1) – commonly known as the "compassionate release" provision – these criminals can be released at age 70 if they have served 30 years in prison. But because this compassionate release provision applies to sentences imposed under § 3559(c) – not § 924(c) – offenders like Mr. Angelos are not eligible. Thus, while the 24-year-old Mr. Angelos must serve time until he is into his 70's, a 40-year-old recidivist criminal who commits second-degree murder, hijacks an aircraft, or rapes a child is potentially eligible for release at age 70. In other words, mandatory life imprisonment under the federal three-strikes law for persons guilty of three violent felony convictions is less mandatory than mandatory time imposed on the first-time offender under § 924(c). Again, the rationality of this arrangement is dubious.

The possibility that Angelos will spend longer in prison than career criminals is no mere hypothetical. The same day I sentenced Weldon Angelos, I had before me for sentencing Thomas Ray Gurule.[37] Mr. Gurule is 54-years-old with a lifelong history of criminal activity and drug abuse. He has spent more of his life incarcerated than he has in the community. He has sixteen adult criminal convictions on his record, including two robbery convictions involving dangerous weapons. His most recent conviction (in a trial before me) was for carjacking. In August 2003, after failing to pay for gas at a service station, Mr. Gurule was pursued by the station manager. To escape, Mr. Gurule broke into the home of a young woman, held her at knife point, stole her jewelry, and forced her to drive him away from the scene of his crimes. During the drive, Mr. Gurule threatened both the woman and her family.

[37] *United States v. Gurule*, No. 2:04-CR-209-PGC.

For this serious offense – the latest in a long string of crimes for which he has been convicted – I had to sentence Mr. Gurule to "life" in prison under 18 U.S.C. § 3559(c). But because of the compassionate release provision, Mr. Gurule is eligible for release after serving 30-years of his sentence. Why Mr. Gurule, a career criminal, should be eligible for this compassionate release while Mr. Angelos is not, is not at all obvious.

c. Demeaning Victims of Actual Violence and Creating the Risk of Backlash

For the reasons outlined in the previous section, § 924(c) imposes unjust punishment and creates irrational classifications between different offenses and different offenders. To some, this may seem like a law professor's argument–one that may have some validity in the classroom but little salience in the real world. So what, some may say, if Angelos spends more years in prison than might be theoretically justified? It is common wisdom that "if you can't do the time, don't do the crime."

The problem with this simplistic position is that it overlooks other interests that are inevitably involved in the imposition of a criminal sentence. For example, crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract "war on drugs."

This is no mere academic point, as a case from my docket will illustrate. The same day I sentenced Mr. Angelos, I imposed sentence in *United States v. Visinaiz*, a second-degree murder case.[38] There, a jury convicted Cruz Joaquin Visinaiz of second-degree murder in the death of 68-year-old Clara Jenkins. One evening, while drinking together, the two got into an argument.

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[38] *United States v. Visinaiz*, No. 2:03-CR-701-PGC.

Ms. Jenkins threw an empty bottle at Mr. Visinaiz, who responded by beating her to death by striking her in the head with a log at least three times. Mr. Visinaiz then hid the body in a crawl space of his home, later dumping the body in a river weighted down with cement blocks. Following his conviction for second-degree murder, Mr. Visinaiz came before me as a first-time offender for sentencing. The Sentencing Guidelines required a sentence for this brutal second-degree murder of between 210 to 262 months.[39] The government called this an "aggravated second-degree murder" and recommended a sentence of 262 months. I followed that recommendation. Yet on the same day, I am supposed to impose a sentence of 738 months for a first-time drug dealer who carried a gun to several drug deals!? The victim's family in the *Visinaiz* case–not to mention victims of a vast array of other violent crimes–can be forgiven if they think that the federal criminal justice system minimizes their losses. No doubt § 924(c) is motivated by the best of intentions–to prevent criminal victimization. But the statute pursues that goal in a way that effectively sends a message to victims of actual criminal violence that their suffering is not fully considered by the system.

d. Undermining Public Confidence in Sentencing

Another reason for concern is that the unjust penalties imposed by § 924(c) can be expected to attract public notice and potential backlash. As shown earlier, applying § 924(c) to cases such as this one leads to sentences far in excess of what the public believes is appropriate. Perhaps in the short term, no ill effects will come from the difference between public expectations and actual sentences. But in the longer term, the federal criminal justice system will suffer. Most seriously, jurors may stop voting to convict drug dealers in federal criminal prosecutions if they are aware that unjust punishment may follow. It only takes a single juror

[39] 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).

who is worried about unjust sentencing to "hang" a jury and prevent a conviction. This is not an abstract concern. In the case of *United States v. Molina,*[40] the jury failed to reach a verdict on a § 924(c) count which would have added 30 years to the defendant's sentence. Judge Weinstein, commenting on "the dubious state of our criminal sentencing law"[41] noted that "[j]ury nullification of sentences deemed too harsh is increasingly reflected in refusals to convict."[42] In the last several drug trials before me, jurors have privately expressed considerable concern after their verdicts about what sentences might be imposed. If federal juries are to continue to convict the guilty, those juries must have confidence that just punishment will follow from their verdicts.

Moreover, maintaining a secure society and protecting citizens from crime depends in large measure on the cooperation of citizens. To the extent that the criminal justice system is seen as producing unreliable outcomes, including unjust sentences, the willingness of ordinary law-abiding citizens to step up to assist authorities could be undermined. This concern has been raised most recently in a different sentencing context by the United States Sentencing Commission with respect to the penalty structure for crack cocaine sentencing. Crack penalties are perceived by many to promote unwarranted sentencing disparity based on race. As the Commission pointed out "[a]lthough this assertion cannot be scientifically evaluated, the Commission finds even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system." [43] Mandatory sentences

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[40] 963 F.Supp. 213 (E.D.N.Y. 1997).

[41] *Id.* at 213.

[42] *Id.* at 214.

[43] UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, viii (May 2002).

that produce unjust results that injustice create the same disrespect for and lack of confidence in the federal criminal justice system.

3. Justifications for § 924(c)

Given these many problems with § 924(c) as applied to the *Angelos* case – its imposition of unjust punishment, its irrational classifications between offenses and offenders, and its demeaning of victims of actual criminal violence – what can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes such as § 924(c):

> (1) Assuring "just" (i.e. appropriately severe) punishment, (2) elimination of sentence disparities, (3) judicial economies resulting from increased pressure on defendants to plead guilty, (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others, (5) more effective deterrence, and (6) more effective incapacitation of the serious offender.[44]

These six justifications potentially apply to § 924(c). In its skillfully-argued defense of the § 924(c) sentence for Mr. Angelos, the government did not rely on the first rationale – the "just punishment" rationale – presumably because the sentence imposed on Mr. Angelos was unjust by any reasonable objective measure.

Nor did the government advance the second rationale: that § 924(c) eliminates sentence disparities. Again, the reasons are easy to see. Section 924(c) displaces a carefully-developed sentencing guideline system that would assure that Mr. Angelos receives equal punishment with other similarly-placed offenders. Indeed, § 924(c) creates the potential for tremendous sentencing disparity if federal prosecutors across the country do not uniformly charge § 924(c) violations. Such concerns are founded in real world data. In 1991, the Sentencing Commission

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[44] SENTENCING COMM. MANDATORY MINIMUM REPORT, *supra* note 14, at 5-15.

found that only about 45 percent of drug offenders who qualified for a § 924(c) enhancement were initially charged under the statute, and for 26 percent of these offenders the counts were later dismissed.[45] In 1995, the Commission again found that only a minority of qualified offenders–between 24 and 44 percent–were convicted and sentenced for applicable § 924(c)'s.[46] Again in 2000, the Commission found a pattern of inconsistent application. Only between 10 and 30 percent of drug offenders who personally used, carried, or possessed a weapon in furtherance of a crime received the statutory enhancement.[47]

The Justice Department recently took partial steps to reduce charging disparities stemming from § 924(c). A directive from the Attorney General – the so-called "Ashcroft Memorandum" – required prosecutors to file the first readily – provable § 924(c) count and a second count in certain circumstances:

> (i) In all but exceptional cases or where the total sentence would not be affected, the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and pursued.
> (ii) In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are *crimes of violence*, federal prosecutors shall, in all but exceptional cases, charge and pursue the first *two* such violations.[48]

As applied to the facts of the Angelos case, the Ashcroft Memorandum seems only to highlight the problem of disparity rather than resolve it. First, when three or more violations of § 924(c) are involved, the directive requires federal prosecutors to "pursue the first *two*

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[45] *See id.* at 57-58.

[46] *See* Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41 (2000).

[47] Statement of John R. Steer to the ABA Justice Kennedy Commission, *supra*, at 17.

[48] Memo. to All Federal Prosecutors from A.G. John Ashcroft Re: Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing at 4 (Sept. 22, 2003) (emphases added).

violations." In this case, the prosecutors pursued *five* violations, ultimately obtaining convictions on *three*. It seems likely that the prosecutors' charging decisions in this case would not have been replicated in other parts of the country. Second, the directive requires federal prosecutors to pursue at least two § 924(c) counts when the predicate offenses are "crimes of violence." Here, the predicates were drug crimes, which the directive does not discuss. Thus, the directive offers no guidance as to whether the prosecutors handling this case should have pursued multiple § 924(c) counts and, if so, how many.

There is also a lack of guidance to federal agents investigating these crimes. In this case, for example, the government did not arrest Mr. Angelos immediately after the first "controlled buy," but instead arranged two more such buys, which then produced one of the additional § 924(c) counts. It is not clear that other law enforcement agents would have allowed Mr. Angelos to continue to deal drugs after the first buy rather than taking him into custody immediately. Of course, one of the rationales for the "stacking" feature of § 924(c) is that each additional criminal act demonstrates need for further deterrence. In Angelos' case, though, the additional criminal acts were in some sense procured by the government's decision not to arrest him.

Because of the lack of guidance on these prosecutory and investigative issues, Mr. Angelos received a sentence far in excess of what many other identically-situated offenders will receive for identical crimes in other federal districts. I had been advised by judges from other parts of the country that, in their districts, an offender like Mr. Angelos would not have been charged with multiple § 924(c) counts, particularly the third count. This is no trivial matter. The decision to pursue, for example, a third § 924(c) count in this case makes the difference between a 36-year-sentence and 61-year sentence. In short, § 924(c) seems to create the serious risk of

producing massive sentencing disparities between identically-situated offenders within the federal system. And the problem of disparity only worsens if it is acknowledged that Mr. Angelos would not have been charged with federal crimes in many other states. For all these reasons, the government did not try to defend § 924(c) on an eliminating-disparity rationale.

The government did not advance the third rationale – judicial economies resulting from increased pressure on defendants to plead guilty. Here again, it is possible to understand the government's reluctance. While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty,[49] there is always the nagging suspicion that the practice is unseemly. In the Angelos case, for example, the government initially offered Mr. Angelos a plea bargain in which he would receive a fifteen-year-sentence under one § 924(c) count. When he had the temerity to decline, the government filed superseding indictments adding four additional § 924(c) counts. The superceding indictment rested not on any newly-discovered evidenced but rather solely on the defendant's unwillingness to plead guilty. Moreover, if its plea-inducing properties justify § 924(c), then it is important to understand who will be induced to plead. Section 924(c) will not visit its harsh punishment "on flagrantly guilty repeat offenders (who avoid the mandatory by their guilty pleas), but rather on first offenders in borderline situations (who may have plausible defenses and are more likely to insist upon trial)."[50] For all these reasons, it is understandable that the government would not want to publicly defend § 924(c) with the plea-inducing argument, even though given the realities of overworked prosecutors this may provide a true justification for the statute. Nor did the government argue that § 924(c) was needed to provide incentives for drug

[49] *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

[50] Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 203 (1993).

traffickers to inform on others in their organization.[51] Instead, the rationale advanced by the government was deterrence and incapacitation: the draconian provisions of § 924(c) were necessary to deter drug dealers from committing crimes with those firearms and to prevent Mr. Angelos from doing so in the future.

The deterrence argument rested on a strong intuitive logic. Sending a message to drug dealers that they will serve additional time in prison if they are caught with firearms may lead some to avoid firearms entirely and others to leave their firearms at home. The Supreme Court has specifically noted "the deterrence rationale of § 924(c),"[52] explaining that a fundamental purpose behind § 924(c) was to combat the dangerous combination of drugs and firearms.[53] Congress is certainly entitled to legislate based on the belief that § 924(c) will "persuade the man tempted to commit a Federal felony to leave his gun at home."[54]

Congress' belief was, moreover, supported by empirical evidence. Generally criminologists believe that an increase in prison populations will reduce crime through both a deterrent and incapacitative effect. The consensus view appears to be that each 10% increase in the prison population produces about a 1% to 3% decrease in serious crimes.[55] For example, one recent study concluded that California's three strikes law prevented 8 murders, 4000 aggravated

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[51] *Cf.* Jay Apperson, *The Lock-'em Up Debate: What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994 at C1.

[52] *Simpson*, 435 U.S. at 14.

[53] *Smith v. United States*, 508 U.S. 223, 240 (1993).

[54] 114 CONG. REC. 22, 231-48 (1968) (Statement of Rep. Poff).

[55] *See, e.g.*, Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996); James Q. Wilson, *Prisons in a Free Society*, 117 PUB. INTEREST 37, 38 (1998).

assaults, 10,000 robberies, and 400,000 burglaries in its first two years of operation.[56] One study found that Congress' financial incentives to states to which (like the federal system) force violent offenders to serve 85% of their sentences decreased murders by 16%, aggravated assaults by 12%, robberies by 24%, rapes by 12%, and larcenies by 3%. While offenders "substituted" into less harmful property crimes, the overall reduction in crime was significant.[57] While no specific study has examined § 924(c), it was reasonable to assume – and Congress was entitled to assume – that it has prevented some serious drug and firearms offenses.

The problem with the deterrence argument, however, is that it proves too much. A statute that provides mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses. But it would be hard to view such hypothetical statutes as resting on rational premises. Moreover, a mandatory life sentence for petty theft, for example, would raise the question of why such penalties were not in place for aircraft hijacking, second-degree murder, rape, and other serious crimes. Finally, deterrence comes at a price. Given that holding a person in federal prison costs more than $24,000 per year,[58] the 61-year-sentence I was asked to impose on Angelos would cost the taxpayers (even assuming Mr. Angelos receives good time credit and serves "only" 55-years) about $1,320,000. Spending more than a million dollars to incarcerate Mr. Angelos will prevent future crimes by him and may well deter some others from being involved with drugs and guns. But that money could be far more effectively spent on other law

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[56] *See, e.g.*, Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002).

[57] Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002).

[58] MEMORANDUM TO ALL CHIEF PROBATION OFFICERS FROM THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS REGARDING COSTS OF INCARCERATION AND SUPERVISION (May 9, 2007).

enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization.[59]

If I were to evaluate these competing tradeoffs, I would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to simply be "tough" on crime. Given limited resources in our society, we also have to be "smart" in the way we allocate our resources. But these tradeoffs are, in the final analysis, for Congress – not the courts. In *Busic,* referring to *Simpson*, the Supreme Court recognized that § 924(c) could lead to "seemingly unreasonable comparative sentences" but that "[i]f corrective action is needed it is the Congress that must provide it. It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[60] The Court further noted that "in our constitutional system the commitment to separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal.'"[61]

Accordingly, I had no choice but to impose a 55-year-sentence on Mr. Angelos. While that sentence was unjust and created irrational classifications, there was a "plausible reason" for Congress' action. As a result, my obligation was to follow the law and to reject Mr. Angelos' equal protection challenge to the statute.

B. The Case of Marion Hungerford

[59] *See* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27J. LEGAL STUD. 1 (1998).

[60] *Busic,* 446 U.S. at 405 citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

[61] *Id.* at 410.

It is difficult to imagine a case that might make the result in the *Angelos* case almost appear reasonable, but such an example can be found in *United States v. Hungerford*,[62] a case from the Ninth Circuit Court of Appeals. This case demonstrates that the federal courts of appeals are bound by unjust mandatory minimum sentences no less than the federal trial courts. In *Hungerford*, the appellate court rejected the defendant's constitutional challenges to her sentence. 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 enjoyed the spoils of the offense. Accordingly, when she would not agree to a plea bargain, she was convicted of conspiracy and seven counts of robbery and using a firearm in relation to a crime of violence.[63] Because of the seven stacked § 924(c) counts, Hungerford was sentenced to slightly more than 159 years in prison.[64] Although the evidence indicated that Marion Hungerford suffered from a severe case of borderline personality disorder,[65] Ninth Circuit followed established precedent, rejected her claims, and affirmed her sentence.[66] In his concurrence, Judge Reinhardt lamented the injustice of the sentence:

> Not only is the sentence cruel, it is absurd. It imposes a term of imprisonment of 159 years, under which Hungerford would be incarcerated until she reached the age of 208. The absurdity is best illustrated by the judge's reading to Hungerford the terms of supervised release which she would be required to undergo when she emerged from prison toward the end of the first decade of her third century. The judge told Hungerford that "[w]ithin 72 hours of release from custody," – in the year 2162 – she must "report in

[62] 465 F.3d 1113 (2006).

[63] *Id.* at 1114.

[64] *Id.* at 1119.

[65] *Id.*

[66] *Id.* at 1118.

> person to the probation office," and while on supervised release she must "participate in substance abuse testing to include not more than 104 urinalysis tests." He further ordered Hungerford to "participate in a program for mental health," and "pay part or all of the cost of this treatment, as determined by the U.S. probation officer." ... Certainly, requiring a defendant and a district judge to engage in a charade of this nature cannot increase respect for our system of justice.[67]

Mandatory minimum sentencing laws are blunderbusses – powerful, but crude, lacking the ability to meaningfully distinguish between serious offenders and those who are relatively inculpable. With mandatory minimum sentences, there is no discretion afforded to judges at either the trial or appellate level. In fact, when mandatory minimum sentences are in play, the only individuals with discretion are the prosecutors (who are themselves bound to seek the most serious provable offense by the Ashcroft memo)[68] and the President (who, under extraordinary circumstances, may grant executive clemency).[69]

II. THE JUDICIAL CONFERENCE'S OPPOSITION TO MANDATORY MINIMUM SENTENCES

Because of the injustices mandatory minimums produce in cases like Weldon Angelos' and Marion Hungerford's, the Judicial Conference has consistently opposed mandatory minimum sentences for more than fifty years. At its September 1953 meeting, the Conference

[67] *Id.* at 1120-21.

[68] *See supra* note 48.

[69] *See* United States Attorney's Manual, Standards for Consideration of Clemency Petitions. Grants of clemency are statistically rare, however. *See* Presidential Clemency Actions by Administration (1945 to 2001), at http://www.usdoj.gov/pardon/actions_administration.htm. The current administration has been particularly cautious in conferring pardons, issuing only 113 in six years, "fewer than any president in 100 years." Michael Isikoff & Mark Hosenball, *The Problem with Pardoning Libby*, NEWSWEEK, Mar. 7, 2007, at: http://www.msnbc.msn.com/id/17507199/site/newsweek/.

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.[70]

Since then, the Judicial Conference of the United States has condemned mandatory minimum sentences with some regularity. In September 1961, the Conference considered several criminal bills pending before Congress.[71] 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."[72] By the next year, opposition to mandatory minimum sentences was considered to be the official 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."[73] Legislation containing mandatory minimum sentencing provisions was opposed on these grounds in 1965,[74] 1967,[75] and 1971.[76]

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

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[70] JCUS-SEP 53, pp. 28-29.

[71] JCUS-SEP 61, pp. 98-99.

[72] *Id.* at 99.

[73] JCUS-MAR 62, p. 22 (italics added).

[74] JCUS-MAR 65, p. 20.

[75] 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.").

[76] JCUS-OCT 71, p. 40 ("The Conference reaffirmed its disapproval of mandatory minimum sentences.").

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."[77]

In 1981, the Conference opposed a bill that would have imposed extended and strengthened mandatory penalties for the use of firearms in federal felonies.[78] The Conference noted that proposed legislation typically required the imposition of a minimum term while prohibiting probation and parole eligibility.[79] 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."[80]

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."[81] 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

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[77] JCUS-APR 76, p. 10.

[78] JCUS-SEP 81, p. 90.

[79] JCUS-SEP 81, p. 93.

[80] *Id.*

[81] JCUS-MAR 90, p. 16.

minimum sentencing provisions be repealed, whereupon the U.S. Sentencing Commission should reconsider the guidelines applicable to the affected offenses.[82] The Conference's longstanding opposition to mandatory minimum terms was reaffirmed in July and August of 1991 by the Executive Committee when it opposed amendments to the Violent Crime Control Act of 1991.[83]

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.[84] 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."[85]

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.[86] 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 U.S. Sentencing Commission that attempted to reconcile mandatory minimum sentences with the sentencing guidelines.[87] "The Committee on Criminal Law believed that,

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[82] JCUS-SEP 90, p. 62.

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

[84] JCUS-SEP 91, p. 56.

[85] *Id.*

[86] JCUS-MAR 93, p. 13.

[87] JCUS-SEP 93, p. 46.

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 sentencing guidelines and represents a promising approach."[88] On recommendation of the Committee on Criminal Law, the Conference endorsed the concept.[89]

On May 17, 1994, the Executive Committee 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.[90]

The Long Range Plan for the Federal Courts, adopted in 1995, reiterated the Conference position that Congress should be encouraged not to prescribe mandatory minimum sentences.[91] More recently, when considering the appropriate responses to the Supreme Court's decision in *Booker*, 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."[92] In 2006, the Conference also considered the consequences of mandatory minimum terms in opposing the existing differences between crack and powder cocaine sentences.[93]

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[88] *Id.*

[89] *Id.*

[90] JCUS-SEP 94, p. 42.

[91] JCUS-SEP 95, p. 47.

[92] JCUS-MAR 05, pp. 15-16.

[93] 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.").

Thus, for more than fifty years, since before I was born, the Judicial Conference has consistently opposed mandatory minimum sentencing. The Conference has noted that mandatory minimum sentences diminish judicial discretion, increase the number and cost of trials and appeals, and prolong the sentencing process. For these reasons, the Conference has steadfastly opposed these provisions.

III. OPPOSITION TO MANDATORY MINIMUM SENTENCES IS WIDESPREAD

The Judicial Conference has considerable company in opposing mandatory minimum sentences. Over the years, dozens of academics have criticized such provisions,[94] and scores of federal judges have echoed the condemnation of the Judicial Conference in questioning the wisdom of mandatory minimum terms.[95]

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[94] *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentences*, 152 U. PENN. L. REV. 33 (2003) (suggesting that mandatory minimum sentences invade the function of the judge and the jury); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591 (2005) (challenging the belief that mandatory minimums decrease sentencing disparity and eradicate overly lenient sentencing); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004) (identifying mandatory minimums as the cause of distortions that skew sentencing authority); Schulhofer, *supra* note 50 (noting that the existence of a "cooperation paradox" in which more culpable offenders get shorter sentences because they possess substantial assistance [information] to offer the prosecutor for a sentence below the mandatory minimum, while less culpable offenders, possessing little or no information to offer, must serve the mandatory term); William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992) (noting difficulties in harmonizing mandatory minimum sentences with the federal sentencing guidelines); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 30 FED. B. NEWS & J. 158 (1993) (suggesting that mandatory minimum sentences have distorted the entire structure of federal sentencing).

[95] *See, e.g.*, United States v. Harris, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment) ("Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines."); United States v. Powell, 404 F.3d 678 (2d Cir. 2005), (vacating the sentence of the district court while recognizing the district court's reluctance to impose a

Even individual Supreme Court justices have challenged the wisdom of legislatively-mandated minimum penalties. In 1993, Chief Justice William Rehnquist criticized mandatory minimum sentences, noting that they are often enacted as legislative gestures of outrage, with no real consideration of their impact upon other aspects of the federal sentencing system:

> 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. Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.[96]

Ten years later, Justice Anthony Kennedy declared, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[97] The Kennedy Commission of the American Bar

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mandatory life sentence); United States v. Hiveley, 61 F.3d 1358, 1363 (8th Cir. 1995) (Bright, Senior Circuit Judge, concurring) ("These unwise sentencing policies which put men and women in prison for years, not only ruin lives of prisoners and often their family members, but also drain the American taxpayers of funds which can be measured in billions of dollars."); United States v. Abbott, 30 F.3d 71 (7th Cir. 1994) (quoting the district court, "This [sentence]...perhaps is another illustration of the lack of wisdom in mandatory minimum sentences, but I cannot take it upon myself to change the law that Congress has written because I think it is an inappropriate disposition. That, in sum and substance is the reason for this court imposing the sentence. Congress has told me that I must." (internal quotations omitted)); United States v. Brigham, 977 F.2d 317 (7th Cir. 1992) ("Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor."); John S. Martin Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (resigning from the bench because "[w]hile I might have stayed on despite the inadequate pay, I no longer want to be part of our unjust criminal justice system").

[96] Speech of Chief Justice William H. Rehnquist, *supra* note 1.

[97] Speech of Justice Anthony Kennedy, Address to the American Bar Association (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

Association has echoed these views, urging states, territories, and federal government to repeal mandatory minimum sentence statutes.[98] Justice Stephen Breyer also has been critical of mandatory minimum penalties, noting that they are fundamentally inconsistent with the federal sentencing guideline system established by Congress in the landmark piece of criminal justice legislation, the Sentencing Reform Act of 1984.[99]

> [S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments.... Every system, after all, needs some kind of escape valve for unusual cases.... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. ... In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.[100]

But criticism of mandatory minimum sentencing provisions has not been limited to legal academics and members of the judiciary. Members of the national legislature have also expressed reservations about the prudence of mandatory minimums. Like Justice Breyer, Senator Orrin Hatch from my home state has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.[101]

But congressional doubt about the wisdom of mandatory minimum sentences been expressed many times. In 1970, Congress reconsidered the proliferation of mandatory minimum

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

[99] Pub. L. No. 98-473, 98 Stat. 2019 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[100] Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), *reprinted at* 11 FED. SENT. REP. 180, 184-85 (1999).

[101] *See* Hatch, *supra* note 14.

provisions that it had effectuated for more than a decade and passed the Comprehensive Drug Abuse Prevention and Control Act of 1970,[102] repealing virtually all of the mandatory drug provisions in the criminal code. Supporters of the Act noted that mandatory minimum sentences alienate youth from mainstream society,[103] infringe upon "the judicial function by not allowing the judge to use his discretion in individual cases,"[104] and impede successful re-entry, obstructing "the process of rehabilitation of offenders."[105]

Like Congress, the public appears to have doubts about the wisdom of mandatory minimum sentencing. At first glance, there appears to be some public support for mandatory minimum sentences. When people were asked if they supported a mandatory "three-strikes" law for offenders convicted of a third violent felony, almost 90 percent of Americans were in favor.[106] But while mandatory minimum sentences enjoy widespread support in the abstract, support decreases significantly when people are asked to apply mandatory sentences to specific cases. In one study, support dropped precipitously from 88 percent to a mere 17 percent when subjects are asked to apply mandatory sentences to specific hypothetical cases.[107] The authors concluded that "these findings suggest that citizens would endorse three-strikes policies that

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[102] Pub. L. No. 91-513, 84 Stat. 1236 (1970).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE (1997).

[107] *See* B. Applegate, et al., *Assessing Public Support for 3-strikes and You're Out Laws: Global Versus Specific Attitudes*, CRIME AND DELINQUENCY, 42, 517 (1996).

focus on only the most serious offenders and *that allow for flexible application.* "[108] Support for mandatory minimum sentences also appears to be waning. In 1995, more than half of the sampled public in the United States held the view that mandatory sentences were a good idea; by 2001, the percentage had declined to slightly more than one-third of respondents.[109] In fact, over half the polled public now favor the elimination of "three-strikes" mandatory sentences,[110] and more than three-quarters support allowing judges to set aside mandatory sentences "if another sentence would be more appropriate."[111] This kind of judicial discretion, authorizing courts, where exceptional circumstances exist, to impose a lesser sentence than the prescribed mandatory sentence, exists in most jurisdictions that impose mandatory minimum sentences.[112]

This public skepticism of inflexible sentencing is warranted. A number of research agencies have concluded that mandatory minimum sentences do not result in expected reduction of general crime rates. In its 1994 report on the consequences of mandatory minimum prison terms, the Federal Judicial Center concluded that "evidence has accumulated indicating that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals

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[108] *Id.* at 517.

[109] *See Julian Roberts, Public Opinion and Mandatory Sentencing*, CRIM. JUST. & BEHAVIOR, 30 (4), 483 (2003).

[110] *See* Peter D. Hart Research Associates, *Changing Public Attitudes toward the Criminal Justice System* (2002).

[111] *See* Eagleton Institute of Politics Center for Public Interest Polling, *New Jersey's Opinions on Alternatives to Mandatory Minimum Sentencing* (2004); *see also* Quinnipiac College Polling Institute for the New York Law Journal, *69% of New Yorkers Polled Favor Sentencing Discretion over State-Mandated Sentences* (1999).

[112] *See* Julian Roberts, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* (2005).

of the criminal justice system."[113] Similar conclusions have been reached by RAND,[114] a National Academy of Sciences Panel,[115] and the General Accounting Office (now the Government Accountability Office).[116] The United States Sentencing Commission, the federal government's premiere authority on matters of penology and punishment, concurs. In the Commission's 1991 special report to Congress on mandatory minimum sentencing,[117] the agency concluded, among other things, that mandatory minimums are not uniformly applied and thus create unwarranted disparity;[118] result in distorted plea negotiation and bargaining that undermine truth in sentencing;[119] result in unwarranted uniformity among differently situated

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[113] Vincent & Hofer, *supra* note 96, at 1.

[114] RAND Corporation Drug Policy Research Center, Mandatory Minimum Drug Sentencing: Throwing Away the Key or the Taxpayers' Money (1997) (concluding that mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing cocaine consumption or drug-related crime).

[115] *See* Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., Understanding and Preventing Violence 6 (1993) (finding that even tripling the length of punishment would result in only negligible reductions in crime). Because the same impulsive offenders who commit many of the offenses resulting in long sentences also suffer from situational, social, or biological deficits that cause them to discount the risk and duration of lengthy imprisonment, even long and mandatory terms of incarceration are unlikely to have significant effects on deterrence. *See* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. OF LEGAL STUD. 173 (2004).

[116] General Accounting Office, GAO-04-105, Federal Drug Offenses: Departures from Federal Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001, at 14-16, 79 (Oct. 2003) (finding that more than half of the drug sentences imposed under mandatory minimums fell below the minimum sentence, typically because of prosecutor's substantial assistance motions, fast-track reductions, and safety-valve reductions).

[117] *See* SENTENCING COMM. MANDATORY MINIMUM REPORT.

[118] *Id.* at ii-iii.

[119] *Id.* at iii.

offenders;[120] and transfer sentencing power from the court to the prosecution.[121] The Commission opined that, although mandatory minimums and the Sentencing Guidelines were motivated by similar concerns for certainty, uniformity, and truth in sentencing, the two systems are "structurally and functionally at odds."[122]

IV. ALTERNATIVES TO INJUSTICE

It is said that those who do not learn from history are doomed to repeat it. After the mandatory minimum sentences enacted by the Narcotic Control Act of 1956 failed, Congress tried to rectify the situation by passing the Comprehensive Drug Abuse Prevention and Control Act of 1970. Perhaps it is once again time for history to repeat. Perhaps this Congress can undo some of the mischief created by twenty years of runaway mandatory minimum sentences.

Alternatives to mandatory minimums have been offered by numerous segments of the criminal justice system over the past several years. One obvious and sensible "quick fix" for at least part of the problem would be to "unstack" the mandatory minimum sentences under § 924(c) so that the statute would be a true recidivist statute – that is, the second 924(c) conviction with its 25-year minimum would not be triggered unless the defendant had been convicted for use of a firearm, served time, and then failed to learn his lesson and committed his crime again. Other options include total repeal, selective repeal, "safety valves," congressional oversight, and enhanced operation of the sentencing guidelines. While the ultimate decision rests with the Congress, there is no shortage of support for these alternatives. In this section, I

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[120] *Id.*

[121] *Id.*

[122] *Id.* at 25.

want to highlight, first, the idea of unstacking the section 924(c) penalties and then, second, discuss how Congress might sensibly approach broader reforms of mandatory minimum sentences.

A. Unstacking Section 924(c) Penalties

In considering whether the § 924(c) penalties should be "unstacked," it is helpful to understand the history of this particular statute. 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 enacted following 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."[123] Because § 924(c) was offered as a floor amendment, there are no congressional hearings or committee reports regarding its original purpose,[124] and only a few statements made during floor debate are available.[125]

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 prosecuted in a court of the

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

[124] *Cf. Jung v. Association of American Medical Colleges*, __ F.Supp.2d ___, 2004 WL 1803198 at * 11 (D.D.C. 2004) (noting interpretive difficulties created when legislation is passed without legislative hearings).

[125] *Busic v. United States*, 446 U.S. 398, 405 (1980).

United States."[126] 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."[127]

One of the first questions involving the provision was whether a defendant could be sentenced under § 924(c) where the underlying felony statute already included an enhancement for use of a firearm. In 1972 in *Simpson v. United States*,[128] 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.'"[129] In 1980 in *Busic v. United States*,[130] 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. Supporting its conclusion, the Court noted that in 1971 the Department of Justice had advised prosecutors not to proceed under § 924(c) if the predicate felony statute provided for "'increased penalties where a firearm was used in the commission of the offense.'"[131]

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

[127] *Id.*

[128] 435 U.S. 6 (1977).

[129] *Id.* at 13, 14.

[130] 446 U.S. 398 (1980).

[131] *Id.* at 406 (quoting 19 U.S. Atty's Bull. No. 3, p.63 (U.S. Dept. of Justice, 1981)).

In response to *Simpson* and *Busic*, in 1984 Congress amended § 924(c) "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.'"[132] The 1984 amendment also established a five-year mandatory minimum for use of a firearm during commission of a crime of violence.[133]

In 1986, as part of the Firearms Owner's Protection Act, Congress made § 924(c) specifically applicable to drug-trafficking crimes, and increased the mandatory minimum to ten years for certain types of firearms.[134] In later amendments, Congress increased the penalty for a "second or subsequent" § 924(c) conviction to a mandatory minimum of twenty years (then ultimately to twenty-five years).[135]

The increased penalties for "second or subsequent" § 924(c) convictions produced litigation over whether multiple convictions in the same proceeding were subject to enhanced penalties. In essence, the issue was whether Congress intended § 924(c) to be a true recidivist statute or one that increased penalties for first offenders. 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.[136] But in *Deal v. United States*,[137] the Supreme Court, in a six-

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[132] *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).

[133] *Id.*

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

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

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

[137] 508 U.S. 129 (1993).

to-three decision, construed the statute more broadly. In *Deal*, the defendant was 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 for each of the other five § 924(c) charges – a total of 105 years. In affirming his sentence, the Court held that a "second or subsequent" conviction could arise from a single prosecution.[138] To hold otherwise, the Court noted, would simply encourage prosecutors to file separate charges and try the defendant in separate prosecutions.[139]

Less than two weeks after *Deal*, the Court again interpreted the statute in *Smith v. United States*.[140] 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*.[141] The majority noted than when Congress enacted the relevant version of § 924(c) it was no doubt responding to concerns that drugs and guns were a "dangerous combination."[142] 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.[143] He

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[138] *Id.* at 133-34.

[139] *Id.* at 134.

[140] 508 U.S. 223 (1993).

[141] *Id.* at 228.

[142] *Id.* at 239.

[143] *Id.* at 244 (Scalia J., dissenting).

therefore thought that the word "use" in relation to a crime of violence means use as a weapon, and that this definition of use carried over to the addition of drug trafficking to the statute.[144]

The Court again interpreted § 924(c) in *United States v. Gonzales*[145] and held that a sentence under § 924(c) could not be served concurrently with an unrelated sentence from a state conviction.[146] Finally, in *Muscarello v. United States*,[147] the Court held that, as used in § 924(c), "carries" is not limited to the felon who carries the firearm on his person, but includes a gun brought to a drug transaction in the glove compartment of his vehicle.

At a minimum, Congress should return to the original concept of section 924(c) – as a recidivist statute. Particularly in cases (like the Angelos case) that do not involve direct violence, Congress should consider repealing this feature and making § 924(c) a true recidivist statute of the three-strikes-and-you're-out variety. In other words, Congress should consider applying the second and subsequent § 924(c) enhancements only to defendants who have been previously convicted of a serious offense, rather than to first-time offenders like Mr. Angelos. This is an approach to § 924(c) that the Tenth Circuit[148] and Justices Stevens, O'Connor, and Blackmun[149] believed Congress intended. It is an approach to sentencing that makes good sense.

B. Other Alternatives

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[144] *Id.*

[145] 520 U.S. 1 (1997).

[146] *Id.* at 9-10.

[147] 524 U.S. 125 (1998).

[148] *United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987).

[149] *United States v. Deal*, 508 U.S. at 137 (Stevens, J., dissenting).

While unstacking the penalties of § 924(c) would be a good place to start in reforming mandatory sentencing, a broader perspective is needed. A variety of mandatory minimum sentences are found throughout the federal criminal code and any reform should ultimately consider all of them. Justice Anthony Kennedy recently commented on the roles of courts and legislatures in specific reference to mandatory minimums:

> The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just . . . A court decision does not excuse the political branches or the public from the responsibility for unjust laws.[150]

In considering how to respond to the injustices created by mandatory minimum sentences, Congress can draw on the views of many knowledgeable observers who have considered the question. The Judicial Conference has offered several ideas in the past, which might usefully serve as a basis for reform now. For instance, 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.[151] In 1993, the Conference endorsed a proposal offered by Judge William W. Wilkins, Jr., in his capacity as chair of the U.S. Sentencing Commission, in which the guidelines would "trump" the statutory mandatory minimum.[152]

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[150] Speech of Justice Anthony Kennedy, *supra* note 97.

[151] *Supra* note 84.

[152] *Supra* note 87. *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).

Over the years, several Members of Congress have likewise proposed alternatives to mandatory minimum sentences. 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 mandatory minimums.[153] 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).[154]

Other alternatives to mandatory minimums have been offered in recent years as well. One option, endorsed by the American Bar Association[155] and the Sentencing Project,[156] is the outright repeal of all mandatory minimums. Another option, endorsed by the Constitution Project, calls for the enactment of mandatory minimum sentences "only in the most extraordinary circumstances."[157]

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[153] H.R. 957, 103rd Congress (February 7, 1993).

[154] Hatch, *supra* note 14.

[155] American Bar Association, *supra* note 98.

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

[157] Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report* (March 15, 2006), available at

Advocacy groups like Families Against Mandatory Minimums (FAMM) have repeatedly challenged "inflexible and excessive penalties required by mandatory sentencing laws."[158] FAMM promotes sentencing policies that give judges discretion to sentence individuals according to their role in the offense, seriousness of the offense, and potential for rehabilitation. The group supports three primary strategies to be used in lieu of mandatory minimums.

First, they recommend restoring sentencing discretion to judges. To insure a judge's decision will meet standards for appropriate punishment, the prosecutor or the defendant can appeal the judge's sentence. This safeguard and sentencing guidelines prevent judges from delivering sentences that are too soft or too tough.[159] Second, FAMM supports the use of sentencing guidelines. Even the now-advisory guidelines help prevent wildly disparate sentences for similar crimes, while allowing sentence adjustments based on culpability.[160] 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.[161]

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http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf. It may be relevant to point out that I served as a member of the Project.

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

[159] *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).

[160] *Id.*

[161] *Id.*

All of these ideas have a good deal to commend them. But rather than explore any of them at length, I want to conclude my testimony by offering my own personal thoughts on how Congress might usefully proceed in evaluating these problem.[162]

Congress ought to rely on its expert agency – the Sentencing Commission – as the starting point for reform. Congress created the Commission in 1984 as part of its efforts to help eliminate sentencing disparities and improve the transparency of federal sentencing. The irony now, though, is that Congress has in some cases created *two* conflicting federal sentencing systems – the Guidelines system and the mandatory minimums.

A common criticism of mandatory minimums is that they interfere with Congress' efforts to create a fair sentencing system through the use of guidelines.[163] While guidelines and mandatory minimums can occasionally be reconciled,[164] 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."[165] In the *Angelos* case, for example, the guidelines recommended a sentence for Mr. Angelos that was more than forty year's lower than what he ultimately received. Moreover, because of the transparency of the Guidelines system, it was possibly for me to catalogue precisely how far Angelos' sentence exceeded what he would have received for committing such crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape.

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[162] *See generally* Paul G. Cassell, *Too Sevvere? : A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).
[163] *See, e.g., supra* note 95.

[164] *See, e.g.*, 18 U.S.C. §§ 3553(e) and (f).

[165] SENTENCING COMM. MANDATORY MINIMUM REPORT, *supra* note 14, at 25.

In reforming the system today, Congress should focus on cases where mandatory minimums produce sentences significantly different from those produced by the Guidelines. Perhaps the simplest way to give the Guidelines more prominence in sentencing would be to allow the court to "depart" from the mandatory minimum sentence to impose any sentence that is proper under the Sentencing Guidelines when the Guidelines advised a sentence significantly different from that called for by mandatory minimums.[166] This alternative, which is similar to proposals previously endorsed by the Judicial Conference,[167] is the subject of a soon-to-be released article by Erik Luna and me in our capacities as professors of the University of Utah's S.J. Quinney College of Law.

The advantages of such a system are manifold. Most important, the public could have confidence whenever a judge imposed a sentence that it was consistent with that called for by the nation's expert sentencing agency. The Sentencing Commission, it should be noted, has never (to my knowledge) been charged with being an unduly lenient body. And Congress has the opportunity to review all Guidelines promulgated by the Commission before they take effect and to make adjustments if necessary. In short, the Sentencing Commission's Guidelines form a rational backbone for any sentencing system. That backbone should take precedence over the ad hoc system of mandatory minimums that has grown up over the years.

CONCLUSION

Congress should act to reform mandatory minimum sentences so that they no longer serve as engines of injustice. Today, Weldon Angelos has approximately 52 years left to serve

[166] A similar proposal has been introduced in the House of Representatives for the State of Massachusetts as they consider ways to reconcile guidelines and mandatory minimums. *See* House Bill No. 813 (2005).

[167] *Supra* notes 84 and 87.

on his sentence and Marion Hungerford has approximately 157 remaining years. As the public learns about sentences such as these – far longer than those imposed on even convicted murderers -- its confidence in the nation's federal sentencing system is diminished.

My predecessor as chair of the Criminal Law Committee of the Judicial Conference, Senior Judge Vincent L. Broderick, nicely summarized all these points when he testified about 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 good 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.[168]

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

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[168] 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. Mr. Roper.

TESTIMONY OF RICHARD B. ROPER, III, UNITED STATES ATTORNEY, NORTHERN DISTRICT OF TEXAS, DALLAS, TX

Mr. ROPER. Good morning, Chairman Scott and Ranking Member Forbes. It is an honor to appear before this distinguished Committee and with these fine witnesses to discuss the Department of Justice's views regarding the continued use of mandatory minimum sentences as a part of an overall strategy to reduce crime in our country. I hope to give a perspective of a 25-year prosecutor who has worked at both the State and Federal levels.

Petrified neighbors, concerned parents, tragic victims, frustrated police officers and our fellow citizens look to us to make our community safer. I believe that tough Federal sentencing laws, including the application of mandatory minimum sentences, when combined with prevention and prisoner reentry programs, can effectively reduce crime. Essentially our tough Federal sentencing laws have allowed Federal and local law enforcement to selectively target violent criminal organizations and impact communities.

If time permitted, I would highlight many successful initiatives in my district, the Northern District of Texas in the Dallas-Fort Worth area, where strong Federal statutes have been used to rid neighborhoods of entrenched drug-trafficking organizations and gangs ruining the community. My colleagues across the country could give many more examples. One initiative in Dallas resulted in a 47 percent reduction in the crime rate in that community. A neighbor in that area came up to me at a local weed-and-seed meeting and thanked me for giving her the opportunity to come outside her house without fear for the first time in a long time.

There is a common theme in all of these initiatives. These organizations were involved in the commission of violent crimes in addition to significant drug-trafficking activity. Prior efforts at the State level were unsuccessful, resulting in defendants receiving little or no time. Our Federal statutes allowed law enforcement to garner the cooperation of lower-level gang members, allowing them to climb the hierarchical ladder to bring down the leaders, dismantling the organizations. Those statutes ensured that those outlaws would not quickly return to these communities and again wreak havoc. On the other hand, those deserving defendants received a safety valve reduction tempering the application of the mandatory minimum provisions.

Importantly, those Federal statutes sent a clear message of deterrence, echoed in the lyrics of a local Dallas rap artist later convicted in one of our initiatives when he said, "better call the Feds; DPD, the Dallas Police Department, ain't enough."

While I can provide several examples of the deterrent effect of these sentencing provisions, especially in Texas, that I have observed over the last 25 years as a prosecutor, I offer the success we have had in Dallas. Since 2002, newly released parolees and probationers are required to attend a reentry program where they are educated about the severe Federal penalties associated with firearm possession and use. Federal, State and local law enforcement heads, including myself, meet with these people and convey to these former prisoners their commitment to vigorously enforce

the Federal firearm laws. A study conducted by the University of Texas in Arlington found that since the institution of this program, there has been nearly a 50 percent reduction in the incidence of gun crimes in Dallas County. The threat of severe confinement no doubt contributed to this reduction.

And may I add a footnote. If you think the word is not out about the possibility of significant time for carrying firearms during drug crimes, I had a defendant myself when I was an AUSA, a meth lab cook, who took an informant and told an informant not to bring a firearm to the lab because I don't want—he said this—"I don't want that firearm enhancement on me if I am busted by the Feds."

Finally, I respectfully suggest that it would be imprudent to quickly dismiss the thoughtful deliberations of Members of Congress which resulted in the Sentencing Reform Act and the inclusion of selected statutes for mandatory minimums. As a young Federal prosecutor in the 1980's, I witnessed a dramatic difference in sentencing Federal defendants received depending on where in the country they were sentenced or even who sat as a judge.

Those tough Federal statutes, including selected provisions with mandatory minimums, when used as a part of an overall strategy, including prevention and reentry initiatives, can reduce crime, bettering our communities. I ask that Congress should carefully consider whether to retreat from this effective sentencing structure.

Mr. SCOTT. Thank you, Mr. Roper.

[The prepared statement of Mr. Roper follows:]

STATEMENT

OF

RICHARD B. ROPER
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF TEXAS

BEFORE THE

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

CONCERNING

"MANDATORY MINIMUM SENTENCING LAWS – THE ISSUES"
PRESENTED ON
JUNE 26, 2007

MANDATORY SENTENCING

Since 1984, every Administration and each Congress, whether led by Democrats or Republicans, has supported a mandatory sentencing system consisting of comprehensive and mandatory sentencing guidelines and selective mandatory minimum sentencing statutes. Congress passed the Sentencing Reform Act (hereinafter SRA) in 1984 in an effort to replace the broken and weak system of indeterminate sentencing that had been in place for decades with a stronger, fairer, more uniform, and more honest determinate sentencing system. The Act was intended to usher in certainty and fairness in sentencing, to more effectively fight crime by providing greater deterrence and incapacitation, and to greatly reduce disparities in sentencing that had become commonplace in the federal criminal justice system. The key features of this new mandatory sentencing system, which originated both from the Sentencing Reform Act as well as from other laws enacted around the same time,[1] included the creation of the United States Sentencing Commission, the development and implementation of mandatory federal sentencing guidelines, the abolition of parole, truth-in-sentencing, and the enactment of new statutes imposing mandatory minimum sentences for certain serious crimes – primarily for drug, firearm, and recidivist offenders.

In the more than twenty years since Congress took this important step to reform federal sentencing, the SRA[2], other crime legislation,[3] steps taken by state legislatures to

[1] See U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, p. ii (1991) ("Simultaneous to the development and implementation of the federal sentencing guidelines, Congress enacted a number of statutes imposing mandatory minimum sentences, largely for drug and weapons offenses, and for recidivist offenders.").
[2] Pub. L. No. 108-21, 117 Stat. 650, codified at 28 U.S.C. §994(w) and 18 U.S.C. §3553(c).

reform state sentencing laws and practices, improvements in policing, and other important criminal justice reforms, have all transformed our nation's criminal justice system and dramatically reduced crime levels. In recent years, serious crime has seen its lowest levels in more than a generation, and today, overall crime rates in America remain historically low. Research has clearly established that mandatory and tough sentencing laws contributed to the reductions in crime. For example, a 2002 study assessing the deterrent effect of truth-in-sentencing laws found that such laws decreased murders by 16%, aggravated assaults by 12%, robberies by 24%, rapes by 12% and larcenies by 3%. Overall, the study found the net reductions in crime were substantial.[4] Similarly, various independent estimates found that a significant part of the crime drop over the last 15 years or so resulted from tough incarceration policies.[5] In the face of the recent uptick in some crimes over the past two years, and a record number of persons being released from prison having completed their mandatory sentences, it is even more important that we recommit to criminal justice policies that have proven effective, including mandatory sentencing policies.

Given the proven results, it should come as no surprise that every Administration and each Congress on a bipartisan basis has also supported mandatory minimum sentencing statutes for the most serious of offenses. Like those of prior administrations, our policy has not been blanket support for mandatory minimums for all crimes, but

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3 See Pub. L. 98-473, § 1005(a), 98 Stat. 2138 (1984), amending 18 U.S.C. § 924(c) (applying substantial mandatory sentencing enhancement for the use or carrying of a firearm during a crime of violence); Pub. L. 99-308, § 104(a)(2)(A-E), 100 Stat. 456 (1986), amending 18 U.S.C. § 924(c) (applying mandatory sentencing for use or carrying of a firearm in furtherance of a drug trafficking crime).
4 Joanna Shepherd, *Police, Prosecutors, Criminals and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & Econ. 509 (2002).
5 Alfred Blumstein and Joel Wallman (Editors), *The Crime Drop in America*, Cambridge Studies in Criminology (2000) (chapters three and four).

rather has recognized that mandatory minimums are critical tools for combating certain serious crimes. The relevant existing criminal code provisions, which incorporate mandatory minimum sentences for selected drug, gun, and child sex crimes, as well as for murder and for certain recidivist offenders, provide investigators, prosecutors, and the courts with a valuable tool in the fight against major drug traffickers, gang violence, predators, and those who use firearms to further violent or drug-trafficking criminal activity.

MANDATORY MIMIMUM SENTENCING STATUTES AND SERIOUS CRIME

Because drugs, gangs, gun crimes, and violence threaten our national safety and domestic security, the perpetrators of these serious offenses must be prosecuted vigorously. In 2005 alone, nearly 370,000 murders, robberies and aggravated assaults were committed with a firearm. To reference an oft-cited and alarming statistic, an American teenager is more likely to die from a gunshot than from all natural causes of death combined.[6] Mandatory minimum statutes assist in the effective prosecution of these crimes by advancing several important law enforcement interests, while also serving the greater purposes of sentencing by effectively deterring unwanted serious criminal behavior, incapacitating offenders, providing just punishment, and increasing public safety.

[6] L.A. Fingerhut, *Firearm Mortality Among Children, Youth, and Young Adults 1-34 Years of Age, Trends and Current Status: United States, 1985-90*, Advance Data from Vital and Health Statistics No. 231, Washington, D.C.: National Center for Health Statistics, 1993 (*available at* www.cdc.gov/nchs/data/ad/ad231.pdf).

Mandatory minimums increase the certainty and predictability of incarceration for certain crimes, thereby ensuring uniform sentencing for similarly-situated offenders. These uniform and predictable sentences, in turn, deter criminal behavior by forewarning the potential offender with certainty that, if apprehended and convicted, he will serve hard time. This is an important distinction because it is so vastly different from many state sentencing systems which provide for wide ranges of possible sentences, as well as parole, good time credits, furlough programs, and commuted sentences. Mandatory minimums also enhance public safety by incapacitating dangerous offenders for substantial periods of time.

In addition to serving these important sentencing goals, mandatory minimum sentences provide an indispensable tool for prosecutors, because the law enables the prosecutor to move for relief from these mandatory sentences if a defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense. This possibility of relief from a mandatory minimum sentence in exchange for sworn truthful testimony and other forms of substantial assistance against fellow drug traffickers, gang members, or persons committing violent gun crimes allows law enforcement to move up the chain of command – offering incentives for the minor players in exchange for substantial assistance against the leaders. Such cooperation is essential in the effort to combat these serious crimes, particularly in the areas of organized crime and gang activity. Federal prosecutors rely on substantial assistance reductions and the cooperation they bring every day to help prove their cases, and it is no exaggeration to say that without this tool their job would be considerably more difficult.

A. Drug Crimes

In narcotics enforcement, mandatory minimum sentences are reserved principally for serious drug offenders, based on the quantity of narcotics uncovered. Those with prior felony drug convictions or who have operated a continuing criminal enterprise receive more severe sentences. While these mandatory minimum statutes express society's evaluation of the seriousness of the offender's criminal conduct, the current sentencing structure for drug crimes also recognizes congressional and Administration policy of sentencing nonviolent drug offenders who do not have significant criminal histories without regard to the mandatory minimums – what is commonly referred to as the "safety-valve" exception to drug mandatory minimum laws.[7]

While the Department views mandatory minimums as a necessary and effective law enforcement tool, we also recognize the need to apply the provisions appropriately – protecting the rights of the individual defendant and avoiding unnecessarily long sentences. The safety valve provision addresses this by allowing an otherwise serious drug defendant who did not use a firearm or violence, was not a leader or manager in the drug enterprise, and who does not have a serious criminal history, to be sentenced below the statutory mandatory minimum sentence provided that the offense did not result in death or serious bodily injury. To be eligible for the reduced sentence, the defendant must also truthfully tell the government all of the facts known to him about his crime and related conduct.

[7] See 18 U.S.C. § 3553(f) (directing the court to impose a sentence "without regard to any statutory minimum sentence").

The safety valve provision has been successful at preventing the mandatory minimum drug provisions from sweeping too broadly. Safety valve provisions are mandatory, not discretionary, and are widely used. According to the Sentencing Commission data for 2006, there were 16,269 drug defendants sentenced in cases where a mandatory minimum was applicable. Of those cases, 6,047, or more than one third, received the benefit of the safety-valve. These statistics demonstrate that the safety valve provisions are being applied regularly by federal judges, allowing greater flexibility in sentencing while maintaining appropriately serious penalties, deterrence, and incapacitation for the serious drug traffickers who use violence, are leaders or managers, or who have significant criminal histories.

B. Gun Violence

In the area of gun violence, mandatory minimums are used primarily for those violent offenders or drug traffickers that use a weapon to further their criminal activity and for felons who continue to possess firearms. Moreover, existing law provides for more severe sentences for repeat offenders – those who repeatedly use, carry, possess, brandish or discharge a firearm or destructive device during and relation to the crime of violence or drug-trafficking crime. The statutes also provide enhanced penalties for the use of particularly deadly or surreptitious weapons such as short-barreled rifles and firearms equipped with silencers.

We fully support Congress' continued commitment to eliminating gun violence, and we believe these mandatory minimum statutes are critical to this effort. Title 18, section 924(c)(1), the provision setting forth mandatory minimum sentences for the use of guns in furtherance of a crime of violence or drug crimes, was passed on a bipartisan basis in an effort to combat the debilitating effects of gun violence on our communities and to address the dangerous combination of drugs and guns. The chief legislative sponsor for this bill was quoted as stating that the provision was designed "to persuade the man who is tempted to commit a Federal felony to leave his gun at home."[8] The provisions contained therein – and the mandatory penalties to be imposed – reflect the seriousness of using guns to commit crimes of violence or drug-trafficking offenses, appropriately incapacitate dangerous offenders, and as designed, hopefully dissuade offenders from using firearms in furtherance of their criminal activity.

Mandatory minimum laws for gun violence have also spearheaded Department initiatives to combat violent crime. These mandatory minimum laws are a cornerstone of national collaborative efforts to vigorously enforce gun laws, including Project Safe Neighborhoods ("PSN"). PSN began under this Administration's leadership in 2001 and has been a successful model for the development of additional local, state, and federal cooperatives to more effectively fight crimes of violence. The Attorney General has acknowledged that PSN has "laid the foundation for some of the Department's most significant triumphs in the fight against violent crime."[9]

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[8] 114 Cong. Rec. 22231 (1968) (statement of Rep. Poff).
[9] See http://www.psn.gov (last visited June 12, 2007).

Mandatory minimums are particularly useful for strategic law enforcement programs which target resources to problem places and specific crime problems. For example, as the Attorney General discussed recently, the Department's Violent Crime Impact Team ("VCIT") program is a collaborative local, state and federal effort to reduce the number of homicides and other violent crimes committed with firearms in targeted communities. Modeled after PSN's successes, the VCIT initiative employs innovative technology, analytical investigative resources, and an integrated law enforcement team and strategy to identify, arrest, and prosecute this nation's most violent criminals. Since VCIT's unveiling in 2004, the initiative is responsible for the arrest of 9,800 gang members, drug dealers, felons in possession of firearms, and other violent criminals, and the recovery of more than 11,100 firearms. Upon sentencing, these violent criminals face serious and uncompromising mandatory penalties – not only punishment commensurate with the crime but also punishment that reflects the exact message we want to send to those lawless individuals that continually compromise the safety of our cities and neighborhoods.

CONCLUSION

The substantial gains made by our nation in crime control and reducing unwarranted sentencing disparity fuel the continued and widespread understanding that mandatory sentencing systems work. Although the Supreme Court's 2005 decision in *United States v. Booker* dealt our federal mandatory sentencing regime a damaging blow – the Department remains committed to the principles that gave rise to mandatory sentencing in the first place – consistency, fairness, certainty, truth, and greater justice in sentencing. Moreover, the Department continues to believe that a mandatory sentencing

system, complete with mandatory minimum sentences for certain serious offenses, best serves this nation's interests in reducing crime. The mandatory minimum sentences applicable to serious gun violence and drug offenses, coupled with the national initiatives to combine resources to fight drugs and violent crime, have enabled law enforcement to make great strides in successfully controlling these societal harms. Taken as a whole, the Department of Justice believes that the system of mandatory minimums is fair and effective – promoting the interests of public safety while protecting the rights of individuals.

Mr. SCOTT. Mr. Mauer.

TESTIMONY OF MARC MAUER, EXECUTIVE DIRECTOR, THE SENTENCING PROJECT

Mr. MAUER. Thank you so much, Congressman Scott.

In my testimony I want to address three key themes that address Federal mandatory sentencing, and these are, first, that the Federal mandatory penalties adopted in the 1980's were essentially based on false premises about their ability to reduce crime; secondly, mandatory sentencing has not, in fact, achieved its stated objectives; and thirdly, that alternative policies could produce more fair and more effective sentencing.

Now, the first theme is that mandatory sentencing was based on false premises. Mandatory sentencing, as we have learned through many years, is not, in fact, mandatory; it is not, in fact, consistent. As far back as 1991, in the report by the Sentencing Commission, a comprehensive report on mandatory sentencing, we learned that in about a third of the cases that a mandatory sentence might have applied, in fact, the defendant was permitted to plead to a charge below the mandatory sentence. Now, there are a variety of reasons why that took place. There are also racial and ethnic disparities that resulted from those plea negotiations. But in terms of mandatory sentencing, somehow sending a message that if you do the crime, you do the time, we know that in a third of the cases that was not the case. These people went to prison, but for varying degrees of time.

Mandatory sentencing is also premised or has also been promoted as having a strong deterrent effect on potential offenders. And here I think we have a very serious problem in that the research on deterrence in criminal penalties for a very long period of time has shown us that deterrence is much more a function of the certainty of punishment rather than the severity of punishment. In other words, if a person believes that he or she will be caught for a crime, if there is more law enforcement out there or something like that, then they may think twice about committing a crime. But merely increasing the amount of punishment that someone is subject to for people who generally do not believe they will be caught does not add very much to any kind of deterrent value.

We see the mandatory penalties, as we know, in the Federal system have been overwhelmingly applied to drug offenses. This is the area where they are also least likely to be effective, and that is because drug offenders, low-level sellers on the street, are easily replaced. As soon as we snatch up a few on the street corner, there is an almost endless supply, as we have seen through the war on drugs and the record number of arrests and incarceration and an endless supply of people who are willing to take their place for a chance to make a quick buck or so. And so their replacement, in fact, diminishes any impact that the mandatories may have.

In terms of the level of success, we now have 20 years of experience with Federal mandatory penalties. Some proponents claim that the decline in crime in the 1990's is evidence of the success of mandatory penalties in particular. If we look at the research to date on why crime declined in the 1990's, the best research seems to suggest that at most about 25 percent of the decline in violent

crime was due to rising incarceration. Some researchers believe it is as little as 10 or 15 percent. But we are talking here about incarceration in general. Of all the convictions in the U.S. every year, approximately 1 million, only 6 percent take place in Federal court. Of those, only a small fraction are mandatory penalties. So essentially we are looking at perhaps 1 or 2 percent of all the convictions involving Federal mandatory penalties. It is possible that has had an effect on crime, but we certainly have no idea from any of the research or any of the data, so it is extremely speculative to assume that that is a factor there.

Secondly, in terms of the level of success, as we have heard very clearly from the Sentencing Commission and many others, the drug quantity levels established in mandatory penalties, particularly for crack cocaine, not only are not effective but they encourage prosecution of lower-level offenders by setting the crack cocaine threshold at 5 grams. The Sentencing Commission data shows us that more than 60 percent of the people prosecuted for crack cocaine offenses are low-level offenders. This is not exactly what Federal resources should be doing, and we have seen as well, of course, the disproportionate impact of communities of color.

Thirdly what can we do to develop more effective and more fair sentencing policies? Well, since the *Booker* decision by the Supreme Court, we now have an even greater chasm between mandatory penalties, particularly for drugs, and all other Federal crimes. The sort of disruption in the sentencing grid or the sentencing proportions is even greater now that Federal judges have more discretion in nonmandatory cases. And it calls into question the whole structure much more severely.

What can we do? It seems to me Congress might want to request that the Sentencing Commission conduct an updated assessment of mandatory penalties. It has been 16 years now since the Sentencing Commission first did that.

Secondly, we want to review the drug quantities, particularly for crack cocaine, and raise that to the level of powder cocaine certainly.

It seems to me we should consider the expansion of the safety valve. This is used in approximately a third of the relevant drug cases. Judges are finding significant numbers of cases where it is appropriate. It may be time to see if judges should have more discretion in this regard as well.

Finally we see that the experience in the States over the last several years is one that is very much moving toward reform, reconsideration of sentencing policies. I think we have much to learn from that experience in the States. I think the States are moving in an interesting direction that suggests that maybe it is time to reconsider some of these policies. Thank you.

Mr. SCOTT. Thank you.

[The prepared statement of Mr. Mauer follows:]

PREPARED STATEMENT OF MARCH MAUER

THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

Testimony of Marc Mauer
Executive Director
The Sentencing Project

Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security

Hearing on "How Mandatory Minimum Sentencing Laws Transfer Power From Judges to Prosecutors"

June 26, 2007

Thank you for the invitation to testify before the Subcommittee today on the issue of mandatory sentencing. I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal justice policy issues. I have been engaged in this work for 30 years and am the author of two books and many journal articles on various aspects of current policy.

This hearing is being held in the wake of the mandatory sentences given to two U.S. Border Patrol agents convicted of the shooting and coverup of an alleged drug smuggler fleeing to Mexico. While the circumstances of the case are unusual, they are in many ways illustrative of the problems that have beset the federal courts since the adoption of mandatory penalties in the 1980s. Reasonable people may disagree about the sentences imposed in these particular cases, but they clearly point to the enhanced significance of prosecutorial discretion in the charging decision and the extremely limited ability of the judiciary to engage with the characteristics of the defendants.

My comments today will focus on the experience with the current generation of mandatory sentencing policies in the federal system, the vast majority of which have been applied to drug offenses, and the lessons we should learn from that in order to develop more effective public policy. My remarks will address three main themes:

1) Mandatory sentencing policies have been largely based on false premises, and are particularly unwise in the federal system.
2) Mandatory penalties in the federal system have not proven to achieve their objectives.
3) A variety of policy initiatives could be enacted that would result in more fair and effective sentencing, and would produce better public safety results.

MANDATORY SENTENCING POLICIES ARE BASED ON FALSE PREMISES

The mandatory penalties adopted by Congress in the 1980s were enacted to respond to rising rates of crime, and in particular to the perceived rise in drug abuse and drug-related crime. The theory behind mandatory penalties was that they would "send a message" to potential lawbreakers that regardless of their personal circumstances they would all be subject to the same prison sentence. In focusing on drug offenses in particular, the rationale was that the scourge of drug abuse could be curbed by harsh and certain penalties.

Unfortunately, the theory and practice of mandatory sentencing was flawed in several key respects:

- *Mandatory sentencing is not always mandatory* – Mandatory sentencing was premised in part on a myth that many judges were imposing inappropriately lenient sentences and therefore, limiting their discretion would result in uniformly punitive prison terms. The criminal justice system, though, is comprised of multiple decisionmaking points at which discretion can be exercised, and in the case of mandatory sentencing, discretion has merely been enhanced in the prosecutors' offices. As seen in the border patrol case, prosecutors are now more influential than ever in determining which defendants will be charged with offenses carrying a mandatory penalty and which ones will be permitted to plead to a charge below the mandatory. The 1991 report on mandatory sentencing by the United States Sentencing Commission documented that in a sample of cases involving cases where a mandatory could have been charged, the dynamics of plea negotiations

resulted in 35% of defendants pleading guilty to a non-mandatory or reduced mandatory minimum offense. The Commission concluded that "Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised."

- *Deterrent value of increasing prison terms is very limited* – The effect of mandatory prison terms on deterring crime is limited because they address the "severity" of punishment rather than the "certainty." Research on criminal penalties over many years has demonstrated that deterrence is far more effective if the risk of apprehension ("certainty") can be increased rather than raising the level of punishment ("severity"). That is, people who don't expect to be caught, as few offenders do, are not thinking about the penalties they will face if convicted.
- *Increasing incarceration is less effective as a crime control strategy for drug crimes than for other offenses* – Whatever benefits incarceration may bring to crime control are significantly limited for drug crimes due to the "replacement" nature of the offense. For offenses such as murder or robbery, when an individual is imprisoned there is no "market" for another person to become a robber. But with drug offenses, incarcerating an individual drug seller essentially creates an opportunity for other sellers who seek to meet the demand for illegal drugs. Therefore, the impact on drug availability or use is often very modest.
- *Federal mandatories face additional limitations* – Even to the extent that one may believe that mandatory sentences provide some deterrent effect, federal drug penalties are likely to be particularly limited in their impact. This is a function of the fact that despite the rise in federal drug prosecutions, most

drug offenses are still charged as state crimes. Thus, even if a potential offender is considering the consequences of committing a drug crime, he or she will not necessarily assume that it will be charged as a federal crime.

FEDERAL MANDATORIES HAVE NO PROVEN RECORD OF SUCCESS

We now have 20 years of experience with mandatory penalties, so this provides a good opportunity to review that experience and to evaluate the effect of these sanctions on crime control. Overall, there is little evidence to support the idea that mandatory penalties have produced measurable gains for public safety. Key findings in this regard include the following:

- *Effect of federal penalties difficult to isolate* – While some proponents of these laws contend that they have been effective in reducing crime, there are in fact no studies available that isolate any impact of *federal mandatory sentences* in particular, as opposed to the expansion of imprisonment broadly. Since federal convictions represent less than 6% of all convictions annually, and those carrying mandatory penalties only a fraction of those, any contention that mandatory penalties in themselves are responsible for changes in crime rates is extremely speculative. A further limiting factor is that the mandatory penalties merely enhance punishments for behavior that is already criminalized. Therefore, in order to demonstrate any deterrent effect of mandatory penalties, one would need to show that they increase deterrence over and above whatever impact the previous penalties generated.

- *Fluctuations in crime rates demonstrate complexity of the incarceration-crime relationship* – Even to the extent that one might consider mandatory penalties to have contributed to the decline in crime in the 1990s, this experience is directly contradicted by trends immediately following the adoption of new mandatory sentencing laws in the mid-1980s. Nationally, crime rates rose by 17% from 1984-1991. This suggests that at best, rising incarceration has only an inconsistent relationship to crime, and that a host of additional factors are far more influential.
- *Federal mandatory penalties contribute to over-federalization of crime control* – A key development in court processing since the 1980s has been the expansion of federal prosecution, particularly for drug crimes. In many instances this has involved federal charging for cases that many believe would be more appropriately handled under the purview of state justice systems. Mandatory drug penalties have contributed to that shift by establishing more severe penalties than many states would impose, thus encouraging greater levels of federal attention by prosecutors seeking to impose maximum penalties.
- *Drug quantity levels for crack cocaine encourage prosecution of low-level offenders* By establishing mandatory penalties for crack cocaine beginning at just five grams these laws inevitably result in disproportionate prosecutions of low-level offenders, precisely the opposite of what federal policy should encourage. Analysis by the U.S. Sentencing Commission documents that 62.5% of crack cocaine offenders are prosecuted for low-level activities, primarily serving as street-level dealers. In theory, the resources available to the federal system enable it to address the complex and high-profile crimes that may be too difficult for state systems to address, yet the current penalty

structure inappropriately burdens the federal system with cases that state prosecutors are in fact well equipped to handle.

- *Mandatory penalties have exerted a disproportionate effect on communities of color* – In combination with law enforcement practices, federal mandatory minimums have produced unwarranted disparate effects on Black and Latino communities. This has resulted from arrest rates among minorities that are disproportionate to the degree that these groups use or sell drugs, aggravated by the lengthy terms required by mandatory penalties. Mandatory penalties are not necessarily the source of these disparities, but they compound the effect of disparities produced earlier in the system. According to the U.S. Sentencing Commission's report, *Fifteen Years of Guideline Sentencing*, "…this one sentencing rule [crack cocaine mandatory penalty] contributes more to the difference in average sentences between African-American and White offenders than any possible effect of discrimination." In addition, these dynamics have contributed to a delegitimization of law enforcement in many communities of color, based on a widespread perception that these communities have unfairly been the target of overly zealous prosecutions. Such trends harm the relationship between law enforcement and the community that is vital to effective policing, while also diverting resources from addressing other community public safety concerns.

RECOMMENDATIONS FOR MORE EFFECTIVE PUBLIC POLICY

Developments over the past two years suggest that now is an appropriate time for Congress to consider the adoption of policies that would utilize court resources more effectively and produce better public safety outcomes. These developments include the *Booker/Fanfan* decisions by the Supreme Court in 2005 granting greater sentencing discretion to federal judges, the 2007 report to Congress by the U.S. Sentencing Commission on *Cocaine and Federal Sentencing Policy*, and state legislative changes. These all suggest growing support for granting the judiciary greater latitude to consider the unique circumstances of each offense in imposing a sentence.

Two consequences of the *Booker* decision are of particular relevance at this point. First, there is no credible evidence that federal judges have abused the newfound discretion granted to them. In fact, the proportion of sentences imposed within the guidelines range is not substantially different than in the pre-*Booker* period, and when judges have sentenced outside the guidelines the available evidence suggests that they have done so in a reasonable manner.

The second consequence of *Booker* is that the mandatory penalty structure is now even more at variance with sentences imposed in non-mandatory cases. Since two-thirds of drug cases involve mandatory sentences, federal sentencing in many ways now is two-tiered, with an overly restrictive sentencing regime for drug cases and a reasonably flexible system for non-drug cases. It is difficult to see how this can be justified under any coherent sentencing philosophy.

After examining the relevant information and analysis, my recommendation to policymakers is that federal mandatory penalties be repealed since they fail to contribute to public safety and produce a variety of negative consequences. Recognizing that such a step may take some time, I would offer the following interim recommendations for Congress to consider in addressing these issues:

- *Request that the U.S. Sentencing Commission conduct a study on mandatory sentencing* – In 1991, the U.S. Sentencing Commission produced a comprehensive report on federal mandatory sentencing which concluded that "…the most efficient way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines…rather than through mandatory minimums." It is now 16 years since the publication of that report and it would be appropriate for Congress to encourage the Commission to conduct a comprehensive analysis of the effects of mandatory minimums on public safety, deterrence, fairness in sentencing, and racial disparity.
- *Revise drug quantity levels to reduce excessive prosecutions of low-level cases* – As noted above, low thresholds for prosecution of crack cocaine cases in particular have resulted in a distortion of federal priorities. As long as mandatory minimums remain as public policy, establishing a threshold of 500 grams of crack cocaine for imposition of mandatory penalties would restore an appropriate balance in how drug crimes are sentenced.
- *Reconsider the role of drug quantity in federal sentencing* – The use of drug quantities to determine sentencing levels was premised on distinguishing between higher and lower levels of drug offending. But as has become clear over the past 20 years, the quantity of drugs that an individual is caught with

is not necessarily indicative of that person's role in the offense, and often suggests either a greater or lesser role in drug activity than is the case. Mandatory penalties thus unduly restrict judicial consideration of the full circumstances of an individual's conduct as it should be considered in reference to sentencing. Adopting such a policy should be quite feasible since, as we have seen, the U.S. Sentencing Commission has clearly developed a means of defining offender roles in its various reports on cocaine sentencing.

- *Consider expanding the use of the safety valve provision* – The adoption of the safety valve provision in 1994 for convictions carrying mandatory penalties represented a significant step toward providing more appropriate use of discretion by judges. The degree to which it is used in drug cases – currently more than a third of all such cases – is an indication that federal judges perceive the mandatory penalties to be far too severe in many cases. It is equally important to note that there is no evidence of any substantial problem with the sentences imposed in these cases, such as higher rates of recidivism than in comparable cases.

  I am aware that there is currently legislation pending to restrict the use of the safety valve in certain drug cases. This seems unwise to me for the primary reason that use of the safety valve is entirely discretionary. A judge who believes that a given defendant is inappropriate for such consideration even if he or she meets the legal requirements is under no obligation to sentence below the mandatory. Therefore, given the significant number of cases in which judges have found the safety valve to provide the most appropriate sentence, Congress should consider expanding the range of cases that could be considered for inclusion. It is difficult to see why providing judges with

the option, but not the requirement, of this sentencing policy would result in any abuse of this prerogative, given the experience to date.

Finally, let me suggest that members of Congress pay attention to trends in the states in regard to sentencing reform. In the period 2004-06, 22 states enacted reforms to their sentencing policies, including expanding access to drug treatment, probation and parole reforms designed to reduce time served in prison, and the development of a greater range of alternatives to prison. These reforms have been embraced by both Republican and Democratic governors, who have recognized that such policies provide more effective approaches to public safety while prioritizing scarce prison resources for offenders who present a substantial threat to the public. These policy changes have generally been met with public support and there are no indications of any serious backlash to these developments. Therefore, Members of Congress may wish to review this experience with a goal of assessing its relevance for federal sentencing policy.

I appreciate the opportunity to present this testimony to the Subcommittee and I would be pleased to work with the members in their ongoing consideration of these issues.

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Mr. SCOTT. Mr. Bonner.

TESTIMONY OF T.J. BONNER, PRESIDENT, NATIONAL BORDER PATROL COUNCIL (AFGE), CAMPO, CA

Mr. BONNER. Thank you, Chairman Scott, Ranking Member Forbes, other distinguished Members of the Subcommittee, for the opportunity to try and put a human face on one of these cases. I represent 11,000 front-line Border Patrol agents. This agency has a long, proud history dating back 83 years. In that span of time—and bear in mind, when I entered on duty 29 years ago, there were about 2,500 Border Patrol agents, a relatively small agency. In that short span of time, more than 100 officers have given their lives in the line of duty. As we speak, every 8 hours a Border Patrol agent is assaulted in the line of duty. It is a very dangerous job. It is a testament to the high-quality training that in almost every circumstance when these agents are confronted with danger, that they respond correctly according to their training.

The incident that occurred on February 17, 2005, in Fabens, Texas, was no different. Ignacio Ramos and Jose Compean, when confronted with an armed drug smuggler who wielded on them with a gun, responded properly when they opened fire to defend themselves.

Now, how they ended up in Federal prison is a mystery to me because I have examined facts there. And let us be clear about one thing: There were only three eye witnesses, the two agents and the drug smuggler. Everyone else who was near that area had their vision completely obstructed by an 11-foot-high levee road, so they could not see what happened. And we have physical evidence that was taken from the body of the smuggler about a month later by a U.S. Army colonel, and this colonel testified in court. And also his statement as part of the investigative record shows that the smuggler's body was turned at the moment of impact, indicating that the agents were telling the truth when they said that the smuggler was running dead away from them and turned with his left arm and pointed something at them. Now, they had a split second to determine what that object might have been. Many of us have had the benefit of months to ponder what someone could have possibly been pointing at law enforcement officers as he was fleeing from them. I can't come up with a different answer. It was a gun. Someone who is carrying $1 million worth of marijuana, in my experience as a Federal law enforcement agent, is going to be armed, and that is borne out by the experience of many of my colleagues.

The fact of the matter is this person absconded. He got back across the border, so we will never know with certainty. The real mystery is why did the U.S. attorney choose to believe a drug smuggler over the word of two sworn Federal law enforcement officers?

This case is very troublesome, it is troublesome to the public; it is troublesome to not just Border Patrol agents, but other law enforcement officers who are sitting back wondering how this could have happened in the United States of America.

I realize that the focus of this hearing is on mandatory minimum sentences, but you can't get to a sentencing phase if you don't have

a prosecution. Why were these agents prosecuted in the first place is a question that simply has not been answered to my satisfaction.

With respect to the mandatory minimum sentences, it bears noting that U.S. attorneys have great discretion as to whether or not to bring those charges in the first place. There was an incident in January of this year down in Del Rio, Texas, where Border Patrol agents, State and local law enforcement officers were fired upon by an individual with a high-powered .30-06 hunting rifle. When he was arrested, he stated that the only reason he stopped firing at the law enforcement officers was because he ran out of ammunition.

The same U.S. attorney who prosecuted Ignacio Ramos and Jose Compean, Johnny Sutton, did not bring charges of 18 U.S.C. 924(c), use of a firearm in the commission of a crime of violence. He merely charged him with assault against a law enforcement officer, which carries a 20-year maximum penalty, no minimum penalty.

This case cries out for an investigation. I am not asking for a decision on the spot, but I am asking that this case be fully investigated. It is quite obvious that the Administration is not going to lift a finger to investigate itself, so it falls upon the Congress to take that action, to appoint someone who is impartial and empowered to go in, subpoena people, and get to the heart of this matter, because with each passing day that these agents are allowed to rot in solitary confinement in prison, the public confidence goes down. The confidence of hundreds of thousands of law enforcement officers around the country is declining. This is a crisis of confidence that needs to be addressed now. Thank you.

Mr. SCOTT. 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 MINIMUM SENTENCING LAWS – THE ISSUES

PRESENTED BY

T.J. BONNER

NATIONAL PRESIDENT

JUNE 26, 2007

The National Border Patrol Council appreciates this opportunity to share the views and concerns of the 11,000 front-line Border Patrol employees that it represents regarding some of the issues related to the prosecution of Border Patrol Agents Ignacio Ramos and José Alonso Compean.

Few cases in recent memory have evoked such a strong emotional response, and for good reasons. The prosecution of these two Border Patrol agents raises a number of serious questions and concerns about the fundamental fairness of our system of justice, as well as whether or not its checks and balances adequately protect against abuse by overzealous prosecutors. Although our judicial system is unquestionably one of the best that has ever been developed in the history of civilization, it is by no means perfect. Mistakes occur from time to time, but once they are identified, they must be quickly remedied in order to maintain the confidence of the public.

Before examining the effect of mandatory minimum sentencing laws on this case, it is important to determine whether the underlying facts justified the prosecution of these agents in the first place. If they did not, the discussion of mandatory minimum sentencing laws in this context becomes little more than a theoretical exercise.

Although some of the relevant facts in this case 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. Warme, 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 Warme, 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 trial, when Colonel Warme was asked if the "bullet was fired directly into the back of the person who was shot, or was it fired at an angle through his body," he responded that Aldrete-Davila's "body was on angle to the bullet," and that "the bullet went in on an angle." He also stated that "if [the person who was shot] were turning, as [the prosecutor] demonstrated, [the shooter] would have to be right behind the person." In other words, at the moment that the bullet struck him, Osvaldo Aldrete-Davila was running straight away from the Border Patrol agents, and his torso was twisted back toward them.

This supports the agents' claim that as the drug smuggler was running away, he turned back and pointed a weapon at them. Logically, the only object that someone fleeing from law enforcement officers would turn around and point at them would be a firearm. Long-standing experience has

shown that almost all smugglers carry weapons while transporting large quantities of drugs. With the street value of his load of marijuana exceeding a million dollars, Osvaldo Aldrete-Davila had a very large investment to protect, and in all likelihood was armed that day.

In light of these facts, the only way to conclude that Agents Ramos and Compean should have been prosecuted is if the word of a known drug smuggler is given more credence than the sworn statements of two law enforcement officers, and also if the physical evidence as well as the laws of physics are ignored. In this case, that is precisely what happened. The public statements of the U.S. Attorney's Office for the Western District of Texas make it clear that these Border Patrol agents were prosecuted because the U.S. Attorney believed that they shot an unarmed suspect who was running away, destroyed evidence, engaged in a cover-up, and filed false official reports.

In support of the contention that Osvaldo Aldrete-Davila was unarmed, U.S. Attorney Johnny Sutton points to the fact that all of the Border Patrol agents at the scene of the incident, including Agents Ramos and Compean, testified that they did not see the drug smuggler brandish a weapon as he slid into or climbed out of the drainage ditch. This does not prove that he was 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 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 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 agents to orally report such actions within one hour of the incident. If the shooting were justified, he reasons, the agents would not have hesitated to make the required report. Again, the truth is far less dramatic. Both agents believed that everyone at the scene knew that shots had been fired. In fact, the April 12, 2005 Memorandum of Activity prepared by the Office of Inspector General of the Department of Homeland Security corroborates this, stating that its investigation disclosed that all nine of the other Border Patrol agents "were at the location of the shooting incident, assisted in destroying evidence of the shooting, and/or knew/heard about the shooting." Significantly, none of these other employees were ever charged with any crimes for their actions or omissions on that day, and only three of them

were accused of administrative violations, and that was not until late January of this year. The primary charges in those actions revolved around their alleged false statements to investigators and lack of candor during the investigation. Interestingly, the failure to report the discharge of a firearm is an administrative infraction that, by the agency's own rules, is punishable by a "written reprimand to 5-day suspension." It is also noteworthy that the highest-ranking supervisor at the scene of the incident not only escaped any form of punishment, but has since received two promotions.

Finally, the allegation that Agents Ramos and Compean filed false official reports is based upon the mistaken belief that they should have mentioned the discharge of their weapons in the report concerning the seizure of marijuana. The Border Patrol's Firearms Policy specifically precludes that, however, requiring that all "supervisory personnel or INS investigating officers are aware that employees involved in a shooting incident shall not be required or allowed to submit a written statement of the circumstances surrounding the incident. All written statements regarding the incident shall be prepared by the local INS investigating officers and shall be based upon an interview of the INS employee." [Emphasis in original] The rationale for this prohibition is explained in one of the preceding sections of the policy, requiring that all "supervisory or 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 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 October 23, 2005, shortly before the trial of Agents Ramos and Compean was scheduled to begin, the Border Patrol and Drug Enforcement Administration apprehended another 753 pounds of marijuana belonging to Osvaldo Aldrete-Davila in a van parked in the back of a residence near the same area of the border where the February 17, 2005 shooting occurred. 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 Osvaldo 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 in the trial against Agents Ramos and Compean. Amazingly, the Judge agreed to conceal that vital information from the jury. She also agreed with the U.S. Attorney's Office that the level of violence along the border between the United States and Mexico had no bearing on the state of mind of Agents Ramos and Compean on the day of the incident, and the jury was not allowed to hear evidence concerning that issue either. (On an average day, three assaults are launched against Border Patrol agents.) Similarly, testimony raising serious questions about the integrity of the Border Patrol agent assigned to the Willcox, Arizona Border Patrol Station who initially reported the shooting to the Office of Inspector General was not allowed in open court, and remains sealed. This individual, who was has been a close friend of Osvaldo Aldrete-Davila since childhood, remains employed as a Border Patrol agent, has never been disciplined for associating with a known drug smuggler and failing to report it, and in fact has been praised by the U.S. Attorney for the Western District of Texas.

Although U.S. Attorney Johnny Sutton has stated that he believes that the penalty levied against Agents Ramos and Compean is too harsh for the crime, this position is the height of hypocrisy. Federal prosecutors have extraordinary discretion concerning which charges to file in any given case. In the prosecution of Border Patrol Agents Ramos and Compean, for example, U.S. Attorney Sutton originally charged them with violations of 18 U.S.C. § 113(a)(1), "assault with intent to commit murder," which carries a maximum penalty of 20 years imprisonment; 18 U.S.C. § 113(a)(3), "assault with a dangerous weapon, with intent to do bodily harm," which carries a maximum penalty of 10 years imprisonment; and 18 U.S.C. § 113(a)(6), "assault resulting in serious bodily injury," which also carries a maximum penalty of 10 years imprisonment. None of these charges have any mandatory minimum sentence associated with them. As the trial approached, U.S. Attorney Sutton added several more charges: one count apiece of violating 18 U.S.C. § 924(c)(1)(A)(iii), "discharge of a firearm in relation to a crime of violence," which carries a mandatory minimum sentence of 10 years imprisonment; one count apiece of violating 18 U.S.C. § 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 earlier this year by 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.

As the foregoing demonstrates, the problem lies not so much with the underlying statutes, but with the misapplication thereof. In the case of 18 U.S.C. § 924(c), which carries a mandatory minimum penalty for using or carrying a firearm during and in relation to any crime of violence, it is highly unlikely that Congress intended that it be applied to law enforcement officers who are using the tools of their trade – firearms – within the scope of their official duties. On the other hand, its application to rogue officers who utilize their service weapons in the furtherance of intentional crimes of violence or drug trafficking could very well be appropriate. In the case of Border Patrol Agents Ramos and Compean, however, the levying of this charge was clearly not justified. The facts of that case demonstrate that they had a good faith belief that Osvaldo Aldrete-Davila pointed a weapon at them. In such a circumstance, it was clearly inappropriate to charge them with a violation of that statute.

Everyone who is involved in any aspect of our system of justice has an obligation to ensure that it is administered fairly and equitably. If that does not happen, public trust in the entire institution suffers. The recent case involving Durham County, North Carolina District Attorney Michael Nifong wrongfully prosecuting three Duke University lacrosse players illustrates this point very well, and also demonstrates how the system of checks and balances is supposed to weed out overzealous prosecutors who overstep their boundaries. In the case of U.S. Attorney Johnny Sutton, however, not so much as an inquiry has been initiated, despite the swirling controversy.

This case raises troubling questions about the judgement and motives of the U.S. Attorney for the Western District of Texas. It not only undermines the public's confidence in our system of justice, but also destroys the trust of those charged with enforcing our laws, and could quite possibly cause some of them to hesitate at a crucial moment, jeopardizing their lives and/or the safety of the public. This untenable situation needs to be resolved immediately. Today marks the 160th day that

Agents Ramos and Compean have been incarcerated for crimes that they did not commit. Shortly after arriving in prison, Agent Ramos was viciously attacked by five inmates, sustaining multiple contusions and lacerations, as well as two herniated discs. Both agents now languish in solitary confinement to protect them against further attacks.

While ideally the executive branch of government should resolve this matter, it is quite obvious that it is unwilling to do so. Since the intervention of the judicial branch could be perceived as a conflict of interest, it falls upon the legislative branch to take action. A full and impartial investigation needs to be conducted by an independent counsel with subpoena and prosecutorial jurisdiction over this and all related matters. Further inaction will only serve to exacerbate the crisis of confidence that now besets our Nation's system of justice.

Mr. SCOTT. And I just remind you, you indicated that this hearing is on mandatory minimums. Many of the issues that you have and the questions you have asked are being considered now on appeal, and we don't want to inject ourselves in that process. The impact of that case, though, for this hearing is on the fact that the judge had to sentence at sentencing and could not consider anything other than the mandatory minimum when they were sentencing. And that is what we want to make sure we focus the attention on.

Ms. Nunn.

TESTIMONY OF SERENA NUNN, J.D., ANN ARBOR, MI

Ms. NUNN. Initially I would like to thank this Committee and FAMM for affording me this opportunity to share my experiences and opinions regarding mandatory sentencing provisions affecting thousands across the country. Also I would like to emphasize that nothing I say today should be interpreted as my failure to recognize the far-reaching negative consequences that illegal drugs has had on communities across the country. To the contrary, I understand how the illegal drug trade has ravaged communities and individuals across the country. Moreover, I fully accept responsibility for my actions and understand that I deserved punishment. However, I will state unconditionally to this Committee that the wide net cast in the effort to remove major drug traffickers from the community has taken many potentially first-time offenders out of the community for lengthy periods of time.

With that being said, I will briefly discuss how mandatory minimums affected me. I was raised in a single-parent home in the inner city of Minneapolis. I was the eldest of three. In high school I wrote for the school yearbook and newspaper. I was also homecoming queen and a cheerleader.

I graduated from high school in 1987. After graduation I attended Morris Brown, an Historically Black College in Atlanta, Georgia. While in college I experienced financial difficulties. In the summer after my first year, I returned home. I planned to work, save money and return to Morris Brown College, but that never happened. I met a guy named Monty during the summer after my first year in college. After we began dating, it was obvious that he dealt drugs.

In May 1989, Monty and several others were arrested for attempting to purchase 20 kilos from a Government informant. Within a month of his arrest, at age 19 I was indicted on three Federal felony counts involving the distribution of cocaine. Our trial lasted 5 weeks. Then on December 22, 1989, a jury returned a guilty verdict, and I was taken into custody. In May 1990, the sentencing judge wanted to give me a lenient sentence due to my age, limited role in the conspiracy and the fact that I had no prior criminal record, but Federal mandatory minimums forced the judge to sentence me to 15 years and 8 months.

In December 1997, the Minneapolis Star Tribune newspaper in Minnesota featured me in an article about mandatory minimums thanks to FAMm. And in December 1997, I received a letter from an attorney who was willing to review my case on a pro bono basis. After he reviewed my case, he decided that we should file a Presi-

dential commutation of sentence. The commutation was filed in March of 2000 with the support of the Federal sentencing judge in my case, the Governor of Minnesota, the State attorney general in Minnesota, the Federal prosecutor in my case and our congressional Representative in Minnesota.

On July 7, 2000, I received a Presidential commutation and was released from prison that day. Since my release I received a bachelor of arts degree, I received a law degree. I currently work as a law clerk for a criminal defense attorney, and I cohost a radio talk show.

I would just like to add that my lengthy sentence due to mandatory minimums placed a severe strain on my family, it made my transition into society extremely difficult, and had it not been for a strong support system, it would have diminished all of my hope in becoming a successful, productive citizen back into society.

Simply put, I feel that mandatory minimums should be abolished, and they should allow judges to regain their discretion. Thank you.

Mr. SCOTT. Thank you.

[The prepared statement of Ms. Nunn follows:]

PREPARED STATEMENT OF SERENA NUNN

I was raised by a single parent in the inner city of Minneapolis, and I had a good childhood. I did well in high school, writing for the yearbook and school newspaper while juggling cheerleader duties, and was elected Homecoming Queen. In 1987, I graduated from high school. After graduation, I attended Morris Brown College in the fall of 1987, and I became the first person in my family to attend college.

My mother had planned on subsidizing my college costs but was unable to do so due to personal and financial problems. Unable to support myself at school, I returned to the inner-city environment that I had tried so hard to leave. My plan was to work, save money and return to Morris Brown, but that never happened.

After returning to Minneapolis, I began dating a young man named Monty, who seemed to do well for himself. After moving in with him, it became evident that he was dealing drugs. Stupidity, naivete and love kept me in the relationship.

On May 17, 1989, Monty and several others were arrested for attempting to purchase twenty kilograms of cocaine form a government informant. Within a month of his arrest, at age nineteen, I was indicted on three federal felony counts involving the distribution of cocaine. While living with Monty, my voice was recorded through wiretaps, answering our phone and passing messages between him and his drug associates.

I was convicted of the three charges against me at a trial that included twenty-four co-defendants. The judge wanted to give me a lenient sentence due to my age, limited role in the conspiracy and the fact that I had no prior criminal record. But the federal mandatory-minimum sentencing laws forced the judge to sentence me to fifteen years and eight months.

In December 1997, after eight years in prison, The Minneapolis Star Tribune featured me in an article about mandatory-minimums. Soon after, I received a letter from a young attorney whom only a week earlier had been sworn to practice law. He reviewed my case on a pro bono basis and determined that my only hope of an early release was if President Clinton commuted my sentence. At the time, President Clinton had commuted fewer than five sentences. My attorney devoted a great deal of time to my case, and in March 2000, he submitted my clemency petition. On July 7, 2000, President Clinton commuted my sentence and I was released that day.

A decade in prison taught me many invaluable lessons about life. Shock was my immediate reaction to daily confinement. I could not fathom living the next fifteen years without privacy, and constantly being told when to wake, eat and sleep. I ultimately survived the mental tribulations by refusing to lose sight of my future, telling myself that my early dreams of earning a college degree were not quashed, just postponed. I also realized that my actions in Monty's conspiracy contributed to my community's degradation and punishment was warranted. However, a fifteen year

eight month sentence seemed extremely unfair considering I was a first-time, nonviolent offender.

After five years in prison, I had laid the foundation for my future by completing several college and self-improvement courses. Eight years into my sentence, however, I began to feel depressed as a result of spending most of my twenties in prison, and I still had several more years left, which would stretch into my thirties. I survived depression through prayer, the support of my family and friends, by hardening my determination, and telling myself that despite bleak circumstances, nothing could prevent me from reaching my goals.

After my release I attended college full-time at Arizona State University ("ASU") and worked twenty-hours a week in the political science department. While working on my bachelors degree at ASU, I devoted a significant amount of time to traveling the country, speaking with members of Congress, law students, undergraduate students and special interest groups about the impact of federal mandatory-minimum sentencing laws. In 2002, I graduated from ASU with a degree in Political Science.

In 2003, I began attended the University of Michigan Law School. During law school, I worked at the Public Defenders Service in Washington, D.C. In 2006, I graduated from the University of Michigan Law School.

Currently, I work as a law clerk for a criminal defense attorney in Detroit, Michigan. Additionally, I co-host a Public Affairs Program on one of Detroit's radio stations.

Mandatory-minimums negatively affected my life in many ways. They stole many of my productive years in life because I went to prison at age 20 and was not due for release until age 34. Fortunately, I received a Presidential Commutation so I had the opportunity to redeem myself. However, there are hundreds of women, and men, serving lengthy sentences under mandatory-minimums who will not receive a Presidential Commutation and will serve each day of their sentence.

Mandatory-minimums placed a severe strain on my family members. After my incarceration my immediate family fell apart. My mother fell into a deeper depression. My sister, with whom I share a very close relationship, moved away to another state, and my younger brother, who was 13-years old, felt alone and hopeless. Approximately six years into my incarceration, my younger brother was convicted of murder. My grandmother, who was a pillar of strength in my life, developed health problems during my incarceration. Unfortunately, ten years into my incarceration she passed away.

As a result of the mandatory-minimum sentence I received, I was removed from society for almost eleven years. Once I was released, technology was a major obstacle in my life. I did not know how to operate items that are a part of everyday use. For instance, I did not know how to properly operate a computer, use a debit card at the grocery store or gas station, or know that public bathrooms had self-flushing toilets. Technology continues to evolve and when a person is removed from society for such a long period in life it makes the transition back into society extremely difficult.

After many years of my incarceration, I felt that I was a different person, mentally and spiritually. All I wanted was a second chance to try again in life, to show everyone that I could be a productive citizen, and that I did not need fifteen years of incarceration to become a better person. However, as the years droned on it became harder to believe that my future would be successful because I felt as though I was ready to be released, yet I was still incarcerated wasting away. If I did not receive a commutation, then mandatory-minimums would have robbed me of my hope that I would get another chance in life.

Simply put, mandatory-minimums should be abolished to allow judges to regain their sentencing discretion.

Mr. SCOTT. And I thank all of the witnesses for your testimony.

We will now have questions, and I will begin recognizing myself for 5 minutes. We have been joined by the gentleman from North Carolina Mr. Coble and the gentlelady from Texas Ms. Sheila Jackson Lee. And Mr. Davis has been in.

First, Mr. Mauer, is there any evidence that mandatory minimums reduce recidivism?

Mr. MAUER. No, there is no evidence that shows that. And keeping people in prison longer does not reduce recidivism. People are going to make it or not make it based on their family and community support when they get out and what we do that is constructive

in prison, but mandatory sentencing has no effect. And, if anything, one can argue that it is counterproductive. In States where you have a chance to earn some good time or parole release, there may be some incentive built in to participate in programming in prison which is taken away when you have a mandatory sentence.

Mr. SCOTT. You indicated that there was little deterrent involved in the longer mandatory minimums. Do you have research to support that?

Mr. MAUER. Well, we do know that the research, as I indicated before, on sort of certainty versus severity, is very compelling in showing that potential offenders will respond somewhat to greater law enforcement. The example I always think of is if we are traveling on a highway, some of us have been known to go above the speed limit from time to time. If it is a holiday weekend and there are more State troopers out, most of us will go at the speed limit. So the certainty has changed, and it changes our behavior. But most of us don't know whether the penalty for speeding is $50 or $100 or whatever, and so we are not really paying attention to the severity of the penalty because we don't expect to get caught. It is only when that chance of certainty changes that we may change our behavior.

I think if there is anything in terms of research on mandatories, the most obvious cases, just the impact of the war on drugs, we have increased the drug offender population in our prisons and jails from about 40,000 people in 1980 to nearly a half million today, and one would think that if the idea of mandatory sentencing and massive incarceration was a way to send a message to drug users and drug sellers, we should have sent that message with great force by now, and certainly drug abuse remains a problem in many communities.

Mr. SCOTT. Let me ask Judge Hinojosa, the punishment for—along the same lines, the punishment for crack is substantially different than the sentencing for powder; that for 5 grams of crack, you get 5 years mandatory minimum, and you can get probation for the same amount of powder. Is there any evidence that the more severe punishment has encouraged people to use powder rather than crack?

Judge HINOJOSA. We don't have any evidence of that. As you know, we are again urging Congress to revisit this issue, because as our report points out, the 100 to 1 ratio has created and continues to create problems with regards to the type of individual who might be punished under the mandatory minimum ratio of 100 to 1 between crack and powder. And the Commission itself has taken some action with regards to the guidelines which we consider a very partial remedy to a problem that needs to be seriously addressed by Congress, and we again urge that action by the Congress.

Mr. SCOTT. You talk about the safety valve and why that—let me ask Judge Cassell, because you mentioned the case where you had to sentence somebody to 55 years. Why was that person not entitled to a safety valve consideration?

Judge CASSELL. The safety valve didn't apply to his kind of case. It is not applicable in 924(c) cases. It wouldn't be applicable in the case of the Border Patrol agents that has been discussed.

Mr. SCOTT. Where it is applicable, why doesn't it remove the manifest injustice in the kinds of sentences that have to be imposed? I have talked to a number of judges who have indicated similar same-day sentences for someone with an obviously much more severe crime got much less of a sentence because of the mandatory minimums. Why doesn't the safety valve solve most of those problems?

Judge CASSELL. Well, the safety valve is a step forward, but it doesn't apply in all cases. There are five requirements that people have to meet to satisfy the safety valve exception, and some cases simply don't fit into those five criteria. The basic problem here is that judges aren't given the opportunity to assess individual circumstances of individual cases.

Mr. SCOTT. Thank you.

Mr. Roper, you indicated that you had a significant reduction in crime because you were able to impose long sentences. Why couldn't you have achieved that result with traditional long sentences rather than mandatory minimum long sentences?

Mr. ROPER. Well, I think the reason is, it is that threat of going to jail. It could be under the guidelines. Sure, you could do it just like that if the guidelines were mandatory, but the problem is, you know, a lot of people don't want to cooperate against drug trafficking organizations just because they have a sense of public—of duty. They do it because they are in a position where they have to do it. And I think we need those tools to be able to garner the cooperation of these lower-level drug dealers, give them a break.

That is one reason that many times 924(c)s don't apply, the mandatory minimums don't apply. People do choose to cooperate. And being somebody that is right on the front lines, we need that.

People call us, Chairman, to rid these communities of problems, and we have to have the tools to do it. We can't do it just from wiretaps or just from the sense of waiting for people to come forward. We need to infiltrate those organizations, and if we don't have the tools to do it, we can't do that.

Mr. SCOTT. My time has expired.

Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman. First of all, let me thank all of our witnesses for being here. We are on a limited time period, so I may have to cut you off because I want to get as many questions in as I can.

I want to set the stage first of all, because one of the things we do in these hearings, we bring in six witnesses and we tend to blend apples and oranges, and we listen to testimony and we are trying to say, who is talking about this? Is that the issue we are really looking at?

Part of our job is to make sure we get the apples in the right basket, the oranges in the right basket and so forth. And one of the things that I am looking at here, let's look at, first of all, procedure, how we change this.

We have today the Chairman of the Crime Subcommittee who is here, who has said this violates common sense, mandatory sentencing laws are ineffective in stopping crime, it is wasting taxpayer money, no careful consideration by Members of these bills.

We have the Chairman of the full Committee; at any time we could bring a bill before the full Committee saying, do away with mandatory sentences, and let's vote on it, and let's have a debate on it and see if the Members agree with all these things.

And I encourage them. If that is the route we need to go, bring the bill up. We don't have to have any more hearings on it. Let's just do it.

The second thing that we look at is, we blend State and Federal issues. We talk about, sometimes, what is happening in the State system, what is happening in the Federal. But then I heard the Chairman raise this argument today. He said—didn't understand why border agents doing their job end up being prosecuted under the law.

Mr. Bonner, that is exactly what you are saying. It doesn't have anything to do with whether it is a mandatory minimum or not.

What your big issue is today, they should never have been prosecuted at all. If we went to the Nifong case with the prosecution of the Duke lacrosse players, and let's say not only was he able to get an indictment by a grand jury, but he somehow got a conviction, we wouldn't be in here arguing that we ought to do away with the rape laws in North Carolina. We would be saying it should never have been prosecuted.

Mr. Bonner, I want to ask you—you raised a good point in your testimony. You said, why did U.S. attorneys choose to believe the word of a drug smuggler over two sworn officers? And I agree with you. But that prosecutor had the discretion of whether to bring that charge in the first place, and he also had the discretion of whether simply to bring it with assault, with serious bodily injury, which was the underlying offense.

If those agents had gotten 8 years instead of 10 years, would that have been any less egregious in your eyes?

Mr. BONNER. No, it wouldn't have. If they had received 1 second, it would have still been a gross miscarriage of justice.

Mr. FORBES. So your major concern today—and it is a rightful concern—was why they were prosecuted in the first place. Is that a fair——

Mr. BONNER. That is a fair characterization.

Mr. FORBES. And Judge Cassell, I listen to you and have the utmost respect for you and appreciate your being here.

You talked about the message that came to crime victims, of disparity with mandatory sentences. But there is also a message that goes to crime victims for judges who have that discretion and abuse it by releasing individuals with slaps on the wrist when they commit serious crimes.

We talked about the message to taxpayers when mandatory sentences result in unfair sentences. But there is also a message to taxpayers from judges that release people without giving them adequate sentences. Talking about the message to criminals that they get, it is also a message if we say to criminals, if you do the crime, you are going to do the time.

We had a hearing in New Orleans that just astounded me because the reason we went down there was because we hoped that—somebody hoped, I think, that we were going to find out that there were all kinds of problems after Katrina. In reality, what we found

out was New Orleans had a lot of problems before Katrina and after Katrina; and one of the major reasons—look at these statistics, 7 percent of the individuals arrested ever went to jail and 12 percent, including the ones for violent felonies and murders, ever went to jail. And we had people coming in testifying; it was creating huge problems with morale for police officers, huge problems in corruption down there.

My question to you is, we are always trying to strike a balance, and balances aren't easy. When President Clinton signed the law that you had to impose that sentence, when he signed the law on the case with—in Mr. Bonner's case, I know he didn't intend that these results were going to take place. And we always have to modify and get the law; it just doesn't mean we throw the baby out with the bath water.

In the case of New Orleans, for example, I know it is egregious, but what should we do in those situations, Judge? Should we still give them unfettered discretion in how they continue to hand down their sentences?

Judge CASSELL. I think you are exactly right. We have a balance here. Somewhere between a 55 years for somebody like Mr. Angelo—let me suggest the perfect balance here is what the Sentencing Commission has come up. They have put together guidelines that cover every single case——

Mr. FORBES. Mr. Cassell, with all due respect, I have got cases right here where the judges aren't doing that. They are given sometimes 46 percent, 50-some percent and these are in serious rape cases and pornography cases that are tough cases. And from our position on the legislature, sometimes you sit back and you just say, I don't know how we are going to get those judges to do it. And one of the methods we have are mandatory sentences.

Mr. Roper, you have lived this. You see it on the streets. It is not theory to you. How important are these mandatory sentences to you in dealing with the crime you have to stop every single day?

Mr. ROPER. Well, like I said, it allows us to get cooperation from folks at a lower level, to work up the food chain, so to speak. And it also allows us to take these people out of the community that are violent.

Many of the—what you would consider maybe midlevel drug dealers, sometimes those are the most violent offenders that we deal with that—in addition to being gang members, drug trafficking organizations, that they also are very violent.

Mr. FORBES. And if you don't get them off the streets, then they take good people like Ms. Nunn sometimes and they bring them into those crime networks, too. Is that not a fair statement?

Mr. ROPER. Yes sir, they do. That is the sad thing about it. It ruins communities.

Mr. FORBES. Thank you.

Mr. Chairman, my time has expired.

Mr. SCOTT. Thank you.

Mr. Conyers.

Mr. CONYERS. This is so important, this hearing. I know Marc Mauer is sitting to your left, Mr. U.S. Attorney, and I think he is entitled to make some comments about the discussion that has

gone on, that my good friend, the Ranking Member who, I am sorry, is leaving us now——

Mr. FORBES. Temporarily. I will stay to hear——

Mr. CONYERS. Because I am going to talk about you, my man, and I don't want you——

Mr. FORBES. I will stay.

Mr. CONYERS [continuing]. I don't want you to leave and say, Wow.

As Chairman, I am working overtime and breeding bipartisanship in the Judiciary Committee. And it is long overdue, and I want to do it.

But what my colleague—who, if I remember his track record on these matters, is still a proponent of mandatory minimums and the death penalty and the gang bills. And then he invites us to vote it out of Committee and bring it up for a vote.

Well, let's work on that together, Mr. Forbes. And I would be willing to—and yes, I will yield.

Mr. FORBES. Mr. Chairman, first of all, I will proudly say I am very much in favor of the gang bills. I think we have enormous gang problems in this country. I am proud—I will continue to work on that.

And I still remember the first——

Mr. CONYERS. But what about mandatory minimums?

Mr. FORBES. I will get to that. And I am sure the Chairman will give you as much time as you will need, if you don't mind yielding to me since you are the Chairman.

When we first brought the gang bills before this Committee, your question to me was, do we have a gang problem in the United States? I don't see a gang problem.

Today everybody acknowledges the gang problem. The question is, what do we do about it? The death penalty, I believe in the death penalty. I don't mind saying today that I think the death penalty cures crime.

The final thing, let me just answer your question on mandatory minimums. I don't believe in mandatory minimums across the board. I think we have an egregious case, and what Judge Cassell said, we have got to look at that situation, what Mr. Bonner's case is; I think we have to examine those situations. We don't get it right every time. We don't always hit the mark.

But what I also do is, I know what Mr. Roper says is echoed by law enforcement agents across——

Mr. CONYERS. Well, I don't know if I shouldn't have let you leave the room since you are using all my time. But I do this in the spirit of bipartisanship because we are going to get to the bottom of this for the first time in 12 years in the House of Representatives.

And now I want to turn to Marc Mauer, who has been before this Judiciary Committee more times than I can recall, to help us put this in perspective.

And remember, Mr. Mauer, I am trying to win over Republicans to support this. So that is why I am being very deferential.

Mr. FORBES. Chairman, with all due respect, you have got the majority. We are riding along here.

Mr. CONYERS. Yeah. I have got the majority for 6 months. As a matter of fact, 6 months and—well, it is 5 months and 25 days,

so—and it is a pretty thin majority, as I get reminded almost every day around here.

Mr. Mauer.

Mr. MAUER. I will stay away from political discussion. You can work that out.

But thank you, Mr. Forbes, for being here.

A couple points on this, first, in terms of looking at sentences of incarceration. As you point out, the New Orleans system, I think by all accounts the New Orleans system, as everybody recognizes, was a mess before Katrina and certainly very much afterwards.

I think the problem we have in any system, not just New Orleans, if we look at who was sentenced to a period of incarceration, rarely is this solely a function of what the judge has done. Much more often it is a question of the strength of the evidence the prosecutor has. It has to do with plea negotiations; 90 percent of our convictions are results of plea negotiations, the strength of the case, the quality of the defense attorney. And so the judge may or may not be influential on any given case.

Often, I think the prosecutor would say, I am glad I got a conviction even though they don't get much time because it is better than nothing. So we have to look very carefully at what is going on there.

On the question of controlling judges, I don't know who all these so-called "soft judges" are these days. I really don't see much evidence. Certainly, in the Federal system, we have, you know, excellent data pre- and post-*Booker*, and judges are behaving, I think, quite responsibly overall and taking these very seriously, as are State judges.

The broad picture, of course, over the last 30 years we have increased our prison population by over 500 percent. So, somehow, somebody is sending many people to prison and keeping them there for a long time.

Now, whether or not we think that is a good idea, I would point out one of the things that has happened is, we have had I think a very severe imbalance in resources that has developed. The more money we have put into the prison system, the less we have on the front end of probation and parole supervision; and so probation and parole officials will tell you over and over again that their caseloads have mushroomed, they can't provide effective supervision.

So I think we have got into a very vicious cycle now whereby offenders who could be managed appropriately in the community with services and supervision, now judges and probation officials are often unwilling to take a chance on that because they don't feel they have the proper supervision, and so prison becomes the option. That is why the whole reentry problem has been recognized so significantly.

So I think this imbalance, inappropriate incarceration of far too many low-level offenders, has put the system considerably out of balance and, I think, done a disservice to what everybody would agree is that prison should be used for violent, dangerous offenders that we need to be protected from. Other people can be supervised in the community.

Mr. CONYERS. Mr. Chairman, based on your promised generosity, I ask for 1 additional minute.

Mr. SCOTT. Without objection. But pending that, I would like to recognize the presence of the gentleman from Texas, Mr. Gohmert.

Mr. CONYERS. Thank you very much.

We are in a very complicated situation here, and I am just happy that Howard Coble is here and Judge Gohmert is here, because these are the folks that are going to help us move toward some kind of conclusion on this mandatory minimum.

We have got some more hearings that we will probably have to reach, and I would like to ask Mr. Bonner in terms of his feelings about—not about the case, about these two Border Patrol agents, which I think deserves an investigation and a discussion with U.S. Attorney Sutton at another time. But how do you see us moving into a more realistic version of criminal justice?

We are fighting gangs, we are fighting drug dealers. In what direction should we be moving from your experience and perspective?

Mr. BONNER. Well, that is a very broad question, Mr. Chairman. We are clearly losing the war on drugs. Our borders are out of control. Many of our cities have crime problems that are completely unacceptable. So I think we need to rethink some of the strategies that we have been pursuing.

Clearly, when the cost of drugs is cheaper today than it was 10 or 20 years ago, and when our agents on the frontlines at the border estimate that we seize perhaps 5 percent of all the narcotics coming across the border, we are not winning the war on drugs.

We are not securing our borders. We are not stopping illegal immigration. And I could go on for a long time about ways to improve the system, but I think it requires a fundamental rethinking of some of the aspects.

I mean, for example—and I know that I am taking up precious time, but you opened the door here. So, you know, for example, on the issue of why do 3 or 4 million people come across our borders illegally every year? They are coming looking for work, and they can find work, and as long as that happens, they will come across.

And the drug smugglers are using them as a shield, as a diversion; and that explains why it is so easy to get anything, whether it is drugs, terrorists or weapons of mass destruction across our borders.

Mr. CONYERS. Thank you so much.

And I thank the Chairman for his generosity. I have a lot of questions for the judges, and we will hopefully get back. Thank you, Mr. Scott.

Mr. SCOTT. Thank you.

The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. Mr. Chairman, I apologize to you and the Ranking Member. I had two other meetings and I arrived belatedly. I came in just as Mr. Bonner was speaking. Good to have you all with us.

Mr. Bonner, most of us are not unfamiliar with the Border Patrol case about which you testified. What other prosecutions against law enforcement or Border Patrol officers have been initiated by U.S. Attorney Sutton?

Mr. BONNER. Mr. Sutton?

Mr. COBLE. Several?

Mr. BONNER. Several. The Deputy Sheriff out of Rock Springs, Texas, Gilmer Hernandez; Border Patrol Agent Gary Brugman out of Del Rio, Texas; you had Border Patrol Agent Noe Aleman out of El Paso; you had FBI Special Agent in Charge Hardrick Crawford.

Mr. COBLE. Do you have concerns about the way those matters were handled?

Mr. BONNER. I do. I think we need to open up an investigation and relook at all of those cases because the conduct of the U.S. attorney there—and this is not a universal slam against the U.S. attorneys because we have many, many fine U.S. attorneys in this country who get it right consistently. But when you have one who is exhibiting a pattern of going after the wrong people and giving immunity to drug smugglers, then I think you have to reopen those cases and take a long, hard look at them.

Mr. COBLE. Well, I don't want the tone or tenor of my question to imply that I am trying to slam-dunk Mr. Sutton. I don't even know him. But let me ask you this—pardon?

Mr. GOHMERT. Go ahead.

Mr. COBLE. Thank you, Tex.

But, Mr. Bonner, let me ask you this: What specific concerns, if any, do you have concerning the prosecutor's decision to immunize the victim in the Border Patrol case about which you testified?

Mr. BONNER. Well, I bristle at the use of your word "victim" because the two victims here were the Border Patrol agents.

Mr. COBLE. Yeah. I don't disagree with that.

Mr. BONNER. The drug smuggler was immunized. And out of gratitude for that, he continued in his nefarious ways and was caught in October of that same year, another load in Clint, Texas, very near the same area where he was shot by Border Patrol agents when he pointed a weapon at them.

A van containing 752 pounds of marijuana was discovered, and the occupant of that house pointed him out, pulled him out of a photo lineup, named him by name, physical description. And his brother, who was in Mexico corroborated that. His brother said that he couldn't come back because he had been convicted on drug charges in the U.S. and would be incarcerated if he came back. But he said, he is the guy that the Border Patrol agent shot about 6 months ago, taking it back to February of that year.

Mr. COBLE. Well, as I said, Mr. Bonner, none of us is unfamiliar with that case. We all are very familiar with it. And, Mr. Chairman, this may not be for me to say but I think serious consideration should be commuting those sentences, if not pardoning. But that will be for another day.

I yield back, Mr. Chairman.

Mr. DAVIS. Mr. Chairman, can I make a parliamentary inquiry?

Mr. SCOTT. The gentleman is recognized.

Mr. DAVIS. Simply for a parliamentary inquiry, I don't want to waste my questions on this. But there has been a lot of testimony about a particular U.S. attorney and a particular U.S. case, and I wonder if the record could be opened to give him a chance to respond.

Mr. SCOTT. It could be. People can send in whatever they want. The testimony here is not on the case itself or the prosecution, but

the impact of mandatory minimums. People can ask questions, I guess, about whatever they want to ask.

Mr. DAVIS. I am just simply troubled, Mr. Chairman. There has been significant commentary about a case that is under way, and the opposite point of view has not been represented.

Mr. SCOTT. And on appeal—it is presently on appeal. The point is well taken. And if the gentleman submits any response, without objection, it will be accepted.

The gentleman from Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman. I am concerned about the case involving agents Ramos and Compean, and I appreciate the opportunity that you have taken, Mr. Bonner, to let the Nation know about what happened. And it was in the context of this hearing, which happens to be on mandatory minimums, that you did that. And you did it because these two individuals, Agents Ramos and Compean, have been victimized by the mandatory sentencing scheme that we have enacted into law here. And that is something that Mr. Roper, the former DA and current U.S. attorney, feels very passionately about in terms of the propriety of our maintenance of the mandatory minimums because he feels like they go far toward enabling crime to be addressed, and crime rates would go down as a result.

But, nevertheless, what has happened here with Agents Ramos and Compean is, after they were charged and convicted of assault with a dangerous weapon and aiding and abetting each other, I suppose, in that offense and also deprivation of rights under color of law—and I don't know what the particulars of the case were, but it does appear from your testimony that someone was shot in the buttocks, but they were shot from a side angle; and they were a fleeing felon with $1 million worth of marijuana.

And so I guess an argument could be made that these Border Patrol agents were simply doing their job.

However, a prosecutor decided to charge them, and he charged them with a violation of 924(c), which is discharging a firearm during the commission of the assault or during the commission of the deprivation of rights, whichever the case may have been. And that was a prosecutorial decision that was made by U.S. Attorney Sutton who, by the way, did not make that same decision in a case involving a fleeing felon who used a weapon and unloaded it and stopped firing only because he had no more ammunition.

That is what you have testified to, correct, Mr. Bonner?

Mr. BONNER. That is correct.

Mr. JOHNSON. And so the prosecutor is exercising his discretion, and that discretion translates into what kind of mandatory sentence, if any, would be applicable.

And so Compean and Ramos got charged with 924(c), Mr. Roper, but the other gentleman did not, prosecutorial discretion, and the judges don't have the ability once the prosecutor makes the call as to who—as to what to charge with. Then you are locking the judges into what they can sentence the individual for, not the facts of the case, but the charge that he was convicted of.

So what we have done is shifted discretion away from the judges to exercise discretion, and hoisted it upon the prosecution which—by the way, Mr. Roper, I am very impressed with you and, in terms

of your desire, your strong desire to enforce the law. And I would say that you probably would be biased in favor of prosecution as opposed to defense. And I would think that the judges, after hearing the evidence, would be less biased toward one group or one arm versus the other; in other words, prosecution, defense, the judges sitting up there and making the decision would be able to weigh all the evidence and decide without bias what the proper sentence was.

I believe that is the reason why you are here today, Mr. Bonner, is because the case of the Border Patrol agents illustrates this shift of power from the judges to the prosecutor. What do you say about that, Mr. Roper?

Mr. ROPER. Well, if I understand your question right——

Mr. JOHNSON. My question is, isn't it true that mandatory minimums shift discretion, sentencing discretion, ultimately away from judges and into the hands of prosecutors?

Mr. ROPER. I think to some degree that is true, yes.

Mr. JOHNSON. Let me ask you, Judge Cassell and Judge Hinojosa, what are your thoughts on that?

Judge CASSELL. I think you have hit the nail on the head when you transferred discretion into the arms of the prosecutor, they are a biased party in the sense that they are representing one side. They are representing the prosecution. Our job as judges is to try to balance the competing concerns; and I think from an institutional perspective, we are better able to exercise discretion, better able to make the individualized judgments that are required in sentencing decisions and is one of the parties in the case.

Mr. JOHNSON. Judge?

Judge HINOJOSA. Congressman, we have a system in this country basically where the prosecutors do have discretion. When we get stopped for speeding, it is the policeman who decides if we are going to be given a ticket or not. That is just the way the system is set up. However, it does lead to situations where a prosecutor can bring something before a court based on particular charges and therefore deprive the Court of the opportunity to view a range of sentences.

That is why I, as a judge and certainly as the Chair of the Sentencing Commission, believe strongly that the sentencing guidelines try to do away with that prosecutorial discretion to some extent with regards to the modified real offense conduct that is used by a judge to determine what the sentence should be; and it goes beyond just the particular charges, but the actual conduct in commission of an offense as well as all the other factors that would be considered.

So that is one way that the sentencing guidelines system that was set up by the Sentencing Reform Act was supposed to bring this into the judges to, overall, look at the picture of an offense as opposed to whatever particular charges were brought.

Mr. JOHNSON. Thank you. I have run out of time.

Mr. SCOTT. Thank you. The gentleman's time has expired.

The gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman. I appreciate that. And we had a parliamentary inquiry on the propriety of having hearings with ongoing litigation. I didn't know if that was talking about

something today or the EPA hearings yesterday with ongoing litigation.

Mr. DAVIS. I was talking about the events today.

Mr. GOHMERT. Not about the——

Mr. DAVIS. Yes. Clarity was needed on that.

Mr. GOHMERT. Okay. Well, I will mention, yesterday was also regarding a matter that is involved in pending litigation.

But you know, the mandatory sentencing issue has really surprised me as a former district judge and briefly in the court of appeals in the State system. Every felony that we undertook had a range of punishment; there was a minimum and there was a maximum, and as a judge, I had discretion to go anywhere within that range. That was the legislative prerogative, to make a range of punishment, and I never thought much about that being this horrible thing called a mandatory minimum. I had the range of punishment.

And I appreciate the judges' comments about their sentencing guidelines. Some of us remember when the guidelines took place, some of our Federal judge friends were just going nuts about how horrible they were, how they could usurp control and discretion of the Federal judges. And then it seemed, as time went on—kind of like the frog you put in cool water and eventually warm it up—the judges got quite comfortable with their discretion having been taken away. And then to the point that it seemed, in the last year or two I have been in Congress, we heard judges saying, we haven't had that much problem with the guidelines because they took their discretion away, so they didn't have to stand as much heat for sentences.

But I just have difficulty understanding why there is so much problem with the legislature setting a low end and a high end and, Judge, you have got the middle.

Judge Hinojosa, do you have a problem with having a low end, or is it that the low end is sometimes too high?

Judge HINOJOSA. I guess the question is on the issue of mandatory minimums. I guess what mandatory minimums do do is, they treat everybody exactly the same. What the Commission has always felt is that the guidelines and the individual considerations that get taken into effect, whether it is a mitigating role or an aggravating role, whether it is the use of a firearm or not the use of a firearm, in the sense that if there is no firearm, there is no potential difference in the sentence. And so the point that is made on the Commission's part is that the 35-50-3a factors talk about the background in the offense conduct of the individual defendants as well as all these other factors that are to be considered. The guidelines that take those into effect in that, that system is different from a system that automatically starts treating everybody exactly the same and where you have some cliffs where you might end up with just a very small amount with regards to drugs, for example, putting you over the top, as opposed to somebody who has just got slightly less.

Mr. GOHMERT. But that is the minimum, right, Judge? That is not the maximum that you can do. That is just the low end; isn't that correct?

Judge HINOJOSA. Right.

Mr. GOHMERT. So I am not sure from your answer—well, my question was, do you have a problem with the mandatory minimum not being low enough or just having a mandatory minimum at all? And I am still not sure where we stand on that.

But I would also point out—I am not—I think McCain-Feingold was one of the biggest constitutional blunders we had at Congress that said, Gee, we want to sound like we are toughening up on this, and as I understand it, it provides for a mandatory prison sentence; and the President said, Well, gee, just be aware I am going to sign it if it comes up here; I will let the Supreme Court take care of it.

The Supreme Court said, Don't count on us to be constitutional. So—they punted too, so we ended up with a law that I think has serious constitutional issues. So it is important that we take a good look at these issues and not punt to another body because we can't count on anybody else.

And I do appreciate the hearing, and I appreciate the Chairman of the Subcommittee and the Committee of the whole indicating that this is an important issue. But it seems like the focus ought to be more on, are the mandatory minimums too high and what should those be, rather than should we have them at all, leaving absolutely complete discretion to the judge.

And my time has obviously expired.

Mr. SCOTT. Thank you.

The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chairman and the Ranking Member, the Chairman of the full Committee. This is a hearing long overdue and an important, instructive hearing by the witnesses' testimony to give us guidance for what I think is the chief responsibility of this Committee in particular—but the Congress, Congress first of all, oversight and legislative reform to the extent that it works for the American people and certainly protecting the Constitution.

And I do include in the Constitution the issue of the rights of victims and their families, and the rights of those, of course, who have been before the judicial system. So I hope that in my questioning—and I would ask the witnesses if they would give me brief "yes" or "no" answers.

And, Judge Hinojosa, I am very aware of how fast you spoke the first time around. But if I could start with you, and just be as brief as you possibly can be. Do you think it is possible to have a legislative fix for this issue dealing with mandatory sentencing? Can we analyze the facts and come up with a balance that might be responsive to your testimony?

Judge HINOJOSA. I would hope so. And that is a quick answer. However, you know, at the very least, Congress needs to revisit this issue and at least start looking at it. Certainly in crack, something needs to be done. The issue of the safety valve applies in drug cases. It doesn't seem to apply—it doesn't apply in other cases.

There are a lot of situations where I think that it is time for Congress to start looking at this.

Ms. JACKSON LEE. We should get involved?

Judge HINOJOSA. And I think from the Commission's standpoint, it is true, our last review was 16 years old. There is a changing docket in the Federal system. We are up to 37 percent of defendants in Federal court are noncitizens of the United States. We are up to about 24 percent of the docket is immigration. So this is a very different docket from what it was in 1991.

Ms. JACKSON LEE. Thank you.

Let me just point out the statistic in your Table One, demographics, which I find appalling. All mandatory cases, you have a percentage of 32.9 percent African American, 38.2 percent Hispanic. Do you include the Hispanics as immigration cases?

Judge HINOJOSA. In that table we do.

Ms. JACKSON LEE. And so if we were to look at this from an issue that really faces America on a regular basis, we have got a lopsided, almost seemingly discriminatory approach here where we have over 60 percent almost—in fact, 70 percent, it looks like, of the defendants are mandatory—happen to be minorities. Is that accurate from your table?

Judge HINOJOSA. It is on this table.

Ms. JACKSON LEE. The one I am looking at. I know there are further explanations, but I just want to get that on the record.

Judge HINOJOSA. We also have to realize that up to 43 percent of the docket is Hispanic, which is a big difference from 10 or 15 years ago, because of the growth of the immigration docket, as both of us know living in the Southern District of Texas.

Ms. JACKSON LEE. Absolutely. Which clearly points to your issue of, let's review this, let's have the oversight of Congress. Thank you.

Judge Cassell, you were very clear on the fact that the Judicial Conference wants to get back in the business of being judges. What is the single most important element of that message that you are getting? Why is it so important? Because some people are concerned that the abuse was going the other way, that you will—a judge, a southern judge of the 1960's, will throw the book at somebody who happens to be African American, let someone else walk.

How do you respond to that?

Judge CASSELL. I think we want judges to be able to make the punishment fit the crime. The only way to do that is to give the judges the opportunity to assess an individual case, an individual crime, an individual offender.

Now, you mentioned there may be some problems. We have in this country an appellate court system that, as the Supreme Court told us just a couple of days ago, can review the substantive decisions judges make at sentencing. I am a trial judge; if I make a mistake——

Ms. JACKSON LEE. That appeal process. Let me go to Mr. Bonner very quickly.

Mr. Bonner, your case is an outrage. I asked the President to pardon these individuals. But I think we want to get back on track. Let's focus on that judge. That judge could have done something different.

You were not in the courthouse. Do you know from family members—and this would be hearsay if you were under oath—but do

you know from family members whether the judge wanted to do something else?

Mr. BONNER. I actually was at the sentencing, and the judge's hands were tied.

And let me just quickly add that——

Ms. JACKSON LEE. We want to make this a sentencing issue so I want you to be able to say that. Do you believe the judge might have wanted to be more lenient?

Mr. BONNER. I think the judge was as lenient as she could be, given the constraints of the mandatory minimums. On the other charges, she downward—departed dramatically because she could have, I believe, in one case levied a 120-year prison sentence; and what we saw were 11 and 12 years, of course the 10-year mandatory.

I don't believe that Congress ever intended that people who carry firearms in the performance of their official duties be considered under that law when they are acting reasonably within of scope of those duties.

Ms. JACKSON LEE. Thank you. May I get just this last question from Mr. Mauer, please?

We have got incarcerated persons in under the mandatory sentence, many of them under light drug cases. Do you think part of our oversight should consider the aging incarcerated persons—nonviolent crimes, nonviolent, inside for something—such as a good-time, early-release program that might speak to prisoners 40, 45, 50 years old that complements this whole review of the sentencing process?

Mr. MAUER. Absolutely. And if you talk to corrections officials, they will tell you that is one of their biggest concerns, the cost of an aging prison population, the health care costs, and the fact that everyone knows after the age of 35 or 40, recidivism rates decline dramatically. So, in terms of any risk to the public, obviously this is a very low-risk population we are talking about.

Ms. JACKSON LEE. I thank you.

Ms. Nunn, I thank you so very much. Your story obviously—and I close on this note: You were very fortunate.

Look at what you have done. And I guess you would say—and I can't get the answer probably that you were very fortunate, but how many others are languishing that didn't get the opportunity? Is that a "yes" or "no"?

Ms. NUNN. Yes.

Ms. JACKSON LEE. I yield back. I thank the Chairman for his indulgence.

Mr. SCOTT. Thank you.

I recognize the gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. I appreciate that.

Judge Cassell, I know you have done a tremendous amount of work in a number of different capacities for victims of crime. And I have always admired your work, and I know that many in those organizations appreciate it.

Let me just ask you this: What, if anything, do victims of crime or victims' family members, in your experience, feel about mandatory minimums? When I was on this Committee in my first life, one

of the reasons we set up the Sentencing Commission and one of the reasons that many of us supported some mandatory minimums was the tremendous disparity across the board in Federal sentencing.

I specifically remember a case where I had a woman in my district from southern California who had received an enormous prison sentence on the Federal level for a certain drug offense when she happened to be down in Texas, from a particular judge at that time; and virtually every other judge in the Federal system didn't sentence that way. And the disparity just seemed to be so obvious. So I saw it from that standpoint.

But what about from the standpoint of victims who would say, wait a second? In this case, the person who assaulted me or killed my brother got this sentence. But someone over here got a far greater sentence. Same crime.

I know we tried to take care of that with the Sentencing Commission. The Supreme Court gave us a little more guidance on that, where it seemed to me, take the Sentencing Commission very seriously, but if you take it too seriously, it is unconstitutional. Kind of an interesting concept.

But—I understand what they were trying to do, but from the victim's perspective on mandatory minimum sentencing, can you give us any guidance on that?

Judge CASSELL. I think the interesting question is, why are some crimes subject to mandatory minimums and others not?

We mentioned the case just a year or two ago where the same day I sentenced Weldon Angelos to 55 years for carrying a gun to several marijuana deals, I had a murderer who had beaten an elderly woman over the head with a log. No mandatory minimum sentence in that case and the murderer got a shorter sentence than the man who carried a gun to a drug deal.

There are no mandatory minimum sentences for kidnapping, for rape, for sexual assault on a child. These crimes are covered in general by the sentencing guidelines. We have created a system where we have mandatory sentences for some situations, not for others.

I think the solution is to go with the guidelines across the board. I am with you on that. I think the guidelines deserve very serious consideration in all cases. We put in place an appellate system so that if a judge deviates from the guidelines without a good reason, that can be reviewed.

Mr. LUNGREN. Both above the guidelines and below the guidelines and either side could appeal even though that was a controversy at the time?

Judge CASSELL. Yes.

Mr. LUNGREN. So would you say that, in your opinion, we ought to get rid of all mandatory minimums, or we ought to go back and review those mandatory minimums that exist? I mean, do a full review and see how they comport with sentencing guidelines and see if they may be still necessary in some cases and not others? Or would you argue that mandatory minimum sentences, as a rule, are not good?

Judge CASSELL. I think, as a rule, they are not good. But I certainly understand you are going to need to prioritize your attention, and I would suggest you prioritize situations where you see

the mandatory minimum being one place and the guidelines somewhere else. I think that is your clue that you have got a serious problem.

When you see my case, Weldon Angelos, who was supposed to get 9 years or something like that under the sentencing guidelines, he ended up getting 55 years. That is an indication that you have got a difference between what the expert agency is recommending in a particular situation and what Congress has required.

Mr. LUNGREN. So you are suggesting we are not the expert agency?

Judge CASSELL. Well, I am suggesting—I am suggesting——

Mr. LUNGREN. The darn Constitution always gets in the way, tries to tell us what we are supposed to do.

Judge CASSELL. I am a strong believer in the guidelines.

Mr. LUNGREN. And the Constitution?

Judge CASSELL. And the Constitution, absolutely.

But you have created two voices. You want us to listen to the Sentencing Commission, and in that case they told me 9 years, and obviously you want me to listen to the mandatory minimum sentencing scheme. It is hard for us to follow two masters.

We certainly want to do the right thing. But we think there ought to be one clear message as to what should be done in particular cases. And the guidelines are the one thing that speak across the criminal code, across all crimes, across all offenders, across all circumstances. And so it seems to me they should be taking the lead in most of the cases.

Mr. LUNGREN. And Judge Hinojosa, I know the Sentencing Commission released that report on the disparities between powder and crack cocaine sentencing. And I recall when we started that disparity back in the 1980's; it was a response to the cries of certain communities in this country that they were being overwhelmed by this. And it was the powerful force that seemed to be upsetting their communities and hitting them in ways that weren't being felt in other communities.

Our response in the Congress was to say, well, one of the ways to do that is to create a real deterrent. So in those cases where we saw the presence of a particular type of cocaine really impacted the community, we were going to give tougher sentences there. I was one of those who went along with it at the time, thought it made some sense.

Is your suggestion that we find in retrospect that that disparity of impact in the community, based on the different types of cocaine, doesn't exist or did exist and no longer exists? Did we just make a mistake in Congress? What would you say on that?

Judge HINOJOSA. Since you invited the commenting, I think I will.

I think that situation explains to us how we sometimes in our country react to a specific situation and jump full steam ahead without seriously studying the issue. And as it turns out, 100-to-1 was not the correct ratio in the minds of anybody, or very few people, today; but emotionally, at the time, there was the additional factor of an additional incident that occurred that led everybody down this path.

And so my thoughts on that are, when we have these things happen in a particular case, we need to look at the overall big picture and study it.

The Commission has studied this particular issue for a long time; as you well know, we have sent the fourth report on this issue to Congress. And in our last hearing it was very hard to find anyone from all political spectrums, viewpoints, that would come up with the idea that a 100-to-1 ratio was the correct ratio.

Mr. LUNGREN. I know you are referring to the Len Bias case, I believe that occurred at that time. I will say that that did add impetus to the effort. But I will say that at that time we were receiving reports from all over the country, and it was a bipartisan—and I actually think it was a Member of the other party who brought that forward. And we thought we were responding to the request from the communities at that time.

I thank you for your comment.

Judge HINOJOSA. And I don't disagree with that. I just think that things change and when we find out more information, I think it is okay to revisit issues.

Mr. LUNGREN. Sure. Thank you.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

The gentleman from Alabama.

Mr. DAVIS. Ms. Nunn, your case is a paradigm for what I think Judge Cassell was talking about earlier. It is the way that the guidelines interact with mandatory minimums to create results that frankly don't make a lot of sense on paper.

In your case, what triggered the 10-year minimum in the first place was that the judge decided to hold you accountable for a certain amount of cocaine and then what pushed you to the upper end of the guidelines was, he held you accountable for even more than that. So I want to focus my questions on the provisions of the sentencing guidelines that operate that, frankly, give judges and prosecutors so much power and give juries, frankly, so little power.

It is the relevant conduct provisions; and let's take drug cases, for example. A jury may hear a case of, say, 10 or 15 accounts alleging a variety of transactions over a period of time. A jury can find the defendant not guilty of 14 of those counts and they can find him guilty of 1 count, say, of possession with intent to distribute of 25 grams if I am not guilty of all the rest of the conspiracy.

When the judge gets to sentencing, she is able to take into account, if she wishes, all of the conduct that was the basis of the acquittal, conduct that was never presented to the jury, conduct on which there is very little evidence, and to base the sentence on a finding; and her standard is only a preponderance of the evidence, not beyond a reasonable doubt.

I prosecuted as an AUSA for 4 years. It didn't matter what the jury did as long as there was a threshold conviction. The whole heart of the case where someone got a lot of time or virtually no time came down to what the prosecutor wanted to put on as relevant conduct and how the judge wanted to evaluate that.

That strikes me as a significant problem in its own right. It undoes the congressional intent for consistency in these cases. It

undoes the effectiveness of the guidelines because here is how it works: If the prosecutor decides, I don't want to tell the judge about the extra 3 kilos of cocaine that was seized in Miami, he doesn't have to do it. So it gives an enormous amount of influence to prosecutors.

And the Supreme Court has tried to weigh into this, and I would like your reaction to this, Judge Cassell and Judge Hinojosa. It strikes me that, frankly, they have left as many questions as they have clarified. The *Booker* case several years ago, the U.S. Supreme Court said, well, we are bothered by the massive transfer of authority to judges and prosecutors.

Judge Stevens said, there may be some seventh amendment implications, it may undercut the right to a jury trial, so therefore, we are going to unanchor the guidelines from their mandatory character. So wait several years, another Supreme Court case. Last week the same Supreme Court which raised questions about the guidelines and said they are not mandatory says, well, they are not mandatory, but if you follow them, you are presuming to be acting correctly on appeal.

Now, in the real world where judges don't want to get reversed and try to figure out how to avoid being reversed because they like good win-loss records too, a judge says, well, I know I don't have to follow the guidelines, but if I follow them, I will almost certainly be upheld and appealed.

So the Court giveth with one hand and taketh away with the other; and frankly, the Court several years ago invited Congress to come back and revisit this issue. The Court said, Congress, you have had now 20 years to look at how these guidelines operate; go back and tell us if you are content with this system. And unfortunately, the Congress said, well, we would rather have the Court tell us what is constitutional. We don't want to even accept the Court's invitation to act.

But I would like to get the judges to comment on what you think if you are comfortable with commenting on it, what you think of the Supreme Court jurisprudence and the inconsistency of the jurisprudence in the last several years of the guidelines.

Judge CASSELL. I think, rather than criticize the Supreme Court, let me just hit this particular point which is, I have already criticized some of the things Congress has done. I think the real problem with mandatory minimum sentences is that they are one-dimensional.

Take Ms. Nunn's case, the only what kind of drugs were involved and what was the quantity? Once he knew what the quantity was, that was the end of the story; that was the sentence that had to be imposed.

The advantage of the guidelines is that they are multidimensional. They allow not only consideration of quality, but the role in offense, any other mitigating or aggravating circumstances. And that is what we have to do.

You mentioned judges worried about win-loss records, I think we are not so much worried about win-loss records as we are about doing the right thing in particular cases. We have defendants. We have their family members. We have victims, as Mr. Lungren mentioned. We have prosecutors and defense attorneys.

We have those sentencing hearings with everyone there, and yet our hands are tied in these mandatory minimum sentencing cases; we can't do what we think is the right thing.

Mr. DAVIS. Judge, this is the concern. I am not impugning judges.

The point that I am making is, the way that the system works does not have the transparency that I think the Congress wanted or the transparency that the Sentencing Commission intended, Judge Hinojosa. The way the guidelines work as a practical matter is the most important part of whether someone gets the fate that Ms. Nunn has, or if someone walks out in a few years is not what the jury decides; it is what a given AUSA decides, what a judge decides.

And I will make this final point. In my experience on both the prosecution's side and the defense side, here is what drives whether or not prosecutors bring in particular relevant conduct. Did the defendant cooperate? If the defendant didn't cooperate, we will throw the book at him. If we got ticked off because the jury gave us a "not guilty" verdict on some counts, we will really come back and make a fourth relevant conduct stage? If the defendant files a motion that is too obnoxious, maybe we will come back and decide to bring an even more relevant conduct?

Some of those considerations are blatantly impermissible, some of those are borderline; but in all instances, they give an enormous amount of power to judges as opposed to the prosecutors to put facts in front of judges or not to do so.

And I can't imagine that that is what Congress intended 20 years ago. And I hope it is not what the Supreme Court intends either.

Judge HINOJOSA. Could I answer?

Mr. SCOTT. Certainly.

Judge HINOJOSA. Congressman Davis, I guess I am one of the few judges left who has done sentencing without the guideline system and before the Sentencing Reform Act. I did it for about 4-1/2 years and then have done it since 1987 with the sentencing guidelines.

I will say that the guideline system did bring transparency and due process that we did not have. As you all know, beforehand, I would just go on the bench and say, zero to 20 years, and pick out whatever sentence it was. I did not have to give the defense nor the prosecution to go ahead and explain to me why I might be wrong.

I considered acquitted conduct without ever telling anyone, because it made sense to me to treat somebody differently who might have heard evidence, might have committed another crime, as opposed to somebody who had not committed, in my mind, another crime. So the transparency, the due process, has been brought about by the Sentencing Reform Act through the guidelines.

The other thing that the statute actually says under Title 18, section 1661, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence. And so what we do have is, we do have the relevant conduct.

We do have—the Supreme Court in Watts said that acquitting conduct based on the discretion of the judge could be considered. The guidelines themselves say it has to be a reliable indicia of evidence in order for you to be able to proceed with regards to relevant conduct.

My impression has been that prosecutors try to give us too much relevant conduct. My role as a judge is to try to figure out exactly what some informant may have said is really true, or not, with regards to the amount of the drugs. So I guess it depends on the prosecutor to some extent. But we, as judges, have this role of trying to determine the facts and then determine the appropriate sentence. It is a difficult job. And I know it is difficult for Congress to deal with these issues also, but it is about the hardest thing that we do in the courtroom.

Mr. DAVIS. Chairman, if you would indulge me 15 seconds, I would simply make this comment. I would like to see us move to a world where, frankly, just as in civil cases, juries are asked to make a range of factual findings in addition to liability. I would like to see us move toward a world where juries made factual determinations of whether or not the person was accountable for 500-to-1.5 kilos, whatever the other ranges are. I would like to see us move to the point where those determinations were made by juries so we didn't have, in effect, trials happening at the sentencing phase with a much lower standard of evidence when it happens with a real jury.

Mr. ROPER. Mr. Chairman, if I could just be recognized for a second.

I would hate to give the impression that prosecutors across the country are engaged in hiding relevant conduct from a judge. I don't permit that in my office. I never did that in the years that I served as the prosecutor, trying to manipulate the guidelines.

I think there is a responsibility prosecutors have to provide evidence so that the court will have the ability to consider the full options under the guidelines, and my fear is, if we do away with the guideline sentences, we will go back to what I saw as a prosecutor when I had a defendant brought in to testify that received 15 years in Texas for a bank robbery, pre-guidelines, and he was complaining because he had a defendant in his cell in prison that received 2 years in Federal prison for a similar type bank robbery.

Mr. SCOTT. Thank you. I would like to thank all of the witnesses for their testimony.

Excuse me. The gentleman from Texas.

Mr. GOHMERT. Could I ask unanimous consent to comment on Mr. Davis' good suggestion? Just 1 minute?

Mr. SCOTT. The gentleman is recognized.

Mr. GOHMERT. I think Mr. Davis makes a good comment. That might be of great assistance if we did require those.

In some limited cases in Texas State law we have started doing that. It is an enormous help. If the jury makes the finding, it takes us out of some unknown or unelected or unappointed person back there, who is just hired to make these determinations; and I think that would be very helpful.

And it does sound like, though, the mandatory minimum is not so much objectionable as it is the way they are enhanced up. And

if there were a way to look at that and maybe make incremental increases so it is not just a huge jump up to some 55-year sentence when it should be a 9-year; and the suggestion of Judge Cassell that maybe we look at that in terms of where are the discrepancies between the Sentencing Commission's recommendation and what the law requires and possibly make those areas where we could clean up with legislation.

I appreciate the gentleman's suggestion.

Mr. DAVIS. I thank the gentleman.

Mr. SCOTT. Thank you. I think we have to differentiate between the guidelines and what is permissible to ratchet things up, according to the guidelines, and a statutory mandatory minimum that ignores the guidelines; and if the statutory mandatory minimum is above what the guidelines would say, you would start off at the mandatory minimum regardless of mitigating circumstances and everything else.

So I think the comment was considering for the purpose of guidelines whether or not you meet the mandatory minimums. That is one question.

The other is—excuse me—for the purpose of guidelines whether you ratchet up the sentence, whether you can consider behavior for which you were found not guilty.

The mandatory minimums, you don't even get to the guidelines; you are stuck by statute with a minimum sentence. So they are slightly different situations, but they are, as you have suggested, very much overlapped. So that is something that we need to look at.

And we appreciate your comments. If there are no further comments, I would like to thank the witnesses for their testimony.

Members will have additional—who have additional questions will forward them, and we will forward them to the witnesses and ask that you answer them as promptly as possible for the record. Without objection, the hearing record will remain open for 1 week for the submission of additional materials.

Without objection, the Committee stands adjourned.

[Whereupon, at 11:32 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE LOUIS J. FREEH

I support House Bill 71 and the repeal of Delaware's mandatory minimum drug sentencing laws. When these laws were first passed, lawmakers hoped that these "tough on crime" sentences would catch those at the top of the drug trade and deter others from entering it. More than two decades later, we know better. Drugs are cheaper, purer and more available than ever before, and America's prison population has tripled to more than 2.1 million. Today, Delaware houses 7,000 inmates at a cost of $230 million per year. Delaware's prison and jail population has more than quadrupled in the last 25 years and our correction expenditures have soared. Still, drug use has not declined and our communities are not safer. We don't need any more evidence to know that these laws do not work.

As a former FBI agent, federal prosecutor, and federal judge, I have first hand experience in law enforcement, in prosecution, and on the bench, and I see clearly that Delaware's mandatory minimum drug sentencing laws should be repealed. Without question, drug dealers belong off our streets and in prison, but Delaware's mandatory minimum drug sentences do not apply only to dealers or violent offenders. Delaware's mandatory minimum drug sentencing laws are based solely on the type and weight of the drug involved. The equivalent of a few packets of artificial sweetener can be enough to trigger a mandatory minimum sentence. Take one away and no mandatory minimum applies. Add one and an addict faces a long term of imprisonment.

I have the greatest respect for law enforcement officers and the vital role they play in our criminal justice system. The hours are long and the work dangerous, and law enforcement officials should be given all of the tools necessary to do their jobs. However, we cannot arrest our way out of our nation's drug problem. With the repeal of mandatory minimum drug sentencing laws, Delaware's judges would again be able to consider fully all the aggravating and mitigating circumstances of each case, factors including physical and mental impairment, mental retardation and duress. With such discretion, judges will be equipped to identify drug dealers and imprison them; to recognize those in need of drug treatment and treat them; and to handle all offenders as unique individuals and sentence them appropriately. Delaware's sentencing guidelines and Truth-in-Sentencing Law would remain in force, helping to guide judges in their decisions and ensuring that offenders complete their sentences.

Research has shown that imprisonment alone does not guarantee public safety and there is no evidence that mandatory minimum drug sentencing laws are effective in deterring drug crime. With incarceration rates so high in Delaware, and without a corresponding drop in drug crimes or improvement in public safety, it is a matter of necessity that we explore effective means of reducing our expanded prison population through solutions that will help our state to focus its resources on violent offenders and on programs that will revitalize communities, reduce recidivism, and promote the successful reentry of ex-offenders back into society. It is time for Delaware to follow the growing momentum within our state and across the nation and join the many states including New York, Michigan, and most recently our neighbor Maryland, that have recognized the need for reform and repealed or restructured mandatory minimum drug sentencing laws. We need to do away with the short-term, flawed solution to drug crime posed by these sentences and focus our resources on proven alternatives to incarceration.

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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 MINIMUM SENTENCING LAWS –
THE ISSUES

JUNE 26, 2007

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 Forbes, Members of the Subcommittee, I respectfully submit this statement for your examination of federal mandatory minimum sentencing laws.

I applaud you for holding this hearing on an important matter that has long been both ignored and misunderstood. **This is the single most important issue your subcommittee can address when you consider its impact on crime in American streets and on the day to day operation of every facet of the federal criminal justice system.**

Mandatory minimum sentencing directly affects how the federal government uses its criminal justice resources. The failure of the Department of Justice to follow the spirit of the 1986 sentences has unintentionally allowed major criminal organizations to avoid prosecution and become more efficient – now selling cocaine of higher quality for less money than they did in 1986. Hopefully this hearing renews the critical process of Congressional oversight of the federal criminal justice system.

As Mr. Conyers, Mr. Lungren, and Mr. Coble recall, from 1981 through 1988, I was

Assistant Counsel to this subcommittee. During those years I was the subcommittee counsel principally responsible for federal drug laws, and oversight of the federal anti-drug effort.

In 1986, I was the subcommittee counsel principally 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 drug offenses, most infamously for crack and powder cocaine.

The law enforcement problem with mandatory minimums

The popular focus on the general unfairness of mandatory minimums, the racial imbalance of crack cocaine prosecutions specifically, and the excessive 100 to 1 ratio of crack and powder quantity triggers have concealed another critical failing of the current drug mandatory minimum sentences – **the minimal trigger quantities have distracted federal law enforcement agencies and prosecutors from their mission by improperly defining high level drug trafficking**.

All Members of Congress can agree that one consideration in Congress's determination of sentences for offenses is to identify the most serious offenses in order to guide the Justice Department to give its greatest emphasis to cases of federal significance. Congress's goal in 1986 in creating the mandatory minimum sentences was to redirect the Justice Department's priorities to **more effectively** fight the drug trade by focusing on disruption of high-level trafficking.

Defining the mission of federal drug enforcement

Congress needs to resolve the important question of the mission of federal drug enforcement. Drug cases completely dominate federal criminal dockets and criminal justice activities. These cases are brought by local United States Attorney offices.

Should each U.S. Attorney simply bring whatever drug cases of local significance are brought to him or her, in effect serving as local "super prosecutor?" That is, should the primary decisions about how to use the uniquely powerful federal criminal justice resources be decided locally on a case by case basis?

Or, should each U.S. Attorney be part of a nationally coordinated anti-drug team that focuses precious federal resources on cases of national and international significance? Should the activities of a few thousand federal agents and few thousand federal prosecutors be coordinated to target the most powerful and dangerous criminal organizations with undistracted in-depth and sophisticated investigations and prosecutions?

While Congress can recognize the temptation of the first role, the wiser approach is the latter. Otherwise, federal criminal justice initiatives will be scattered, haphazard and half-hearted. **Perhaps half the federal districts in the country should see no drug prosecutions at all because they do not have jurisdiction over genuinely appropriate federal cases.** The

number of prosecutors in many federal districts should be reduced so that they can be assigned to high-level investigations coordinated in Miami, Houston, Phoenix, San Diego, New York, etc. where enormous shipments of drugs arrive routinely for redistribution around the nation..

If America's anti-drug strategy is going to reduce the quantity and quality of cocaine sold in America's crackhouses or drive up the price of crack to discourage use and to encourage drug dependent persons to seek treatment, **the well-managed, sophisticated organizations that collectively deliver hundreds of tons of cocaine to the American market must be attacked and destroyed.** This is the unique mission of federal drug enforcement.

Does any Member of this Subcommittee imagine that the law enforcement agencies in Mexico, for example, have the sophistication, independence, resources, and integrity to effectively take down the major drug cartels that are rampaging across our border? Is any Member under the misimpression that these organizations' cocaine distributions are measured in grams as opposed to tons?

Just as the Sentencing Reform Act of 1984 brought a large measure of uniformity to federal sentencing across the nation's 96 districts, in 1986 Congress attempted to guide federal prosecutors to fight global criminal organizations involved in drug trafficking, money laundering, assassination and terrorism in a more nationally focused manner. An effective assault on these criminal organizations requires centralization in identifying and carrying out priority investigations. **Congress utterly botched the job by picking quantity triggers of 5, 50, 500 and 5000 grams of crack and powder cocaine to define high priority cases because these amounts are more typical of the amounts sold over a short period of time by an active cocaine retail operation.**

<u>The distraction of minor cases</u>

In my first year working for the House Judiciary Committee I learned an aphorism that I was told was an informal mantra in the Justice Department: "Little cases, little problems. Big cases, big problems." Congress hoped to address that problem by creating mandatory minimums and identifying categories of major cases, but Congress placed the bar at ankle height, and failed to change Justice Department patterns or practices.

Only the United States federal government has the resources to effectively combat global criminal organizations. But around the country, U.S. Sentencing Commission data demonstrate that federal agents pursue mostly local low-level, and street-level drug cases even though they trigger the mandatory minimums with 50 grams of crack or 5000 grams of powder. Frankly, they are wasting federal resources and, ultimately, betraying their local law enforcement allies, and the American people who are desperate to see progress in the war on drugs.

If the federal drug prosecutions were brought against appropriate high-level defendants, whatever their race, would there be political challenges about the racial mix of the defendants? I don't think so. The current scandal is that the majority of the overwhelmingly Black and Hispanic crack and powder defendants are low-level offenders receiving long sentences more

appropriate for major traffickers.

Congress' goals for the mandatory minimum legislation

In 1986, Congress had a laudable goal for the mandatory minimum legislation – **"to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources**." The Judiciary Committee said in its report, **"The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs."** (H.Rep't. 99-845, Part 1, Sept. 19, 1986, pp. 11-12).

This point deserves emphasis. First, by 1986, every state police organization, and most county and municipal law enforcement agencies of any size, had highly-trained narcotics agents and bureaus. Far more state and law enforcement officers than DEA Special Agents were engaged in the specialized tactics and procedures of enforcing the drug laws. Suppressing the illegal drug trade was not primarily a Federal government activity.

Second, throughout the 1980s, in numerous committee hearings in both Houses of Congress, Members of Congress expressed a strong concern for more effective coordination and division of labor in fighting the drug trade. Congress passed legislation in 1982 (vetoed), in 1984 and 1988 to try to require a more coherent, prioritized and focused federal drug enforcement effort.

Most Members of this subcommittee fully understood the enormous capacity of state and local law enforcement agencies to police neighborhood, local and city-wide retail drug trafficking. This capacity is even greater today than it was in 1986. For the past decade, state and local law enforcement agencies have collectively been making between 1 and 1 ½ million arrests for drug abuse violations each year. State courts impose about one-third of a million felony drug convictions annually. State prisons hold between 400,000 and 500,000 drug offenders.

In contrast, even after the vast expansion of the federal effort over the past two decades, the number of federal drug cases that are brought is dramatically smaller -- in the range of 20 to 30 thousand cases per year.

Congress's primary goal made sense: focus the federal effort, using the assistance of the military and intelligence agencies, the cooperation of foreign governments, and the ability to gather financial evidence globally, upon the cases promising the greatest impact in dismantling the drug trade and supply – the high level cases. Focus federal drug enforcement upon the most serious criminals – those who use their profits and acquire the power to assassinate, to corrupt, and to finance terrorism.

The Subcommittee's approach in 1986 was to tie the punishment to the offenders' role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because

the Subcommittee believed that this quantity was easy to specify and prove and "is based on the *minimum* quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." (*Ibid.* emphasis added).

However, we made some huge mistakes. **First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort.**

The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all. Unfortunately, without holding any hearings to gather expert advice and operating in haste and without full consideration of the implications, the Subcommittee also envisioned a federal enforcement role against the managers of the retail traffic. (*Ibid.)* Federal retail drug enforcement should be an anachronism. Forty and more years ago, when the national and international drug trafficking universes were much smaller, the Federal Bureau of Narcotics routinely made retail level arrests, in part because a retail dealer would have been likely to provide information to prosecute "up the chain" of distribution. However, now, retail distribution is many organizations and many transactions removed from the genuine large scale organizations. Major drug trafficking organizations are much larger, richer enterprises now than 40 or 50 years ago, and are a much greater threat to global stability.

The myth of an anti-Black crack law

In the years following the 1986 enactment, it became apparent that the Department of Justice, in its crack cocaine prosecutions, was disproportionately targeting African-Americans. In 1995, Dan Weikel, writing for *The Los Angeles Times* (May 21, 1995), reported that since 1986 no whites had been prosecuted for crack cocaine offenses in the federal courts in Los Angeles, Boston, Denver, Chicago, Miami, and Dallas, or seventeen states.

Even in 2006, the Department of Justice prosecuted ten Black defendants on crack cocaine charges for every white defendant. Because of the sentencing guidelines, low-level crack defendants, on average, get longer sentences than high-level powder cocaine defendants, according to the U.S. Sentencing Commission's 2002 report to Congress.

The apparent Justice Department emphasis on incarcerating black crack defendants has led to the myth that the crack sentences, compared to the powder sentences, were intended to punish blacks. **Congress did not intend to more harshly punish black drug offenders in 1986.** But the real inequality in sentencing crack and powder cocaine defendants legitimately demands reform. The inequality in sentencing has led to the observation that the quantity trigger ratios between crack and powder cocaine are 100 to 1, and the suggestion that the 100 to 1 ratio is the source of the racial disparity in sentencing.

The myth of the 100 to 1 ratio

How did the 100 to 1 ratio of 500 grams of powder to 5 grams of crack come about? The

suggestion that this ratio was based on a Congressional finding or understanding that crack was a "black drug" and powder cocaine was a "white drug" is false. Congress may have believed that the crack problem in 1986 was particularly acute in poor black urban neighborhoods, but that did not drive the selection of the quantity triggers.

Responding to the inflammatory idea that the ratio was designed with race in mind, an alternative narrative has been constructed – equally unfounded – that Congress determined that crack was much more dangerous than powder cocaine and therefore more deserving of greater punishment than powder cocaine on a weight basis. This is completely untrue as well.

I was at the table in 1986 when this bill was being drafted. The Subcommittee on Crime was attempting to apply higher punishments in the mandatory sentences strictly on the basis of the more significant role of the offender in the drug trafficking pipeline. Higher-level traffickers were to be punished more severely. Based largely on information that I obtained from an expert consultant to the Select Committee on Narcotics Abuse and Control, a Metropolitan Police Department narcotics detective named Jehru St. Valentine Brown, the Subcommittee concluded that a trafficker in 20 grams of crack cocaine was trafficking at the same "serious " level in the marketplace as a trafficker in 1000 grams of powder cocaine. We believed a "major" trafficker could be identified if he trafficked in 100 grams of crack or 5 kilograms of powder cocaine. This is spelled out in the report of the Committee on the Judiciary (H. Rept. 99-845, Pt. 1, pp.16-18). Coincidentally, these both were a ratio of 50 to 1. There were no findings regarding addictiveness of crack, the prevalence of *in utero* cocaine exposure (i.e., "crack babies"), or violence in the drug market, or other measures of harmfulness or dangerousness of crack *vis a vis* powder cocaine. **Congress never developed a ratio of relative harms between crack and powder to create a ratio between the quantity triggers.**

Many critics of the large proportion of and long sentences for low-level Black and Hispanic crack offenders have highlighted the 100 to 1 ratio to illustrate the irrationality of the crack quantity triggers compared to the powder cocaine triggers, since crack and powder cocaine are pharmacologically similar.

<u>The fallacy of only fixing the crack- powder ratio</u>

The emphasis on *the ratio* led some members of the Sentencing Commission, officials in the Clinton Administration, and U.S. Senators to fix the racially disproportionate prosecutions of crack cases by finding a new *ratio* between crack and powder to adjust the low crack cocaine triggers. Their approach, which has a certain logic, is to ascertain the correct *ratio* of harmfulness between crack cocaine and powder cocaine. **This misses the point of federal cocaine enforcement**. *Federal* cocaine quantity triggers should not be sending a message that crack is more harmful (that's the job for NIDA, CSAP, and the Department of Education). The quantity triggers should be sending a message to DEA agents and federal prosecutors that high-level cases are the only appropriate subjects for federal investigations.

The preoccupation with the ratio has led to bills that lower the powder cocaine quantity triggers to achieve the correct "harmfulness" ratio. Such bills fail to credit the proper role of

Federal drug enforcement and, more ominously, perpetuate the serious problem that the small quantity triggers present to the criminal justice system. **The law enforcement goal should be to elevate the federal focus to the highest-level, multi-ton traffickers,** not prosecute more low level powder cocaine traffickers on the mistaken impression that they are more likely to be white. Meaningful federal prosecutorial activity is being sacrificed to the symbolism of being tough on crack or being tough on powder cocaine.

Well-intentioned legislation now pending in the U.S. Senate risks repeating the mistakes of 1986 by affirming a flawed definition of a high level cocaine trafficker. The quantity triggers in those bills could be quickly measured by children with a kitchen scale. Congress must not fix the wrong thing which is the *coincidence* of a 100 to 1 ratio between tiny (50 grams) and insignificant (5000 grams) without fixing the fundamental mistake of 1986 – absurdly low quantity triggers for powder cocaine that lead federal agents away from targeting the heart of the illegal drug business.

Current evidence of the distraction of low quantity triggers

Low quantity trigger mandatory minimums have given the Justice Department the wrong signal about the drug cases Congress and the American people want fought with federal resources. They distract DEA and other Federal agents from the high-level cases.

The U.S. Sentencing Commission has compiled data that illustrate the system-wide misuse of federal mandatory sentences. The Commission deserves the nation's thanks for detailing in May 2007 the enormous number of insignificant cases brought by U.S. Attorneys around the nation, cumulatively, and on a district by district basis.

My nomination for the most egregious waste of federal criminal justice resources in a federal district for FY 2006 is New Hampshire. The United States prosecuted 41 crack cocaine cases with a median weight of 3.1 grams, and only 10 powder cocaine cases with a median weight of 200 grams. (U.S.S.C. 2007 Report to Congress on Cocaine and Federal Sentencing Policy, pp.108-114). What a waste of hundreds of thousands of dollars in agent, prosecutor, judicial, imprisonment and support staff time are in these cases!

In quantitative terms more appropriate examples of federal cocaine case selection in FY 2006 were:

	# cases crack	median wt. gms.	# cases powder	median wt. gms
Southern California	1	33.6	97	22,020
Puerto Rico	12	77.5	48	332,350
Arizona	4	143.0	147	13,040

Unfortunately the data do not reveal the fraction of these cases that may have been simply "mules," and not the leaders of organizations responsible for delivering such quantities.

Another example of wasted federal resources was **Eastern Virginia**, which had the highest number of crack cocaine prosecutions of any district in the nation, 253. Over one-third of

those crack cases involved less than 25 grams – all retail level cases easily prosecuted by Virginia's competent Commonwealth's Attorneys.

Crack cocaine is almost always only created by retail organizations a short distance from where it is sold. Crack is not the form of cocaine involved in international smuggling or national distribution.

Twenty years after the enactment of the crack and powder cocaine mandatory minimums, America's anti-drug effort is far from disrupting the heart of the global cocaine trade. Federal cases devoted to crack cocaine prosecutions are a distraction from that focus. Placing federal prosecutors in districts which have no role in the international drug trade to simply bring some drug cases of local significance is a waste of national resources.

Conclusion

Until Congress decides to repeal mandatory minimum sentences for the various reasons well expressed by other witnesses, the pro-law enforcement issue for reform of drug mandatory minimums is to set the quantity triggers at the appropriate levels for high level traffickers.

I suggest, for the ten year mandatory (up to life imprisonment), an appropriate quantity trigger that would properly direct the investigative energy of highly trained, dedicated and well equipped federal agents and prosecutors against major global criminals is on the order of one metric ton, 1000 kilograms of cocaine. For the five year mandatory (up to 40 years imprisonment), an appropriate trigger quantity to target mid-level but important cocaine traffickers would be in the range of 100 to 200 kilograms.

Similar revisions would make sense for all of the drug quantities set forth in 21 U.S.C. 841(b).

When these quantities become the typical levels of federal prosecutions – not 52 grams of crack cocaine nor 16 kilos of powder cocaine which was the median for high level traffickers in 2000 as reported by the U.S. Sentencing Commission in 2002 – then America's neighborhoods will be getting the federal drug law enforcement they deserve to fight their neighborhood's crack houses and open air drug markets. Then our communities may begin to enjoy a reduced cocaine problem that our White House National Drug Control Strategy purports to offer.

# # #

Defending Liberty
Pursuing Justice

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July 3, 2007

The Honorable Bobby Scott
Chair
Subcommittee on Crime, Terrorism
and Homeland Security
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Randy Forbes
Ranking Member
Subcommittee on Crime, Terrorism
and Homeland Security
U.S. House of Representatives
Washington, D.C. 20515

Re: Hearing on "Mandatory Minimum Sentencing Laws"

Dear Chairman Scott and Ranking Member Forbes:

Thank you for holding hearings on the subject of Mandatory Minimum Sentencing Laws. The American Bar Association ("ABA") is pleased to submit this statement of our views for Subcommittee's consideration and inclusion in the record of the June 26, 2007 hearing on this important subject. The American Bar Association is the world's largest voluntary professional organization, with a membership of over 410,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. The ABA believes that mandatory minimum sentencing laws are incompatible with the requirements for just sentencing and we support their repeal by Congress.

Mandatory Minimum Sentences In General
The Association has devoted significant time and interest to the broad subject of federal sentencing reform and has done so with a sense of urgency in recent years particularly through the work of its membership Section of Criminal Justice, its Justice Kennedy Commission and its Commission on Effective Criminal Sanctions.

At the ABA's August 2003 Annual Meeting in San Francisco, U.S. Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing and corrections in the United States

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

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 *Standards for Criminal Justice on Sentencing* (3d ed.) State clearly that "[a] legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized," and "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account."

Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with both commands of just sentencing.

Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on "offense characteristics" and ignore "offender characteristics." In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that it is prosecutors who sentence by the charging decisions they make, rather than judges imposing a sentence, taking into account all relevant factors regarding an offender and a charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant's mitigating circumstances at the charging stage of a case.

Mandatory Minimum Cocaine Sentences

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

> Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D.C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is

> indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.
>
> ***Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Kennedy's views are consistent with ABA policy.

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

> Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense by an offender, they tend to shift sentencing discretion away from courts to prosecutors. Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.
>
> Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months. In 2001, the average federal drug trafficking sentence was 72.7 months, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.
>
> These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

> The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony. (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.
>
> The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders were African-American, and in 2000, 84.7% were African-American. The disproportionate penalties for crack offenses obviously have a great impact on African-American defendants in federal prosecutions. (Footnotes omitted)

The ABA has long recognized that legislation is needed to end the disparity in crack versus powder cocaine sentencing. At its August meeting in 1995, the House of Delegates of the American Bar Association approved a resolution endorsing the proposal submitted by the U.S. Sentencing Commission to Congress which would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person.

The American Bar Association has not departed from the position that it took in 1995, and the U.S. Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and urge that the Subcommittee respond favorably to the May 2007 recommendation of the U.S. Sentencing Commission to enact legislation that treats both types of cocaine similarly.

Not only do we believe that the crack-powder distinction is arbitrary and unjust, but we find that it has a large, disparate effect on minorities that calls into question whether the United States is adequately concerned with equal justice under law.

It is important to emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that, if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute. But, eliminating the disparity would leave mandatory minimum sentences in place.

Early Release of Ill and Aged Prisoners

The ABA also urges Congress to consider whether current law is adequate to address situations where fundamental changes in a prisoner's circumstances since sentencing make that person's continued incarceration unjust and inequitable, as well as an unacceptable economic burden. Apart from the situation where changes in sentencing laws are made retroactive, the only way under present law that a prisoner may be released early from prison (aside from executive clemency) is through a motion to the sentencing court by the Bureau of Prisons (BOP) under 18 U.S. C. § 3582(c)(1)(A)(i). This provision authorizes a sentencing court to reduce a term of imprisonment for:"extraordinary and compelling reasons." BOP has in the past interpreted this provision very narrowly, to apply only where a prisoner is weeks away from death, in a manner that we believe is inconsistent with Congress' intent. The Sentencing Commission has recently issued policy guidance that may encourage g reliance on this statute in a broader range of cases in the future: this new policy guidance urges BOP to consider making a motion for release from imprisonment where a prisoner has a terminal and serious chronic illness, is disabled (including as a result of aging), or has some compelling family circumstances such as the death of a minor child's caretaker.

The ABA has for many years urged a more expansive use of courts' authority to reduce a prison sentence in extraordinary cases, including cases in which a prisoner has grown old and seriously ill while incarcerated. We are gratified that the Sentencing Commission has at last taken the steps to encourage BOP to bring to a court's attention cases worthy of this relief. However, it remains to be seen how BOP will respond to the Sentencing Commission's policy guidance. (Indeed, the Justice Department has predicted that any policy guidance that varied from BOP's practice would be a "dead letter.") It may be that there are more efficient ways of handling such exceptional cases, and we urge Congress to monitor the situation as BOP considers how it will carry out the mandate given it by the Sentencing Commission's new policy.

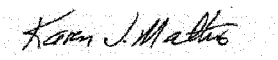
Collateral Consequences of Conviction

Finally, the ABA also urges Congress to consider how federal laws and policies create barriers to the reentry and reintegration of offenders, particularly in the area of employment and professional licensure. The collateral consequences of conviction have grown exponentially in recent years, as have backgrounding practices, which together exclude people with criminal records from many opportunities. Many of these barriers have been created or encouraged by federal law and policy. We believe these issues are properly considered as part and parcel of federal sentencing policy, even though their applicability is considerably broader than the relatively small community of federal offenders.

In conclusion, the American Bar Association supports repeal of federal mandatory minimum sentencing laws. We urge the Judiciary Committee to conduct further hearings on this subject. In addition, we believe there is a growing consensus in the current Congress to act to end the crack-powder disparity in sentencing and to repeal specific mandatory minimum sentences for simple cocaine possession. We urge the Subcommittee to move forward and approve such legislation.

Thank you for consideration of our views.

Sincerely,



Karen J. Mathis
President

FAMMGRAM
FAMILIES AGAINST MANDATORY MINIMUMS
Spring 2007
Issue 1 | Volume 17

Sentencing history repeating?

According to philosopher George Santayana, "Those who cannot remember the past are condemned to repeat it." Most people are not aware that the mandatory sentences we fight today are not the nation's first experiment with these laws. Federal mandatory minimum prison sentences for drug offenses were repealed in 1970 and signs indicate it's time for them to be repealed again.

The first repeal was directed at the "Boggs Acts," named after Rep. Hale Boggs (D-La.) who championed the passage of stiff five- and ten-year federal mandatory sentences for drug offenders in 1951. Five years later, the sentences were increased and the federal Boggs Acts became so popular that they were mimicked by "Little Boggs Acts" in the states, some specifying prison terms as long as 10-to-40 years.

This bill offers our first opportunity to deal with the changing drug abuse problem in a flexible and comprehensive manner...I support the bill and urge my colleagues to do so.

—FORMER REPRESENTATIVE HALE BOGGS (D-LA.), ORIGINAL SPONSOR OF THE "BOGGS ACT" MANDATORY MINIMUMS

By the 1960s, mandatory minimums were under attack because they were unduly severe and inflexible, interfered with the judiciary's role in individualized sentencing, treated low-level offenders the same as "hardened criminals," and did not lead to reduction in drug law violations. Treatment of drug addiction as a medical and psychological problem gained acceptance. In 1963, the Presidential Commission on Narcotic and Drug Abuse recommended the relaxation of mandatory minimums and support for local treatment centers.

In 1970, 19 years after their passage, Congress repealed virtually all mandatory minimums for drug offenses as part of the 1970 Comprehensive Drug Abuse and Control Act. Four years later the repeal was made retroactive. The repeal was supported by Republicans and Democrats.

Among those supporting the repeal was Texas freshman Congressman George H.W. Bush who said, "Contrary to what one might imagine, this bill will result in better justice and more appropriate sentences... Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion....As a result [of repealing mandatory minimums], we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences. These penal reforms have been a long time coming." Those words sound as fresh today as they did when they were uttered 37 years ago.

Everything old is new again

By the mid 1980s, members of Congress forgot the lessons of the Boggs Acts and re-introduced harsh mandatory minimum prison terms for drug offenders. Despite a decline in drug use between 1978-1986, and without any acknowledgment of the enormous impact of the legislation on the criminal justice system, the 1986 Anti-Drug Abuse Act was overwhelmingly approved. Only 16 Congressmen voted against the bill, which passed the Senate by voice vote. President Reagan signed the bill into law on October 27, 1986, one week before election day.

The new law established the bulk of drug-related mandatory minimums that exist today, including the five- and 10-year mandatory sentences for drug distribution or importation. In 1988, the Omnibus Anti-Drug Abuse Act created a mandatory minimum of five years for simple possession of more than five grams of crack cocaine. It also doubled the existing 10-year mandatory minimum for continuing criminal enterprise (CCE) and added drug conspiracy penalties.

(continued on page 5)

"Ma Pekin" put family in FAMM

For seven years, Joann Jordan and members of the Cedar Rapids FAMM chapter have supported each other through the ups and downs of incarceration, separation and for many, life after prison. *Read more about Joann on page 18.*

Debating repeal in 1970

The Drug Abuse Prevention and Control Act of 1970 repealed most drug mandatory minimums. It was the subject of lively debate in the Senate and House of Representatives, with many members voicing their opinions. Then as now, bipartisan Congressional support was the key ingredient for broad sentencing reform.

"This is primarily a law enforcement bill … [The Boggs Act] did not seem to dam up the flow of narcotics or the fast spreading abuse of drugs."

—Former Senator Jacob Javits (R-N.Y.)

"Quite apart from the basic irrationality of mandatory sentences which do not give the judge any area for discretion, the mandatory sentence often makes for extraordinary contradictions."

—Former Senator Thomas J. Dodd (D-Conn.)

"What is most important about this penalty structure is that it is credible in that the penalties fit the crimes and the persons who commit the crimes. By being credible, this law will be enforceable, which is not the case today with existing law."

—Former Rep. Lowell P. Weicker, Jr. (R-Conn.)

"It is clear that today's federal penalties for drug violations are inconsistent, illogical and unduly severe in some cases. This bill would revamp the entire penalty scheme, substituting a new and flexible system of penalties which will enable courts to truly tailor the punishment in any given case to fit the crime. Current penalties have little or no deterrent value, as illustrated by the alarming increase in drug related arrests over the past decade. In addition, several federal offenses have been invalidated by the courts. This new penalty scheme is realistic and affordable."

—Former Representative J. Glenn Beall, Jr. (R-Md.)

"The purpose (of the repeal) is to deal comprehensively with the menace of drug abuse in the United States through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, more effective means for law enforcement aspects of drug abuse prevention and control, and an overall balanced scheme of criminal penalties for offenses involving drugs."

—Former Representative Ray J. Madden (D-Ind.)

"Everyone is interested in the revised penalties included in this bill. Upon inspection some say enforcement has been weakened. Others say just the opposite. The idea of the changes was to create more flexibility in the handling of the first offenders and those who might actually be salvaged, while bearing down with great intensity upon the pusher and the peddler. It is the opinion of most law enforcement people that the harsh mandatory sentences in the narcotics law have been a hindrance rather than an aid to enforcement. This bill avoids the mandatory minimum, particularly in first offense cases."

—Former Representative William Lee Springer (R-Ill.)

"As a former prosecutor, I recognize the extreme difficulty in attempting to dispense justice in sentencing individuals who have been convicted of violations where a minimum penalty is required. I believe removing the minimum penalty provision will afford our courts greater latitude to the end that greater justice will be served better and so that the needs of our people, particularly those who have gone astray, will also be best served."

—Former Representative David E. Satterfield (D-Va.)

History repeating

(continued from page 1)

Déjà vu in 2007

Fast forward 21 years to 2007: State and federal prisons are bursting with low-level drug offenders, sentences are harsh and rigid, the courts have no sentencing discretion under mandatory minimums, low-level drug offenders are sentenced like kingpins, and drugs are as available and cheaper than they've ever been. Sound familiar?

These conditions mirror those of 1970, when the earlier set of mandatory minimum drug laws was repealed, as does the political make-up of the Congress and White House. In 1970, when support was mounting in Congress for the repeal of mandatory minimums, the Congress was controlled by Democrats, as it is today, and the President was a Republican, Richard Nixon. Today's President, George W. Bush, can even point to his father's support for the repeal of the Boggs Act in 1979.

President Ronald Reagan made mandatory minimums federal law in 1986.

What will it take to repeal current drug mandatory minimum sentences? Bipartisan support – not just in Congress but around the country. That support has been growing in the past few years but it will become broader when more policy makers understand that public safety is not compromised by making sentences individualized, sufficient but not greater than necessary, and conducive to successful rehabilitation and reentry. Those basic tenets of American justice can only be achieved with the repeal of mandatory minimums.

A conservative message

The sentencing reform message is conservative. Federal judges appointed by both Republican and Democratic presidents have already spoken out against mandatory minimum sentencing laws. So have the U.S. Sentencing Commission, Federal Judicial Center, U.S. Courts Study Committee, and American Psychological Association, among others. A handful of Republicans in Congress have voiced strong opposition to mandatory minimums, as have many Democrats. Bills to repeal state mandatory minimums are being considered in Maryland, Delaware and elsewhere.

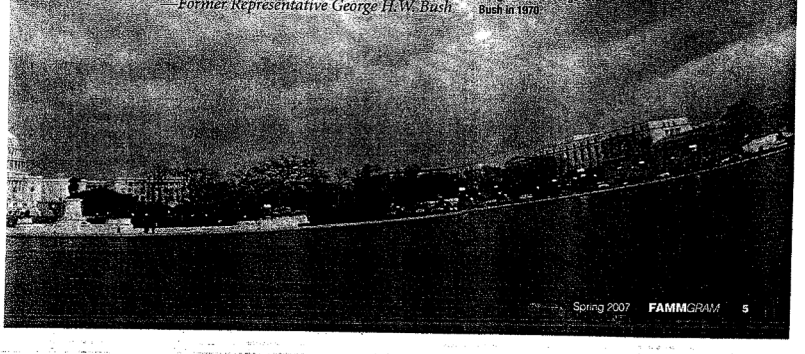
As Supreme Court Justice Anthony Kennedy eloquently noted, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases mandatory minimum sentences are unwise and unjust. . .The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just."

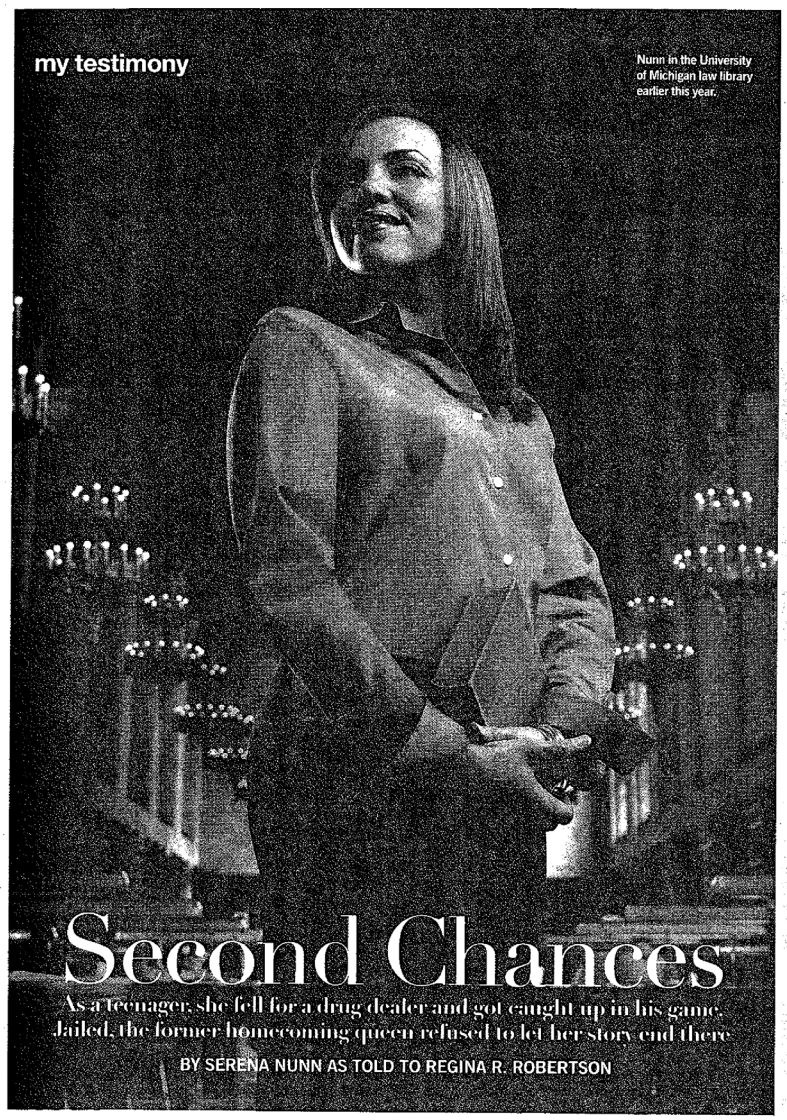
President Richard Nixon and Congressman George H.W. Bush in 1970

The movement for serious sentencing reform is well underway. With a lot of pressure history will repeat itself. An injustice of the magnitude of mandatory minimums can only last so long.

"Contrary to what one might imagine, this bill will result in better justice and more appropriate sentences ... These penal reforms have been a long time coming."

—*Former Representative George H.W. Bush*





Second Chances

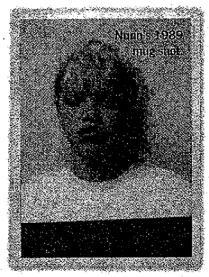
As a teenager, she fell for a drug dealer and got caught up in his game. Jailed, the former homecoming queen refused to let her story end there.

BY SERENA NUNN AS TOLD TO REGINA R. ROBERTSON

Monty was 18, and I was 19 when we met. One night a group of us were going to dinner, and he came along. Although he was on the quiet side, we ended up talking for the rest of the night. It was August 1988 and I'd returned home to Minneapolis after a semester at college in Atlanta. I dreamed of being a lawyer, but in my freshman year, I ran out of money. Growing up as the oldest of three on the north side of Minneapolis, I'd watched my mother work split shifts as a city bus driver to support us. In high school I was homecoming queen, but I knew that as much as we struggled, I was blessed to even make it to college; I wasn't about to give up. I decided I'd find a job and save enough money to get back in school. Instead, I got in trouble.

Monty was raised in St. Paul, where a lot of young guys were dealing. I knew Monty sold drugs, too, because he drove expensive cars and traveled at his leisure. Soon I was taking messages for him, driving him to meetings, and handling his money. I knew I was blurring the line between right and wrong, but dealing was so commonplace that I didn't think much of it.

One day in May 1989, we'd planned to go to the movies, but Monty never called. The next morning, my sister, Charlita, told me he'd been arrested during a sting. I thought, *Oh my God, he's in trouble*, but not once did I think that I might be, too. But a few weeks later, I was at his mother's house when state officials knocked on her door. I heard the words, "Serena Nunn, we have a warrant for your arrest," and I just went numb. I still don't know how my mom managed to post bail, but she was waiting when I walked out of jail three days later. Her face told me how worried she was, but she didn't ask questions. I was grateful because I didn't have any answers.



I was charged with conspiracy and aiding and abetting the distribution of 20 kilos of cocaine. In all, 24 people were charged, and the trial was set for November. I hadn't yet grasped that ours was the first big case in Minnesota to which the mandatory-minimum sentencing guidelines would apply. Under the new federal rules, I faced at least ten years, yet I still didn't believe I'd go to prison. I thought a jury would see I was just a girl in love.

"Under the new rules, I faced at least ten years, yet I still didn't believe I'd go to prison. I thought a jury would see I was just a girl in love."

Instead, I was found guilty on every count. I sat frozen as the judge sentenced me to 188 months. My grandmother was crying; my mother looked as though she might collapse. I remember thinking, *Okay, 60 months is 5 years; 120 months is 10 years....* In fact, it was 15 years and 8 months.

I was flown to the federal correctional institute in Lexington, Kentucky. For me, the hardest part of being in jail was the lack of privacy. Our mail was opened before we received it, and officers could trifle with our belongings at any time. Sometimes we'd be forced to undergo humiliating strip searches after having visitors. To maintain sanity, I'd work out, watch sports and read. But I never let myself get comfortable. This was not my home.

I knew my mother and grandmother were praying for me, and their faith helped strengthen my own. I attended church services and studied my Bible, but I missed my family so much. I was in a different state, so it was two years before their first visit. As soon as I saw my mother and sister, we all broke down in tears. But even though it tore my mom's heart to see me in jail, she let me know that if I stayed strong, I could overcome my situation.

And that's what I decided to do. I started taking college classes at the end of 1990. A few professors came to the facility, and I also took correspondence courses. Then in 1995, I got news that my brother, Jerome, had become caught up in the streets and had been convicted of murder. I was so depressed. But I kept pushing. And slowly my belief that I could turn my life around began to be reflected, as if God saw what I was trying to do and sent help.

In late 1997 I received a letter from Sam Sheldon, a young attorney from San Diego who'd seen an article in the *Minneapolis Star-Tribune* about women sentenced under mandatory-minimum laws. I'd been featured in the article. By then, I'd been moved to Arizona; Sam came to visit me there in January 1998 to discuss my case. Soon after, he wrote saying he wanted to help me pursue a presidential commutation of my sentence.

During the two years Sam and I worked on my case, I finally earned my associate of arts degree. It had taken nine years. Then, in 2000, my sentencing judge agreed to write President Clinton in support of my release. He said he would never have given me the time he did if his hands hadn't been tied. The prosecutor in my case wrote a letter, as did Governor Jesse Ventura. By the time I turned 31, I'd heard rumors that I might be released, but I was dumbfounded when on July 7, 2000, the administrator called me to his office. After 11 years, I was free! I only wished my grandmother, who had died six months earlier, had lived to see that day.

While in jail, I had applied and been accepted to Arizona State University for my bachelor's degree. So when I was released, I immediately started school there. And, with the help of financial aid, I got an apartment. I embraced the smallest things, like lying on my own couch and opening the refrigerator whenever I wanted.

Since I now had a felony record, I assumed that my dream of being a lawyer was shattered, but Sam explained that I could still pursue law. I would just have to be approved for the character fitness portion of my bar application. So, after earning my bachelor's in political science two years later, I applied and was admitted to the University of Michigan law school. Midway through my program, I met a man who understood my goals. Life got even sweeter when our daughter, Serenity, was born in November 2005.

A year ago my family cheered as I crossed the stage at my graduation from law school. I had done it!—become the first person in my family to earn a law degree. I thought about Monty and my brother, Jerome, both still serving time, and I realized that I represented everyone who had ever made a mistake and gone to prison, yet somehow made it through. As I crossed that stage to pick up my degree, I felt pride—and possibility—for them too. □

Serena Nunn plans to become a public defender. She told her story to Regina R. Robertson, West Coast editor of ESSENCE.

E-mail your story of triumph over adversity to mytestimony@essence.com.

U.S. Department of Justice
U.S. Attorney's Office
Western District of Texas

Johnny Sutton, U.S. Attorney

FOR IMMEDIATE RELEASE

April 25, 2007

Shana Jones, Special Assistant
610 N.W. Loop 410
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UNITED STATES ATTORNEY JOHNNY SUTTON SETS THE RECORD STRAIGHT REGARDING THE PROSECUTION OF RAMOS AND COMPEAN

Former Border Patrol Agents Ignacio Ramos and Jose Compean were found guilty by a unanimous jury in a United States District Court after a trial that lasted more than two and a half weeks. The two agents were represented by four experienced and aggressive trial attorneys, all of whom vigorously challenged the Government's evidence through argument and direct and cross examination.

Both agents told their stories from the witness stand and had full opportunities to explain their version of events and to offer their own evidence. The jury heard all admissible evidence, including the defendants' claims of self defense, but the jury did not find their stories credible.

The case is now on appeal to the U.S. Court of Appeals for the Fifth Circuit, which recently agreed with the District Court that Ramos and Compean should not be released on bond pending appeal.

Unfortunately, some of the media attention and heated debate over the prosecution of this case has been based on, and has led to, many factual inaccuracies and unfounded criticism. The purpose of this fact sheet is to identify some of those inaccuracies and provide corrections with factual information from the public record, to the extent possible given that this case is currently on appeal.[1]

Allegation: THE AGENTS WERE JUST DOING THEIR JOBS AND SHOULD NOT HAVE BEEN PROSECUTED

Response: Securing our nation's borders can be a tough and dangerous job. Often, Border Patrol agents find themselves in difficult and dangerous situations. The Border Patrol provides them with guns and the law allows them to defend themselves. The law allows for the use of deadly force when an agent reasonably fears imminent bodily injury or death. But, an agent is not permitted to shoot an unarmed suspect who is running away, regardless of whether the victim is illegally in this country or turns out to be a drug smuggler. In order to maintain the rule of law, federal prosecutors cannot look the other way when law enforcement officers shoot unarmed suspects who are running away, then destroy evidence, engage in a cover-up, and file official reports that are false.

[1] The page numbers referenced herein are to the transcript available on the website at http://www.usdoj.gov/usao/txw/press_releases/index.html

There was no credible evidence that the agents were in a life-threatening situation or that Osvaldo Aldrete Davila, the Mexican alien, had a weapon that would justify the use of deadly force. In fact, Border Patrol Agent Oscar Juarez, who was at the scene, testified at trial that he did not draw his pistol because he did not believe that Aldrete posed a threat to his or Agent Compean's safety. *Vol. VIII, p. 173; Vol. IX, p. 22.* He also testified that Aldrete's hands were empty when Compean attempted to strike Aldrete with the butt of Compean's shotgun. *Vol. VIII, p. 176.* By the time Agent Juarez saw Compean shooting, Aldrete was almost in Mexico. *Vol. IX, p. 21-22.*

The crimes committed by these agents are felonies, not mere administrative oversights. This was not a simple case of discharge of a firearm that was not reported. The truth of this case is that Agents Ramos and Compean intentionally, and with the intent to kill, shot 15 times at an unarmed man who was running away from them and who posed no threat.

Allegation: THE GOVERNMENT LET THE DRUG SMUGGLER GO FREE BY GIVING HIM BLANKET IMMUNITY

Response: We are in the business of putting guys like Aldrete behind bars. In fact, this office leads the nation in the number of drug smuggling cases we prosecute. My office would have much preferred to see Aldrete convicted and sent to prison for his crimes. Aldrete was not prosecuted for the drugs he had on February 17, 2005, because of the conduct of Agents Ramos and Compean. Instead of arresting Aldrete as he attempted to surrender, Agent Compean tried to strike Aldrete with the butt of his shotgun. *Vol. VIII, p. 174-175; Vol. IX, p. 13; Vol. VII, p.107.* When Agent Compean missed, lost his balance and fell into a ditch, Aldrete ran around him and toward Mexico. *Vol. VIII, pp. 176-178.* Compean got up, ran after Aldrete, and fired at him fourteen times as Aldrete ran away. *Vol. XIII, pp. 161-164; Vasquez Transcript, pp.37-38; Vol. XIV, p. 153.* When Compean stopped shooting, Ramos fired once, *Vol. XII, p. 209*, and struck Aldrete in the buttocks. *Vol. VII, pp. 117-122.* Aldrete fell to the ground and waited for the agents to arrest him. *Vol. VII, pp. 122, 133.* According to Aldrete, when he saw the agents had turned and walked away, making no effort to apprehend him, he crossed the river into Mexico. *Vol. VII, pp. 123-125, 133.*

Because the agents failed to apprehend him, and because they later lied about the shooting, there was no way to prove Aldrete's involvement except through Aldrete's own admissions and cooperation. Even Ramos admitted that by not reporting the shooting, he prevented the recovery of evidence that would have made it possible to prove the marijuana case against Aldrete. *Vol. XIII, p. 88.*

With respect to the immunity offered to Aldrete, it is not unusual for prosecutors to give immunity to witnesses, victims and even defendants suspected of criminal activity, in order to secure testimony, evidence, or other participation in a case. Given Ramos' and Compean's criminal conduct in this case, there was insufficient, legally admissible, competent evidence to prosecute Aldrete in this case, *Vol. XIII, p. 88; Vol. XIV, pp. 70-71*, and we could not force him to return to the United States through extradition. His testimony and evidence were needed to investigate and prosecute violent criminal activity by federal agents. Accordingly, in exchange for his agreement to come to the United States and testify truthfully about the events that occurred on February 17, 2005, Aldrete was promised that he would not be prosecuted for offenses he disclosed that he committed on that date. This immunity, as a practical matter, gave up very little, since the case against him was not prosecutable.

Allegation: ALDRETE HAD A GUN AND THE AGENTS ONLY FIRED IN SELF DEFENSE

Response: The jury in this case evaluated the testimony from Border Patrol agents, including the defendants, whose testimony established that Aldrete did not have a gun in his hands when Compean had an opportunity to arrest him. Agent Juarez testified that Aldrete's hands were visible and empty as Aldrete approached Compean. *Vol. VIII, pp. 175-176; Vol. IX, p. 155.* Ramos testified that he did not see anything in Aldrete's hands as Aldrete moved through the ditch. *Vol. XIII, p. 43.* Compean testified that Aldrete's hands were empty as he went through the ditch and later, that Aldrete had no weapon in his hands. *Vol. XIII, pp. 154-155; Vol. XIV, pp. 66-68, 71-72.* In his statement to investigators, Compean admitted that Aldrete had attempted to surrender with both hands open and in the air. In their sworn testimony, Agents Juarez and Compean both confirmed that Aldrete had his hands in the air, *Vol. VIII, p. 175; Vol. IX, pp. 155-156; Vol. XIII, pp. 154-155; Vol. XIV, pp. 66-68, 71-72,* in an apparent effort to surrender.

Testimony also revealed that Agents Ramos and Compean never took cover nor did they ever warn the other agents to take cover. *Vol. VIII, p. 176; Vol. X, pp. 168-169.* This action contradicts their claims that they believed they were in danger. Had Agents Ramos and Compean truly believed Aldrete was a threat, they would not have abandoned him after the shooting, *Vol. VII, pp. 122-125,* and they would have warned their fellow agents who arrived at the scene to stay out of the open while an armed suspect was on the loose.

Agent Compean testified that after the shooting, he picked up his spent casings and threw them into the drainage ditch. *Vol. XIII, pp. 165-166; Vol. XIV, p. 157.* He even admitted that he may have picked up Ramos' casing. *Vol. XIV, p. 158.* He could not explain at trial why he did this. *Vol. XIII, pp. 165-166; Vol. XIV, pp.156-158.* Agent Arturo Vasquez testified that Compean actually removed the casings from the scene, showing them to Vasquez as Compean was returning to the Fabens Border Patrol Station. *Vasquez Transcript, pp. 36-38.* According to Vasquez, Compean showed him nine spent casings and calculated he was missing five more, based on the number of live rounds remaining in his magazine. *Vasquez Transcript, pp. 37-38.* If the agents had believed that the shooting was justified, they would have left the crime scene undisturbed and let the investigation absolve them. Their conduct established that the agents knew that Aldrete did not have a weapon and they knew he posed no threat to them as he fled.

Immediately following the shooting, when Ramos encountered Agent Jose Luis Mendoza near the van, Ramos did not say he was in fear for his life or that he shot at anyone. *Vol. X, p. 35.* While Compean confessed to his fellow agents, David Jacquez and Vasquez, that he shot at the driver, he did not tell them that the driver had a gun, that he saw something shiny in the driver's left hand, or that he or Ramos were ever in danger. *Vol. X, pp. 69-70, 80; Vasquez Transcript, p. 35.* Had Aldrete actually had a gun or a shiny object in his left hand, or had Aldrete truly posed a danger to either Ramos or Compean at any time, they would have broadcast to any and everyone that the driver had a gun.

Allegation: THE AGENTS WERE NOT SURE OF WHAT THEY SAW BECAUSE IT WAS IN THE MIDDLE OF THE NIGHT

Response: The events of Feb. 17, 2005, occurred at approximately 1:00 P.M. MT. *Vol. VIII, pp. 103-104; Vol. X, p. 191.*

Allegation: AGENT COMPEAN WAS BLOODIED FROM A STRUGGLE WITH ALDRETE

Response: Compean testified at trial that he had a cut to his hand and a cut to his chin. *Vol XIII, p. 168.* He told Agent Mendoza that he cut his chin when he slipped and fell trying to apprehend Aldrete. *Vol. X, pp. 32-33.* Agent Jacquez noticed the cut between Compean's thumb and finger, but did not consider the injury to be traumatic. *Vol. X, p. 90.* Compean cleaned up the cuts in the bathroom at the station. *Vol. XI, p. 77.* Compean twice told his supervisor that he had not been hit or assaulted by Aldrete. *Vol. X, pp. 217; Vol. XI, p. 77.* He also refused to fill out an injury report. Had Compean been assaulted he would have reported this to his supervisor. *Vol. X, p. 217.*

Allegation: AGENT RAMOS CLAIMS THAT THE BULLET EXTRACTED FROM ALDRETE MIGHT NOT HAVE COME FROM HIS SERVICE WEAPON

Response: Agent Ramos stipulated and agreed before trial that the bullet extracted from Aldrete came from his service weapon. *Vol. VII, pp. 118-121.* This stipulation was based on independent forensic analysis that Ramos did not dispute at trial.

Allegation: THESE AGENTS DID NOT REPORT THE SHOOTING TO SUPERVISORS BECAUSE THE SUPERVISORS WERE ON THE SCENE OF THE SHOOTING

Response: The evidence introduced at trial and credited by the jury demonstrated that no supervisors were on the scene during the shooting. Two supervisors arrived after the shooting. *Vol. X, pp. 22-25.* Field Operations Supervisor Jonathan Richards arrived after the shooting, after all but two other agents were already on the scene. *Vol. X, p. 209.* Supervisor Robert Arnold arrived shortly after Richards. *Vol. X, p. 216; Vol. XI, p. 72.* Richards was not aware there had been a shooting, *Vol. X, p. 225,* and no one reported the shooting to him. Supervisor Richards testified that he first learned of the shooting when he was interviewed about the incident by the agent of the Inspector General in mid-March, about a month after the shooting. *Vol. X, p. 239.* Supervisor Arnold first learned of the shooting in mid-March, when he was told two agents were soon to be arrested for it. *Vol. XI, p. 78.*

Ramos admitted that he knew Border Patrol policy required him to report a shooting within an hour. *Vol. XIII, pp. 18-19.* He had been a firearms instructor *Vol. XIII, pp.19-20* and a member of the evidence recovery team responsible for investigating shootings. *Vol. XIII, p. 84.* Compean also knew he was required to report the shooting and he did not. *Vol. XIV, pp.169-170.* Compean admitted to Luis Barker, then the Chief of the El Paso Border Patrol Sector, that he knew he had to report the shooting and that he knew it was wrong for him and Ramos not to report the shooting. *Vol. XI, p.167.* Compean admitted to Barker that he knew that if he had reported the shooting, they would have gotten in trouble. *Vol. XI, p.167.*

Allegation: THESE AGENTS DID NOT REPORT THE SHOOTING BECAUSE BORDER PATROL POLICY PROHIBITS THEM FROM DOING SO

Response: Border Patrol policy requires that a Border Patrol agent who fires his or her weapon anytime (on or off duty), must notify their supervisor within an hour. Further, Border Patrol policy requires that all who participated in or observed the shooting shall report it to their supervisor. Testimony of several agents and supervisors as well as the transcript of the radio transmissions, indicate that no supervisor was on scene at the

time of the shooting. Yet, neither Ramos nor Compean reported the shooting of Aldrete as required by Border Patrol policy. Ramos' assertion that supervisors already knew about the shooting, or that someone else had reported it, is inaccurate, unsupported by the evidence, and did not excuse their obligation to report within an hour.

Additionally, Compean proceeded to write the I-44 report (the Report of Apprehension or Seizure) concerning the incident, with input from Ramos. The report made no reference to several key events that afternoon, including Compean's encounter with Aldrete on foot in the ditch, his having pointed the shotgun at Aldrete, the ensuing foot chase as Aldrete fled, and the firing of shots at Aldrete. The claim that Border Patrol policy does not require the reporting of a shooting in the I-44 is specious. To protect agents involved in shootings from self-incrimination, the Border Patrol practice allows for an agent other than the one involved in the shooting to write the I-44. The I-44 still must include all significant information about the events being reported. That includes the fact that shots were fired. By undertaking to write the I-44, Compean was required to write a truthful report, not a report that contained material omissions amounting to falsehoods. Indeed, in the context of Border Patrol practices and policy, by undertaking to write the I-44, Compean was intentionally creating the impression that there was no shooting. And by omitting the relevant facts, with the aid of Ramos, they submitted and caused to be submitted a false report.

Allegation: THE BALLISTICS REPORT FAILED TO PROVE THE BULLET CAME FROM RAMOS' GUN AND THE MEDICAL REPORT OF THE BULLET ENTRY WAS CONSISTENT WITH RAMOS' CONTENTION THAT THE SMUGGLER WAS TURNING AROUND WITH WHAT LOOKED LIKE A WEAPON

Response: Agent Ramos stipulated and agreed before trial that the bullet extracted from Aldrete came from his service weapon. *Vol. VII, pp. 118-121.* This stipulation was based on independent forensic analysis that Ramos did not dispute at trial. The stipulation was entered into evidence at trial with Ramos' agreement. Regarding Aldrete's movements at the time the bullet struck him, the medical testimony was inconclusive. *Vol. IX, pp. 197-98.* The doctor testified he could not know exactly how Aldrete was turned. *Vol. IX, p.195.*

Allegation: RAMOS AND COMPEAN DID NOT BELIEVE THEY WOUNDED THE SMUGGLER BECAUSE HE KEPT RUNNING AND ESCAPED ACROSS THE BORDER INTO A WAITING VEHICLE

Response: This assertion is directly contradicted by Compean's handwritten statement provided to the investigator in which Compean stated "I think Nacho [Ramos] might have hit him." *Vol. XIV, p. 155.*

Allegation: RAMOS AND COMPEAN'S ONLY "LIE" WAS THAT THEY GAVE AN INCOMPLETE REPORT OF THEIR CONFRONTATION WITH THE SMUGGLER ON FEBRUARY 17, 2005

Response: These agents were prosecuted and convicted of the serious felony offenses of illegally using deadly force when their lives were not in danger, depriving another of rights under color of law and obstructing justice. There was no credible evidence that the agents were in a life-threatening situation or that Aldrete had a weapon that would justify the use of deadly force. In fact, Border Patrol Agent Juarez, who was at the scene, testified at trial that he did not draw his pistol because he did not believe that Aldrete posed a threat to his or

Agent Compean's safety. *Vol. VIII, p. 173; Vol. IX, p. 22.* He also testified that Aldrete's hands were empty when Compean attempted to strike Aldrete with the butt of Compean's shotgun. *Vol. VIII, pp. 175-176.* By the time Agent Juarez saw Compean shooting, Aldrete was almost in Mexico. *Vol. IX, p. 22.*

Allegation: THE GOVERNMENT SHOULD HAVE PROSECUTED THE DRUG SMUGGLER AND GIVEN IMMUNITY TO THE BORDER PATROL AGENTS

Response: My office would have much preferred to see Aldrete convicted and sent to prison for his crimes. We are in the business of putting guys like Aldrete behind bars. In fact, this office leads the nation in the number of drug smuggling cases we prosecute. Because the agents could not identify him, found no fingerprints tying him to the van and did not apprehend him after shooting him, the case against Aldrete could not be proved. Furthermore, the shooting of a fleeing suspect who posed no threat to agents Ramos and Compean is a serious crime that federal prosecutors could not ignore.

Allegation: THE GOVERNMENT USED THE WRONG LAW THAT CARRIES A MANDATORY ADDITIONAL 10 YEAR SENTENCE.

Response: The prosecution used the law that Congress enacted. Congress made it a crime to discharge a firearm during a crime of violence, punishable by a mandatory prison term of at least ten years. Agents Ramos and Compean committed that crime, as well as others. Congress did not provide an exemption for law enforcement officers. The crimes committed by these agents were serious -- shooting 15 times at a fleeing, unarmed suspect -- and because of that this charge was warranted.

Allegation: THE GOVERNMENT WITHHELD CRUCIAL EVIDENCE FROM THE JURY

Response: The prosecution did not withhold any admissible evidence from the jury. The prosecution provided the defense an opportunity to see the government's evidence before trial. This is standard operating procedure. The trial judge ruled on a number of evidentiary issues during trial, and excluded evidence that was not relevant or admissible under the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, which govern all federal trials. Those rulings are subject to review on appeal by the Fifth Circuit Court of Appeals and the United States Supreme Court. This procedure is what distinguishes a trial at law from a street fight or free-for-all. Deciding guilt or innocence according to established rules is what makes this a civilized country.

Allegation: THE JUDGE KEPT FROM THE JURY ALDRETE'S CLAIM THAT HIS FRIENDS HAD CONSIDERED A "HUNTING PARTY" TO GO SHOOT SOME BORDER PATROL AGENTS

Response: These allegations were addressed by the district court. *Vol. VII, pp. 215-217.* The admissibility of testimony is committed to the discretion of the trial judge, based on the Federal Rules of Evidence and other legal precedent, and is subject to review by the Court of Appeals. Beyond that, the government cannot comment other than to say that the defendants received a fair and thorough trial and will have full opportunity to have their case reviewed on appeal.

Allegation: A DEPARTMENT OF HOMELAND SECURITY MEMO DATED MAY 15, 2005, SHOWS THAT THE TWO AGENTS DID GIVE A PROMPT, COMPLETE, ORAL REPORT TO SUPERVISORS WHO WERE ACTUALLY PRESENT ON FEBRUARY 17, 2005. THE SUPERVISORS DECIDED NOT TO MAKE A WRITTEN REPORT

Response: The evidence demonstrated that no supervisors were on the scene during the shooting. Two supervisors arrived after the shooting. Field Operations Supervisor Jonathan Richards arrived after the shooting, after all but two other agents were already on the scene. *Vol. X, p. 209.* The second supervisor, Robert Arnold, arrived shortly after Richards. *Vol. X, p. 216; Vol. XI, p. 72.* Radio transmissions admitted at trial corroborated this testimony. Richards was not aware there had been a shooting, *Vol. X, p. 225*, and no one reported the shooting to him. Supervisor Richards first learned of the shooting when he was interviewed about the incident by the Inspector General agent in mid-March, about a month after the shooting. *Vol. X, p. 239.* Supervisor Arnold first learned of the shooting in mid-March, when he was told two agents were soon to be arrested for it. *Vol. XI, p. 78.* Both Ramos and Compean admitted in their testimony at trial that they did not report the shooting as required.

Ramos admitted that he knew Border Patrol policy required him to report a shooting within an hour. *Vol. XIII, pp. 18-19.* He had been a firearms instructor and a member of the evidence recovery team responsible for investigating shootings. *Vol. XIII, pp. 19-20, 84.* Compean also knew he was required to report the shooting and he did not. *Vol. XIV, pp. 169-170.*

Allegation: THESE AGENTS WERE SENTENCED TO TOO MUCH TIME IN FEDERAL PRISON

Response: Congress determined the penalties imposed on Ramos and Compean by setting the punishment for discharging a firearm during a crime of violence at a mandatory minimum of ten years (in addition to any other sentence imposed). Title 18, United States Code section 924(c)(1)(A)(iii). Congress did not make an exception for law enforcement officers. Instead, Congress specifically debated the issue and determined that no exception should be made and that the law should apply to officers who misuse their privilege to carry a firearm.

Allegation: SINCE THE TRIAL, JURORS HAVE STATED THAT THEY WERE COERCED BY THE FOREPERSON INTO RENDERING A GUILTY VERDICT

Response: Because an appeal is pending, we cannot directly comment on the content or legal implication of possible juror statements. However, we can clarify a few facts. On March 8, 2006, the jurors were polled in open court immediately after announcing their verdicts and all said without hesitation or equivocation that the verdicts were theirs. Ramos and Compean filed motions for new trials based on juror affidavits in October 2006. The government responded and the District Court denied their motion.

Allegation: RAMOS WAS IMPROPERLY PLACED IN THE GENERAL PRISON POPULATION WHERE HE WAS BEATEN.

Response: Ramos was processed into the federal prison system in much the same manner as other former law enforcement officers who are convicted of crimes and currently serving sentences in prison. As a general

matter, the Federal Bureau of Prisons (BOP) determines the appropriate institution in which to house inmates based on information from many sources, including the courts, the probation office, the U.S. Marshals Service and the prisoner. There are some inmates who, based on their backgrounds and other characteristics, have difficulty functioning in the general population. The BOP has the ability to segregate such offenders from other inmates. When inmates arrive at the institution to which they have been designated, as a part of the intake screening process, staff discuss with inmates the living conditions in segregation and in general population. The decision to segregate is based on the totality of the circumstances and necessarily limits the prisoner's freedom of movement, recreation, visitation, and communication. As such, whenever it is possible to do so safely, inmates are housed in the general population.

In this case, Compean, through his counsel, requested to be separated from the general prison population, and he was. In response to BOP's inquiry, Ramos' counsel indicated in a letter that Ramos did not want to suffer any of the "punitive consequences" of segregation and that he preferred to be housed in the general population. The Federal Bureau of Prison's objective is to ensure that all of its more than 195,000 inmates are housed safely and securely and provided appropriate programs and services, including appropriate medical care.

Allegations: THE GOVERNMENT WOULD NOT RELEASE THE TRANSCRIPT OF THE TRIAL WITHOUT WHICH THE BORDER PATROL AGENTS COULD NOT APPEAL

Response: The United States Attorney's Office has no involvement in the preparation of the trial transcript and made it available to the public soon after it was received. Indeed, our office requested an expedited copy of the trial transcript from the court reporter on October 17, 2006, even though the government did not plan to bring an appeal. The transcript was received from the court reporter on Friday, February 9, 2007, and as a public service, we posted it to our website by Tuesday, February 13, 2007.

The ability of Ramos and Compean to appeal has no relation to the prosecution receiving a copy of the transcript. The former agents had the same ability to order the transcript from the court reporter as the prosecution.

Allegation: THE GOVERNMENT DENIED RAMOS AND COMPEAN'S FREEDOM PENDING APPEAL

Response: The district court properly applied the law enacted by Congress, which mandated the agents' detention pending appeal after they were convicted of crimes of violence. On February 22, 2007, the Court of Appeals for the Fifth Circuit affirmed the District Court's ruling, No. 06-51489.

Allegation: ALDRETE HAS BEEN SUBSEQUENTLY ARRESTED FOR SMUGGLING MORE DRUGS INTO THE UNITED STATES, BUT THE GOVERNMENT WILL NOT PROSECUTE HIM

Response: Our office aggressively prosecutes drug offenders every day in court. If we had a provable case against Aldrete, we would prosecute him. There have been allegations about subsequent drug activity by Aldrete. As of today, to our knowledge there has been no arrest or indictment of Aldrete for any drug activity. As a general matter, U.S. Attorneys' offices do not comment on pending investigations. Moreover, because

some evidence evaluated by the trial court has been placed under seal and the appeal in this case is currently pending, we cannot comment specifically on the facts alleged by some in the media and Congress. But, to be clear, the immunity provided to Aldrete extended only to offenses committed on February 17, 2005. In conjunction with law enforcement agencies that investigate crimes, this office vigorously enforces the nation's laws, and will continue to do so. If we obtain information that gives us a provable case of criminal activity by Aldrete, we will prosecute him.

Allegation: THE DRUG SMUGGLER WAS AWARDED A GREEN CARD OR OFFERED PERMANENT RESIDENT STATUS IN EXCHANGE FOR HIS TESTIMONY

Response: Aldrete was not given a green card or offered permanent resident status in the United States. As is common practice in investigations and law enforcement operations that require assistance from persons not legally residing in the United States, immigration officials obtained "paroles" or fixed term, limited use documents that permitted Aldrete to enter the United States. In this case, Aldrete was permitted to enter the United States for medical treatment associated with the removal of the bullet, a key piece of evidence in the case, as well as to help prepare for and provide testimony at trial in El Paso. To the best of our knowledge, the last time he was legally allowed to enter the United States was in February 2006, to testify at trial.

Allegation: ILLEGAL ALIENS DO NOT HAVE ANY CONSTITUTIONAL RIGHTS

Response: The United States Supreme Court has held that the Constitution protects all persons in the United States whether they are here legally or illegally. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). It is a violation of the Fourth Amendment to shoot an unarmed person who poses no threat to the shooter. *Tennessee v. Garner*, 471 U.S. 1 (1985). This law applies regardless of immigration status. *Zadvydas*, 533 U.S. at 693.

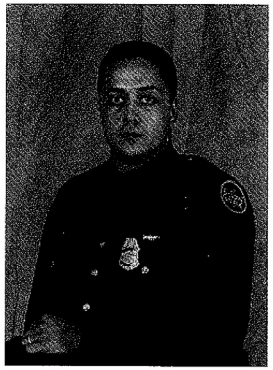
Allegation: AGENT RAMOS WAS BORDER PATROL AGENT OF THE YEAR

Response: Agent Ramos has never received any formal recognition or award for being the Border Patrol Agent of the year. In fact, he has been arrested on at least three occasions for domestic abuse and was formally suspended by the U.S. Border Patrol on two occasions. *Vol. IV, pp. 3-22.*

March 9, 2007

Briefing

The Case of Border Agents Ramos and Compean



Ramos and Compean Biography

- Married, father of three
- 10 year veteran of the Border Patrol
- Nominated for Agent of the Year in 2005
- Involved in the capture of over 100 drug smugglers
- 8-year veteran of the US Navy Reserve

- Married, father of three
- Served 4 yrs in the U.S. Navy
- 5 year veteran of the Border Patrol

Who is Osvaldo Aldrete-Davila?

• Aldrete-Davila is not an innocent victim who only smuggled drugs one time to pay for his sick mother's medication as the prosecutors would have you believe, he is a known illegal alien drug smuggler caught not once, but twice, with over $1million worth of narcotics each time.

• Davila lied multiple times to the DHS-OIG investigator about his illegal drug activities, even though he left behind 743lbs of marijuana in a van on the day of the shooting incident, Feb. 17, 2005.

• Granted immunity by the US Attorney's Office in exchange for his testimony against Agents Ramos and Compean.

• While under immunity, Davila was involved in a *second* drug smuggling incident in October 2005. **Leaked sensitive DEA documents clearly identify Davila as the driver of a van carrying 752.8lbs of marijuana seized during a DEA raid on Oct. 23, 2005.**

• Led BP Agents on a high speed chase through the town of Fabens, TX, abandoned his vehicle to make a run for the border and resisted arrest.

• Davila is currently suing the U.S. Government for $5 million for violating his civil rights.

• During his interview, Davila told investigators his friends wanted to put together a "hunting party to go out and shoot Border Patrol officers" in retaliation. DHS took the threat serious enough to issue a "BOLO" (Be On The Look Out) alert to all neighboring BP stations.

•Several family members claimed Davila "was always armed" and they fear him because of his association with the drug cartel.

•Has yet to offer up any information about who hired him to smuggle the drugs or where the drugs were to be delivered.

Who is U.S. Attorney Johnny Sutton?

- A President Bush appointee and long time friend
- Policy Coordinator for Bush/Cheney Transition Team 2001
- Criminal Justice Policy Director under Gov. George W. Bush 1995-2000
- Associate Deputy Attorney General, Dept. of Justice
- Fluent in Spanish;served as a commentator for Univision during the Selena murder trial

- Has repeatedly and falsely claimed the agents were "corrupt" & shot an unarmed man in the back

- Refuses to discuss the second drug smuggling incident his "star" witness Aldrete-Davila was involved in while already under immunity

- Granted a drug smuggler immunity, provided him medical care in the U.S. and issued him a border crossing card

- Has overseen 4 other questionable law enforcement prosecutions

What Went Wrong?

- Agents Ramos and Compean were prosecuted for procedural violations which could have been dealt with internally through a reprimand or suspensions.
- The word of a drug smuggler was taken over the word of two law enforcement agents.
- The US Attorney was more interested in sending two Border Patrol agents to jail than the illegal alien who was smuggling drugs
- Dept. of Homeland Security officials deliberately misled Members of Congress during a briefing on this case
- The jury was not permitted to hear vital evidence. Three jurors signed affidavits stating they were misled by the foreman to vote guilty.

What The Jury Didn't Hear

- No references to the dangerousness of this section of the border
- No discussion of prior shooting incidents not reported
- No mention of the 2nd drug smuggling incident Aldrete-Davila was involved in while preparing to testify against Ramos & Compean.The judge ruled it "irrelevant."
- No witnesses to the 2nd drug smuggling incident
- The agents who testified against Ramos & Compean lied multiple times to DHS-OIG but were then given Proffer Letters for their "truthful" testimony in court.
- The judge issued a gag order with a threat of contempt if the 2nd incident was discussed publicly
- The judge permitted the prosecutors to speak Spanish to the jury
- The judge has stated she doesn't believe crossing the border illegally constitutes a "serious crime."

Were Criminal Charges Really Necessary?

- Official Border Patrol Policies & Penalties

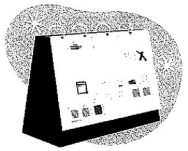
- "Failure to report the discharge of a firearm or use of weapon as required by applicable firearms policy" = ***Written reprimand to 5-day suspension***

- Sec. 12.B.1.(g)-"Ensure that supervisory personnel or INS investigating officers are aware that employees involved in a shooting incident shall not be required or allowed to submit a written statement of the circumstances surrounding the incident. **All written statements regarding the incident shall be prepared by the local INS investigating officers and shall be based upon an interview of the INS employee.**

- U.S. Attorney Charges

- Assault with intent to murder
- Assault with a dangerous weapon
- Assault with serious bodily injury
- Unlawful discharge of a firearm during the commission of a crime of violence (*mandatory minimum 10 year sentence*)
- Tampering with an official proceeding
- Violation of civil rights

TIMELINE

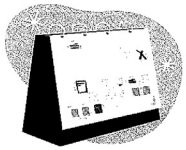


2/17/05	Drug smuggler Aldrete-Davila refuses to stop his van after tripping border sensors near Fabens, TX. After resisting arrest and an altercation with border agents, he was wounded by a bullet fired by agent Ramos. Davila absconds into Mexico to be picked up by a waiting van. Leaves behind 743lbs of narcotics in his vehicle.
3/3/05	Aldrete-Davila's mother calls a friend of hers, who is a mother of a Border Patrol agent in Arizona.This agent, Rene Sanchez, is told by his mother that his childhood acquaintance, Aldrete-Davila, was shot while crossing the border. Agent Sanchez begins his own investigation into the incident.
3/4/05	Agent Sanchez notifies his supervsior, who in turn contacts DHS Office of Inspector General about Aldrete-Davila when he is unable to find any record of a shooting on the day his mother mentioned. DHS agent Christopher Sanchez is dispatched to investigate the situation.
3/7/05	DHS agent Christopher Sanchez calls Aldrete-Davila, who refuses to mention the fact that he was smuggling drugs when he was wounded. Agent Sanchez offers to help Aldrete-Davila with free healthcare at taxpayer's expense at a nearby Army hospital.
3/10/05	Aldrete-Davila comes clean about smuggling drugs. DHS agent Sanchez finds out who was involved in the incident.
3/16/05	Aldrete-Davila is offered full immunity for any crimes he committed the day of the incident if he agrees to testify truthfully and completely about that day. DHS agent Sanchez continues to ensure Aldrete-Davila has a border crossing card and free healthcare. Border Patrol agents Ramos and Compean are arrested.
3/18/05	DHS interviews Border Patrol agents Ramos and Compean. Compean gives a full statement, in which he gives an account of the incident including his belief that Davila had "something shiny" in his hand. Ramos declines until he speaks with a union representative.

TIMELINE cont.

10/23/05	While awaiting the start of the trial, Aldrete-Davila smuggles another load of Marijuana into the US from Mexico. DHS agent Sanchez interviews eye-witnesses who positively identify Aldrete-Davila as the driver of a van packed full of Marijuana that was brought to a drug stash-house. DHS agent Sanchez continues to provide Aldrete-Davila a border crossing card and healthcare at taxpayer's expense.
Feb. 2006	Despite knowing about the second load of marijuana, DHS agent Sanchez preps Aldrete-Davila for his testimony at trial. The US Attorney's office demands that any mention of the second load of drugs not be admissible during the trial. The judge forbids any mention of the second incident.
Mar. 2006	During the trial, Aldrete-Davila says he smuggled drugs to pay for medicine for his mother. The US Attorney's office allows Aldrete-Davila to represent himself not as a professional drug smuggler, but as a one-time offender.
3/8/06	The jury acquits Ramos and Compean of assault with intent to murder, but convicts them of the lesser charges of assault and tampering. The two agents were sentenced to 11 and 12 years in federal prison.
9/26/06	The Inspector General of DHS tells Congress that agents Ramos and Compean stated on the day of the incident that they confessed to knowing Aldrete-Davila was unarmed, didn't feel threatened and "wanted to go out and shoot some Mexicans". All later proven false.
1/17/07	Agents Ramos and Compean are denied bond and forced to report to their respective federal prisons to begin 11 and 12 year sentences, respectively. They are both currently in solitary confinement.
1/17/07	President Bush rebuffs calls for a pardon, and US Attorney Johnnie Sutton begins a media tour stating the agents "shot someone in the back", were "corrupt" and compared them to Tookie Williams. Sutton denied that Aldrete-Davila was "arrested or indicted" a second time for drug smuggling.
2/3/07	America's Most Wanted airs a piece on the case. After suspected members of a Latino gang see the program, agent Ramos is assaulted in prison, and had to be rescued by a fellow inmate. Medical attention was delayed for days, and only after Congress became aware of the attack was Ramos medically treated in a substantial manner.

TIMELINE (cont.)



2/6/07	The Inspector General of DHS admits in a Congressional hearing that they did not tell the truth to Congress about this case, and Ramos and Compean never stated a desire to shoot someone on the day of the incident.
2/15/07	Dept. of Justice files a motion in opposition to releasing the agents on bond pending appeal. Appeals court judge denies bond.
2/27/07	DEA documents surface that outline the details of Aldrete-Davila's second known smuggling attempt. The Department of Justice and Department of Homeland Security have yet to explain why he was not arrested or charged for this second incident.
March 2007	Members of Congress are petitioning leadership to hold hearings to examine this case. Letters have been sent to Speaker Pelosi, Judiciary Chairman Conyers, Homeland Security Chairman Thompson. No decision has been made.

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January 9, 2007

Congress Is Expected to Revisit Sentencing Laws

By LYNETTE CLEMETSON

WASHINGTON, Jan. 8 — Federal sentencing laws that require lengthy mandated prison terms for certain offenses are expected to come under fresh scrutiny as Democrats assume control of Congress.

Among those eagerly awaiting signs of change are federal judges, including many conservatives appointed by Republican presidents. They say the automatic sentences, determined by Congress, strip judges of individual discretion and result in ineffective, excessive penalties, often for low-level offenders.

Judges have long been critical of the automatic prison terms, referred to as mandatory minimum sentences, which were most recently enacted by Congress in 1986 in part to stem the drug trade. Now influential judges across the ideological spectrum say that the combination of Democratic leadership and growing Republican support for modest change may provide the best chance in years for a review of the system.

"With a changing of the guard, there should at least should be some discussion," said William W. Wilkins, chief judge of the United States Court of Appeals for the Fourth Circuit, who was nominated by President Ronald Reagan.

The House Judiciary Committee, under the new leadership of Representative John Conyers Jr., Democrat of Michigan, is planning hearings on the laws, starting later this month or in early February. One of the first issues planned for review is the sentencing disparity between offenses involving powder and crack cocaine.

The possession or trafficking of crack brings much harsher penalties than those for similar amounts of the powder form of the drug. Mr. Conyers, a longtime critic of mandatory minimum sentences, favors treating both drugs equally.

The Senate Judiciary Committee has no immediate plans for hearings. But Senator Jeff Sessions, Republican of Alabama, also supports some changes in the sentencing policy for crack cocaine convictions (though more modest than Mr. Conyers and some other Democrats favor), and Judiciary Committee staff members say a serious Senate review of the issue is likely in the current Congress.

Many law enforcement officials support tough, automatic sentences and argue that weakening existing laws will cause an increase in drug trafficking and violent crime. Many judges say current laws have clogged jails and too often punish low-level offenders. Some judges also argue that automatic lengthy sentences give prosecutors an unfair bargaining tool that they can use to tailor charges and press defendants into plea bargains.

"These sentences can serve a purpose in certain types of cases involving certain types of offenders," said Judge Reggie B. Walton of Federal District Court in the District of Columbia, who was appointed by

President Bush, "but when you apply them across the board you end up doing a disservice not just to individuals but to society at large."

Several judges say that broad inclusion in the coming Congressional hearings on sentencing would mark a notable departure from Judiciary Committee activity under the former Republican chairman, Representative F. James Sensenbrenner Jr. of Wisconsin, who many judges say maintained an antagonistic stance toward judges.

"There was no question that judges were targeted under the Sensenbrenner committee for speaking out," said Judge Nancy Gertner, a Federal District Court judge appointed by President Bill Clinton who teaches a course on sentencing policy at Yale Law School.

Judge Gertner and others point to the example of Judge James Rosenbaum, a Reagan appointee who, in 2003, faced a Congressional review of his sentencing decisions under a barrage of criticism that he and other federal judges were too lenient. Many in the judicial community argued that Judge Rosenbaum was singled out because he criticized a proposal to increase federal sentences in testimony before the House Judiciary Committee.

Most judges shy away from direct formal involvement in legislative matters. But many say private interactions with legislators that do not focus on specific cases but on policy matters of concern to the judiciary are appropriate.

Judge Wilkins, a former legislative assistant to Senator Strom Thurmond, said he believed private conversations on mandatory minimum sentences with his own congressman, Representative Bob Inglis, Republican of South Carolina, helped change the legislator's position.

Mr. Inglis, once a supporter of tough automatic sentences, said during a 1995 House vote that he would never vote for them again and has since become a Republican leader on sentencing reform.

"I was delighted that he took a principled stand, and I would like to think I was of some benefit to him in getting there," said Judge Wilkins, who served as the first chairman of the Federal Sentencing Commission, the body charged by Congress with developing sentencing guidelines and collecting and analyzing statistics.

Some judges have expressed displeasure with the system from the bench or in written opinions.

At a sentencing last January Judge Walter S. Smith Jr., of the Western District of Texas, was required to add 10 years to the already mandated 10-year sentence in a crack distribution case because a gun was found under the defendant's bed. During the sentencing, the judge stated, "This is one of those situations where I'd like to see a congressman sitting before me."

In an impassioned written opinion in 2004, Judge Paul G. Cassell of the Federal District Court in Utah, who was appointed by President Bush, called the mandatory 55-year sentence he was forced to give a low-level marijuana dealer who possessed, but did not use or brandish, a firearm "simply irrational."

In the opinion, Judge Cassell recommended a commutation of the sentence by the president, noting that the

sentence, with consecutive 25-year terms for firearm possession, was longer than those required for an airport hijacker, second-degree murderer or a rapist.

The Supreme Court declined last fall to hear the case. But an amicus brief urging the court to take the case included signatures from legal figures like William Sessions, the former F.B.I. director; Janet Reno, attorney general during the Clinton administration; and Griffin Bell, attorney general under Jimmy Carter.

Many opponents of mandatory minimum sentences would like to see a full repeal of the laws. "After so many years of this, people have forgotten that we should be asking for the whole fix, not just little pieces," said Julie Stewart, president of Families Against Mandatory Minimums.

But most legal, legislative and judicial experts agree that repeal, or even broad-ranging overhaul of existing laws, is unlikely. More probable is serious review of crack cocaine sentencing laws.

Currently, possessing five grams of crack brings an automatic five-year sentence. It takes 500 grams of powder cocaine to warrant the same sentence. Similarly disparate higher amounts of the drugs results in a 10-year sentence. The 100-to-1 disparity, opponents of the law say, unfairly singles out poor, largely black offenders, who are more likely than whites to be convicted of dealing crack cocaine.

At a sentencing commission hearing in November, Judge Walton, associate director of the White House Office of National Drug Control Policy under the first President George Bush and a onetime supporter of tough crack cocaine sentences, said it would be "unconscionable to maintain the current sentencing structure" on crack cocaine.

Mr. Sessions is a co-sponsor of a bill that would change the ratio for the two drugs to 20 to 1, increasing the amount of crack that brings a five-year sentence to 20 grams from 5, and lowering the powder cocaine trigger from 500 grams to 400 grams.

If judges say they are hopeful for new debate on sentencing policy, they are quick to add that they are not naïve. After all, many say, even politicians who are critical of current laws fear looking soft on crime.

"Candidly, the Democrats were never particularly courageous on this issue either," Judge Gertner said. "But at least now it seems judges may be encouraged to be a part of the discussion. And if asked to speak up, I think many will."

Sabrina Pacifici contributed reporting.

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Memorandum March 13, 2007

SUBJECT: **The Investigation, Arrest, and Trial of U.S. Border Patrol Agents Ignacio Ramos and Jose Compean: Background and Issues**

FROM: Blas Nuñez-Neto
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Domestic Social Policy Division

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American Law Division

This memorandum summarizes the February 17, 2005, shooting of Osvaldo Aldrete-Davila (Aldrete-Davila) and the subsequent investigation, arrest, prosecution, and conviction of U.S. Border Patrol (USBP) agents Ignacio Ramos (Ramos) and Jose Compean (Compean). The descriptions provided are primarily from an investigation conducted by the Department of Homeland Security's (DHS) Office of Inspector General (OIG)[1] and press releases by the U.S. Attorney's Office for the Western District of Texas.[2] This case has received widespread coverage by the news media, and many sources have reported different accounts of the events of February 17, 2005 and of the subsequent trial, and have come to varying legal conclusions. All of this has created some controversy and uncertainty surrounding this case. This memorandum also discusses some of the issues that have recently gained attention and lists legislative responses from the 110th Congress. Issues relating to congressional pardons, as proposed in recent legislation, are not discussed in this memorandum.

Events of February 17, 2005

According to the DHS OIG report, around 1:00 p.m. on February 17, 2005, Aldrete-Davila attempted to drive a van loaded with 743 pounds of marijuana to a "stash house"

[1] DHS, OIG, *Report of Investigation of Ignacio Ramos & Jose Compean*, I05-CBP-ELP-07117 (Nov. 21, 2006) available at: [http://www.dhs.gov/xoig/assets/OIG_foia_RamosCompean.pdf] [hereinafter "OIG Report"].

[2] *See, e.g.*, U.S. Dep't of Justice, U.S. Attorney for the Western District of Texas, *Myth vs. Reality – The Facts of Why the Government Prosecuted Agents Compean and Ramos* (Jan. 17, 2007) available at: [http://www.usdoj.gov/usao/txw/press_releases/2007/Compean_Ramos_factsheet1.pdf] [hereinafter "U.S. Attorney Press Release"].

located near Fabens, Texas. Aldrete-Davila noticed he was being followed by USBP agents, at which time he turned the van around and started driving back toward Mexico. After losing control of the vehicle, he jumped out and attempted to run back to Mexico. Refusing to stop at the commands of agent Ramos, Aldrete-Davila jumped into a ditch abutting a levee near the U.S.–Mexico border.

The report indicates that upon attempting to exit the large ditch, Aldrete-Davila was confronted by agent Compean who was waiting for him with a shotgun. During his testimony, Compean acknowledged that at that time Aldrete-Davila held his hands up, as if to surrender, with his palms open, and no weapon was in either hand, or evident on his person. Ramos also testified that when he saw Aldrete-Davila in the ditch, he had an opportunity to look at the suspect's hands and did not see any weapons. Aldrete-Davila then heard someone yell "hit him," and saw Compean swing his shotgun around in an attempt to hit him with the butt of his weapon.[3] Compean, however, lost his footing and fell into the ditch, according to testimony. Aldrete-Davila exited the ditch and continued his run to Mexico.

Compean stated that he observed Aldrete-Davila look back at him as he continued to run away and observed something shiny in Aldrete-Davila's left hand. The U.S. Attorney's Office reports that Compean fired at least fourteen times and Ramos fired once at the fleeing suspect. According to Aldrete-Davila, the last gunshot knocked him to the ground, on the U.S. side of the border.[4] Instead of pursuing Aldrete-Davila, Ramos and Compean holstered their weapons and turned away from the scene.[5] When he was not pursued further, Aldrete-Davila crossed the border and approached a Mexican highway where he was picked up by a van. Following the shooting, Compean picked up at least nine casings and later asked another Border Patrol agent to look for five more casings that he had not picked up. The agent threw away the five casings he found. The U.S. Attorney's Office notes that at the time of the shooting, neither Compean nor Ramos knew that the van driven by Aldrete-Davila contained marijuana.

According to trial testimony, no supervisors were at the scene at the time of the shooting. When supervisors did arrive shortly after the shooting, Ramos mentioned the

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[3] Compean denied that he ever tried to hit Aldrete-Davila with the butt of his shotgun. Rather, he stated that he took the butt of his shotgun away from his shoulder and attempted to push the suspect back into the drainage ditch. OIG Report, *supra* note 1, at 12.

[4] Some interest groups have raised concerns about the ballistics testing. For instance, it has been questioned why the Texas DPS conducted the examination rather than the FBI for a federal prosecution of federal officers. Jerome R. Corsi, *Ballistics Data Don't Support Charge against Border Agents*, WorldNetDaily.com (Jan. 28, 2007) available at: [http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=53976]. Furthermore, it has been argued that tests do not conclusively demonstrate that the bullet came from Ramos' firearm. *Id; see also* National Border Patrol Council, *Rebuttal to U.S. Attorney's Office of the Western District of Texas*, available at: [http://www.nUSBPc.net/ramos_compean/rebuttal_to_sutton.pdf], at 2, 8. On the other hand, the U.S. Attorney's Office has argued that the testing demonstrates a match between the bullet extracted from Aldrete-Davila and Ramos' weapon and that Ramos stipulated and agreed before trial that the bullet came from his weapon.

[5] Compean stated that he stopped shooting at Aldrete-Davila because he continued to run away and it appeared that he was going to cross into Mexico. OIG Report, *supra* note 1, at 12.

pursuit of Aldrete-Davila and that Compean fell to the ground as he tried to grab the suspect.[6] Ramos did not mention the shooting, and said nothing about the suspect having a weapon. Compean denied that he had been injured by Aldrete-Davila and refused the supervisor's offer to file a "Report of Assault" on his behalf. The DHS OIG investigation found that Ramos and Compean did not inform any of the other USBP agents that they had observed Aldrete-Davila with a weapon or a shiny object in his hand.

Ramos and Compean were subsequently arrested for the events that occurred on February 17, 2005. The U.S. Attorney's Office for the Western District of Texas prosecuted the agents in federal court before U.S. District Judge Kathleen Cardone. A jury found Ramos and Compean guilty of violating several criminal laws,[7] including 18 U.S.C. § 924(c), which carries a mandatory minimum sentence of ten years for the discharge of a firearm in relation to a crime of violence.[8] Ramos and Compean were subsequently sentenced to 11 years and 1 day of incarceration and 12 years of incarceration, respectively.[9] The agents have since

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[6] According to at least one news report, the DHS OIG alleged in a March 12, 2005 letter that all of the USBP agents on the scene, including two supervisors, were aware of the shooting when it occurred and failed to report it. *See* Sara A. Carter, *Two Reports Clash on Agents; New Study Also Fails to Back What House Members Were Told*, Inland Valley Daily Bulletin (Feb. 8, 2007), available at: [http://www.dailybulletin.com/search/ci_5181762] (last viewed Mar. 6, 2007). This statement contradicted the final DHS OIG report, which found that other agents on the scene were not aware shots had been fired. *Id. See also* OIG Report, *supra* note 1, at 32-33. DHS has not made the March 12, 2005 letter publicly available.

[7] Ramos and Compean were found guilty of the following charges: (1) assault with a dangerous weapon (18 U.S.C. § 113(a)(3), and aiding and abetting an assault with a dangerous weapon; (2) assault resulting in serious bodily injury (18 U.S.C. § 113(a)(6)), and aiding and abetting an assault resulting in serious bodily injury; (3) discharge of a firearm in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)(iii)); (4) tampering with an official proceeding (18 U.S.C. § 1512(c)(2); and (5) deprivation of rights under the color of law (18 U.S.C. § 242).

[8] Although 18 U.S.C. § 924(c) does not include an exemption for law enforcement officers, some have argued that, at least as a policy matter, the law should only apply to law enforcement officers only when they have committed heinous crimes (e.g., sexual assault or drug smuggling) and carry a firearm in the commission of those crimes. *See* Rep. Walter B. Jones, Press Release, *House Members Join Jones to Question Improper Charge Against U.S. Border Patrol Agents* (Oct. 13, 2006), available at: [http://jones.house.gov/release.cfm?id=455] (discussing letter sent by Rep. Jones and five other Congressmen to Attorney General Alberto Gonzalez, recommending that charges under 18 U.S.C. § 924(c) be dropped). Others, including U.S. Attorney Sutton, have argued that no exception should be made, as "Congress did not make an exception for law enforcement officers" when enacting 18 U.S.C. § 924(c). *See* U.S. Attorney Press Release, *supra* note 2, at 3.

[9] Some have suggested that the guilty verdicts against Ramos and Compean were the result of jury misconduct. According to news reports, at least three jurors conceded their votes during jury deliberations, after statements by the foreman made them believe that the judge would not accept a hung jury. Jerry Seper, *Border Agents Seek New Trial*, WASH. TIMES, Nov. 6, 2006, at A3. One juror reportedly wrote in a sworn statement after the trial that she "did not think the defendants were guilty of the assaults and civil rights violations." Louie Gilot, *Jurors Say They Were Misled to Convict Agents*, El Paso Times & Inland Valley Daily Bulletin (Oct. 18, 2006), available at: [http://www.dailybulletin.com/news/ci_4508579]. Judge Cardone denied defendants' motion for a new trial, which was based, in part, on the alleged jury misconduct. With limited exception, in any inquiry relating to the validity of a verdict, federal courts may not consider the testimony of a juror relating to the his or the jury's deliberations. FED. R. OF EVIDENCE § 606(b). The Federal Rule of Evidence barring such consideration codifies long-standing judicial practice. *See* Martinez

(continued...)

filed notices of appeal with the Fifth Circuit Court of Appeals. DIIS's OIG began an internal investigation shortly after the shooting and released a redacted version of its final report to the public on February 7, 2007. The time line at the end of this memorandum summarizes a number of events that occurred during the arrest, investigation, prosecution, and conviction of Ramos and Compean.

Possible Issues

Border Patrol Operations. Some in Congress have become concerned with Border Patrol pursuit policies and whether staff shortages and lack of training contributed to the incident.[10] In particular, questions have been raised about the level of oversight provided by USBP management and the number of supervisors that were on duty when the shootings occurred. Others are concerned that the conviction might have a negative impact on USBP morale and a chilling effect on the agency's law enforcement activities.[11] Another concern may be the conviction's impact on the hiring of agents in the future; the Administration has announced it will double the number USBP agents by the end of its tenure but in order to accomplish this it will need to hire an unprecedented 5,500 agents in two years.[12] In response to this criticism, the U.S. Attorney's Office has stated that "in order to maintain the rule of law, federal prosecutors cannot look the other way when law enforcement officers shoot unarmed suspects who are running away."[13]

Presidential Pardon or Commutation of Sentence. Some members of Congress have urged the President to pardon Ramos and Compean. Calls for the issuance of a presidential pardon reportedly intensified following reports that Ramos had been assaulted in prison.[14] Others have argued that a presidential pardon or sentence commutation is unwarranted. President Bush stated in a television interview in January that he would take "a sober look" at the case to decide whether a pardon was warranted.[15] However, the

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[9] (...continued)
v. Food City, Inc., 658 F.2d 369, 374 (5th Cir. 1981).

[10] Chris Strohm, *Lawmaker Wants Justice to Probe Border-Shooting Charges*, CongressDailyAM (Feb. 8, 2007) available at: [http://nationaljournal.com/cgi-bin/ifetch4?ENG+CONGRESS-_-POLL_TRACK-_-AD_SPOTLIGHT+7-cdindex+1186794-REVERSE+0+1+796+F+1+1+1+ramos].

[11] Jerry Seper, *Feinstein Questions Treatment of Border Agents*, WASH. TIMES, Feb. 14, 2007, at A10.

[12] The USBP was appropriated funding to hire an additional 2,500 agents in fiscal year (FY) 2007 and has requested funding for 3,000 more agents in FY2008.

[13] *See supra* note 2; *see also* Smith v. Cupp, 430 F.3d 766, 775-76 (6th Cir. 2005) *citing* Tennessee v. Garner, 471 U.S. 1, 9 (1985) ("It is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head."). Under *Garner*, a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect *only* when the suspect poses an immediate threat of serious harm to police officers or others. *Garner*, 471 U.S. at 11.

[14] Cox News Service, *Pardon by Bush Sought; Calls to Forgive Two Ex-Border Patrol Agents Increase after One of Them Is Beaten in Prison*, KAN. CITY STAR, Feb. 10, 2007, at A6.

[15] Rachel L. Swarns, *Bush Comments on Agents Who Shot Suspected Drug Dealer*, N.Y. TIMES, Jan. 20, 2007, at A12.

Department of Justice (DOJ) reportedly stated subsequently that Ramos and Compean were currently ineligible for consideration of a pardon.[16]

While the President's ability to grant pardons or reprieves to persons convicted of federal crimes is clear,[17] the President often relies on recommendations made by the Office of the Pardon Attorney within the Department of Justice (DOJ). The Office of the Pardon Attorney is responsible for accepting and reviewing applications for executive clemency, as well as preparing recommendations regarding the disposition of such applications.[18] DOJ regulations provide that a petition for pardon should not be filed "until the expiration of a waiting period of *at least five years* after the date of the release of the petitioner from confinement or, in case no prison sentence was imposed, until the expiration of a period of at least five years after the date of the conviction of the petitioner."[19] No similar temporal restrictions are placed on consideration of petitions for the commutation of a criminal sentence. However, DOJ regulations generally bar consideration of petitions for commutation made by persons in the process of appealing their criminal convictions, "except upon a showing of exceptional circumstances."[20] It is important to note that DOJ regulations concerning pardons and sentence commutations are advisory in nature, and do not prohibit the Office of the Pardon Attorney from considering petitions that do not meet regulatory requirements.[21] Further, these regulations do not circumscribe the President's plenary authority to grant pardons and reprieves, including to individuals who have not petitioned for such relief.[22] For additional background on presidential pardoning power, see CRS Report RS20829; *An Overview of the Presidential Pardoning Power*, by T.J. Halstead.

Congressional Hearings. Some members of Congress have called for congressional hearings concerning the prosecution of Ramos and Compean. In February, thirty-eight members of Congress signed a letter to House Speaker Nancy Pelosi and the Chairmen of the House Judiciary, Homeland Security, and Oversight & Government Reform Committees, requesting congressional hearings relating to "all aspects" of the Ramos and Compean case. The letter argues that hearings are necessary because "[n]umerous and repeated attempts by Members of Congress to ascertain the facts of this case through inquiries with relevant federal agencies have been unsuccessful," and this failure to obtain information "threatens Congress's ability and inherent responsibility to provide oversight to these federal agencies."[23] Presently, the Senate Committee on the Judiciary is investigating

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[16] *Id.*

[17] U.S. CONST. art. II, § 2, cl. 1.

[18] 28 C.F.R. §§0.35-0.36.

[19] 28 C.F.R. § 1.2.

[20] 28 C.F.R. § 1.3.

[21] 28 C.F.R. §1.11.

[22] *Id.*

[23] Letter by Representative Ted Poe, *et al.*, to House Speaker Nancy Pelosi and House Committee Chairmen John Conyers, Bennie Thompson, and Henry Waxman (Feb. 27, 2007), available at: [http://poe.house.gov/UploadedFiles/Oversight%20Hearings_Ramos&Compean.pdf].

the circumstances surrounding the prosecution and sentencing of Ramos and Compean, but has yet to hold hearings on the matter.[24]

While no hearings have yet been held to specifically deal with the investigation and prosecution of Ramos and Compean, the subject has been raised in the context of other hearings, particularly as it relates to the OIG's investigation of the matter. Some in Congress have questioned the OIG's investigation, particularly because early memoranda and briefings from OIG staff have been reported to contradict the final OIG investigative report that was released to the public on February 7, 2007.[25] On February 5, 2007, DHS Inspector General Richard Skinner, reportedly admitted in testimony before the Homeland Security Appropriations Subcommittee that Members of Congress were given false information about the events of February 17, 2005, by high-ranking officials in DHS.[26] In subsequent testimony given before the Subcommittee, Inspector General Skinner stated that while certain statements given by OIG staff members were misleading or inaccurate, "at no time did any...[staff member] member knowingly and willingly lie to Congress about the investigation of Ramos and Compeon or any other matter."[27]

Legislation

H.R. 563 – Congressional Pardon for Border Patrol Agents Ramos and Compean Act. This bill would order the conviction and sentences of Ramos and Compean vacated. Further, it would order the defendants to be released from custody and prohibit any additional criminal prosecution against the defendants that may stem from events of February 17, 2005. H.R. 563 would also provide a sense of Congress that calls on DHS to review the rules of engagement presently utilized by the Border Patrol.

H. Con. Res. 37 – Expressing the sense of Congress with regard to pardoning Border Patrol agents Ramos and Compean. This resolution would provide a sense of Congress that calls on the President to "swiftly and unconditionally" pardon Ramos and Compean.

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[24] Sen. Dianne Feinstein, Press Release, *Senator Feinstein Calls for Answers Regarding Prosecution and Imprisonment of Border Patrol Agents* (Feb. 9, 2007), available at: [http://feinstein.senate.gov/07releases/r-border-patrol-ltr0209.htm].

[25] DHS has reportedly refused to release documents substantiating these claims. Sara Carter; *Memo Casts Doubt on Agency's Assertions/ Homeland Security Won't Release Papers on Border Agents' Case*, DAILY BULLETIN, Jan. 29, 2007, available at: [http://www.dailybulletin.com/news/ci_5108915] (last visited Mar. 8, 2007).

[26] Michelle Mittelstadt, *Anger Grows in Congress over Border Agents' Case / Some in House Dismiss Homeland Official's Apology, Say Punish Staff for Misstatements*, HOUS. CHRON., Feb. 8, 2007, at A1.

[27] FDCH Cap. Transcripts, Rep. Henry A. Waxman Holds A Hearing On Homeland Security Contracts, 2007 WLNR 2547812 (Feb. 8, 2007). Inspector General Skinner went on to claim that, "Anyone who states that my staff knowingly lied, willingly lied is slandering them."

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Sequence of Events

Date	Event
Feb. 17, 2005	Shooting of Aldrete-Davila occurs near Fabens, Texas.
Mar. 4, 2005	A DHS OIG investigation begins.
Mar. 16, 2005	The DHS OIG agents meet and interview Aldrete-Davila at the United States Consulate, Ciudad Juarez, Chihuahua, Mexico. DHS OIG agents provide Aldrete-Davila with a "Letter of Limited Use Immunity" from the U.S. Attorney's Office, Western District of Texas. Arrangements are made with DHS to obtain a limited Border Crossing Card for Aldrete-Davila to enter the United States for the purpose of being examined by medical doctors at Fort Bliss in El Paso, Texas. The doctors removed a 40-caliber Smith & Wesson bullet from Aldrete-Davila.
Mar. 17, 2005	DHS OIG agents submit the bullet extracted from Aldrete-Davila to the Texas Department of Public Safety (DPS), Crime Laboratory, for analysis.
Mar. 18, 2005	The Texas DPS informs the OIG that the bullet recovered from Aldrete-Davila's leg had been fired from a 40-caliber Beretta pistol that matched the firearm assigned to Ramos.
Mar. 18, 2005	U.S. Magistrate Judge Richard P. Mesa, Western District of Texas, signs a "Warrant for Arrest" for Ramos and Compean.
Mar. 18-19, 2005	Ramos and Compean are arrested at their residences and taken into custody.
Mar. 24, 2005	Judge Mesa sets bond for Compean and Ramos at $15,000 and $35,000 respectively. The agents are released from custody.
Mar. 25, 2005	Ramos and Compean are suspended without pay by the Border Patrol.
Apr. 13, 2005 - Jan. 25, 2006	A federal grand jury in the Western District of Texas returns true bills indicting Ramos and Compean of the following: 1) 18 U.S.C. §113(a)(1), assault with intent to murder; 2) 18 U.S.C. §113(a)(3), assault with a dangerous weapon; 3) 18 U.S.C. §113(a)(6), assault with serious bodily injury; 4) 18 U.S.C. §924(c)(1)(A)(iii), discharge of a firearm in relation to a crime of violence; 5) 18 U.S.C. §1512(c)(1), tampering with an official proceeding; and 6) 18 U.S.C. §242, deprivation of rights under color of law.
Feb. 21, 2006	The federal trial against Ramos and Compean begins in the U.S. District Court for the Western District of Texas in El Paso. The Honorable Kathleen Cardone, U.S. District Judge, presides over the trial.
Mar. 6, 2006	The trial ends.

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Date	Event
Mar. 8, 2006	The jury ends deliberations and finds Ramos and Compean guilty of: 1) assault with a dangerous weapon (18 U.S.C.§113(a)(3), and aiding and abetting; 2) assault with serious bodily injury (18 U.S.C. §113(a)(6)) , and aiding and abetting; 3) discharge of a firearm in commission of a crime of violence (18 U.S.C. §924(c)(1)(A)(iii); 4) tampering with an official proceeding (18 U.S.C. §1512(c)(1)); and 5) deprivation of rights under color of law (18 U.S.C. § 242).
Sept. 26, 2006	DHS OIG employees brief four Members of Congress regarding the investigation and prosecution of Ramos and Compean.
Oct. 19, 2006	Judge Cardone sentences Ramos to 11 years and 1 day of incarceration and sentences Compean to 12 years of incarceration.
Oct. 20-23, 2006	Ramos and Compean each file notice of appeal.
Oct. 26, 2006	DIIS forwards letters of proposed removal (termination) to Ramos and Compean.
Nov. 21, 2006	The DHS OIG investigation is completed.
Jan. 16, 2007	Judge Cardone denies Ramos and Compean's motion to stay out on bond while they appeal their case.
Jan. 17, 2007	Ramos and Compean surrender to the United States Marshal Service. Ramos is sent to Yazoo City Federal Penitentiary in Mississippi and Compean is sent to Elkton Federal Correctional Institution in Ohio.
Feb. 3, 2007	Ramos is assaulted in prison.
Feb. 7, 2007	A redacted version of the OIG's final "Report of Investigation" is released to public. In addition to the criminal statutes that Ramos and Compean violated, the OIG found that Ramos violated the USBP's Pursuit Policy, Firearms Policy, Deadly Force Policy, and Reporting Allegations of Misconduct Policy. The OIG also found that Compean violated the USBP's Firearms Policy, Deadly Force Policy, and Use of Non-Deadly Force Policy.