



R E S E A R C H   A N D   A D V O C A C Y   F O R   R E F O R M



# **Testimony of Marc Mauer**

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**Before the Senate Judiciary  
Committee**

**On the Sentencing Reform and  
Corrections Act of 2015**

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Thank you for the opportunity to testify regarding the Sentencing Reform and Corrections Act of 2015. I am Marc Mauer, Executive Director of The Sentencing Project. I have had extensive engagement in public policy research on criminal justice issues for many years, with a particular focus on sentencing, incarceration, and racial disparity. I am the author of two books on these issues and numerous journal articles and public commentary, and I have previously been invited to testify before Congress and legislative bodies in a number of states.

This legislation would have a significant impact on key problems identified in federal sentencing and corrections in recent decades. It is very encouraging that we are now at a political moment where there is broad bipartisan support for such initiatives, building on the public support we have seen for scaling back harsh sentences, increasing the use of sentencing alternatives, and investing in community-based treatment programs around the country.

The Sentencing Reform and Corrections Act of 2015 is being considered at a time when we are experiencing historically low rates of crime and violence. For a variety of reasons crime rates have been declining throughout the nation since the early 1990s. Yet for most of this period rates of incarceration at both the federal and state levels continued to rise. These conflicting trends support findings over several decades that changes in policy, not crime rates, have been the key factor in rising prison populations. Therefore, policy shifts can likewise produce necessary and effective reductions in prison crowding.

In recent years we have witnessed the success of such initiatives at the state level. Three states – California, New Jersey, and New York – have reduced their prison populations by about 25% in the past 15 years. In almost all categories of crime and violence, these states achieved reductions equal to or greater than the national average as they lowered their prison populations.

Adopting the provisions of the Sentencing Reform and Corrections Act of 2015 would accomplish a number of objectives:

- Promote public safety
- Produce a more rational and effective federal sentencing structure
- Reduce the federal prison population and related costs
- Restore a greater measure of discretion to federal judges
- Address the high rates of incarceration of African Americans and Latinos
- Enhance prospects for successful reentry from prison through enhanced programming
- Follow the lead of a number of states that have reduced prison populations without compromising public safety
- Free up funds that can be allocated for crime prevention and substance abuse treatment programs

In this testimony I will describe how the elements of this legislation would contribute to achieving these goals.

## PROMOTING PUBLIC SAFETY

Public safety resources are finite, and therefore it is critical that policymakers assess the appropriate balance of investments in achieving outcomes. The dramatic expansion of the prison system over the past four decades has had a variety of disturbing effects, particularly on disadvantaged communities of color that have borne the heaviest burden of these policies. This expansion has also produced a severe imbalance in our approach to public safety, whereby record fiscal expenditures have been targeted at the back end of the criminal justice system, coming at the expense of investments in crime prevention, drug treatment programs, and support for more effective initiatives to aid law enforcement and the courts in promoting a broader public safety strategy.

It is also clear that the dramatic expansion of the prison system has now placed us well past the point of diminishing returns for public safety. There are a number of reasons why this is the case, but key among them has been the trend of incarcerating successively lower level offenders along with expanding the length of prison terms well past the ages at which individuals are likely to continue committing crimes.

Due to mandatory sentencing, cutbacks in parole release, limited use of executive clemency, and initiatives such as “three strikes and you’re out,” many individuals are kept in prison well past the point where they present a serious threat to public safety. It is well known that individuals generally “age out” of crime, so the 20-year old incarcerated for an armed robbery is much less likely to be a threat to the community by the age of 40. The impact of lengthy prison terms, therefore, produces diminishing returns for public safety at an increasingly high cost, in large part due to rising healthcare costs for aging individuals in prison. While prison clearly has some incapacitating effect on crime, the key question for policymakers should be how to compare that impact with other investments of those resources, either within or outside the criminal justice system. In regard to this legislation, one option for the use of cost savings due to reduced incarceration could be to apply those resources to enhanced programming in federal prisons and/or reentry services to support transition from prison.

By reducing the broad application of mandatory sentencing that is overly punitive in a substantial proportion of cases, this legislation would help to restore a more appropriate balance in sentencing policy and the use of criminal justice resources. Recent evidence from the U.S. Sentencing Commission confirms that sentence reductions of the magnitude proposed in the bill can be accomplished without adverse effects on crime. Following the Commission’s retroactive application of reduced guidelines in 2007 for persons convicted of crack cocaine offenses, the Commission conducted a three-year post-prison study of recidivism rates. Their finding was that the persons who served an average of two years less than a previous cohort exhibited no significant difference in recidivism.

In addition to shorter prison terms not producing any harmful individual effects there is also no reason to believe that they will result in any negative consequences for public safety. Research has long documented that the deterrent effect of the justice system is much more a function of the

*certainty* of punishment than the *severity* of punishment; therefore, longer prison terms at the current level of imprisonment provide little additional benefit. Further, lengthy prison stays mean that individuals are increasingly isolated from their families and communities, a key factor in reentry success following incarceration.

## **PROMOTING A MORE RATIONAL AND EFFECTIVE FEDERAL SENTENCING STRUCTURE**

The problems generated by the widespread use of mandatory sentencing have been well documented by the U.S. Sentencing Commission and substantial academic research. Key among these effects are the following:

- Mandatory sentencing establishes a “one size fits all” sentencing structure that prohibits consideration of individual and case factors long considered to be relevant at sentencing.
- Mandatory sentencing is not necessary to impose harsh prison terms on deserving persons since such penalties are already codified in statute, but they result in excessively harsh terms for many people who are not the most serious offenders in a given category.
- While mandatory sentencing policies are premised on the idea that they restrict the use of arbitrary discretion in the courts, they instead largely result in a transfer of discretion from judges to prosecutors, primarily through the charging and plea negotiation processes.
- Mandatory sentencing has produced racial disparities in outcomes, whereby white defendants are more frequently able to plead guilty to charges that do not carry a mandatory penalty than similarly situated African American defendants.

The safety valve provisions proposed in this legislation would build on what has been an effective provision in federal sentencing for two decades. Since the Congress codified a safety valve provision in 1994, federal judges have employed that mechanism in about a quarter of all drug cases. This has helped to ameliorate some of the most extreme effects of mandatory sentencing.

Over the course of this period many federal judges have noted the relatively limited criteria for application of the safety valve, and have described various types of cases and individuals for whom a sentence below the applicable mandatory minimum would be both just and effective. With the expansion of safety valve options in this legislation judges will now be able to consider on a case-by-case basis a broader range of defendants for whom such sentencing outcomes would be appropriate. There is no reason to believe that federal judges will not employ the enhanced criteria with the same care and attention that they have demonstrated to date.

In addition, such an expansion of the safety valve would help to correct some of the sentencing distortions produced by the broad application of mandatory minimums. These are frequently brought about through the enhanced power of prosecutors in plea negotiations due to the threat of highly punitive mandatory penalties.

## **ADDRESSING UNJUST RACIAL/ETHNIC DISPARITIES IN FEDERAL SENTENCING**

The advent of mass incarceration has had a particularly harsh impact on African American communities, and increasingly on Latinos. Black men are incarcerated at a rate six times that of white men, and one in ten black males in his 30s is in prison or jail on any given day. The intersection of socioeconomic disadvantage and the criminal justice system is similarly dramatic, with 70% of black male high school dropouts having been incarcerated by the age of 35. The life consequences for these individuals and their communities are quite profound, and threaten much of the progress toward racial justice of recent decades.

Federal sentencing policy has unfortunately contributed to these outcomes. The most high level instance of this has been the mandatory sentencing policies for crack cocaine offenses adopted in the late 1980s, whereby persons convicted of a crack cocaine offense are punished more harshly than those convicted of a powder cocaine offense. As a result of racial disparities produced in drug law enforcement, more than 80% of defendants subject to these penalties in crack cocaine cases have been African American.

To address these concerns, as well as the excessive punishments for crack cocaine offenses overall, Congress enacted the Fair Sentencing Act in 2010, which reduced the sentencing disparity between the two forms of cocaine. Notably, the legislation did not apply retroactively to individuals sentenced prior to its adoption. This created the unjust circumstance whereby an individual sentenced a day before the legislation was enacted would have received a longer prison term than another person sentenced the day after. By applying the provisions of the Fair Sentencing Act to an estimated 6,500 individuals currently incarcerated in federal prisons this legislation would reduce excessive incarceration overall and that of African Americans in particular.

## **ADDITIONAL MEASURES TO ADOPT EVIDENCE-BASED PROGRAMMING AND FAIRNESS IN SENTENCING**

Without elaborating in great detail, let me briefly describe several additional salutary measures in this legislation.

The programming expansion in federal prisons represents a much needed initiative to address the limited educational attainment and employment histories of many people in prison. By providing individuals with job and life skills, accompanied by sentencing reduction incentives, this provision can support a more productive prison environment and enhance prospects for successful reentry.

While the number of juveniles in the federal justice system is quite modest we should nonetheless apply current thinking and research findings to their conditions of confinement. As such, the measures to restrict the use of solitary confinement of juveniles and to provide for expungement possibilities are important components of a rational approach to working with this population.

Finally, the provisions of this legislation applying to life prison terms and to aging offenders also represent sound and compassionate policies. Currently under federal “three strikes” policy persons

can receive terms of life without parole for three drug offenses that do not involve violent behavior. While many of these individuals have been higher level players in the drug trade, a sentence of life imprisonment provides no greater impact on drug markets than the proposed 25-year minimum. As we have seen with the recent commutation grants by President Obama, there are a considerable number of deserving individuals who fit these circumstances. On the day of sentencing in court no one can predict which defendants will be the ones who turn their lives around while in prison, but that is precisely the reason why a review after 25 years is so necessary.

Similarly, aging offenders in prison rarely represent the public safety concerns that they might have presented at a much younger age, and their continued incarceration comes at great fiscal and human cost. A sentencing system that strives to be both effective and compassionate should make use of release mechanisms in such cases.

## **CONCLUSION**

The sentencing and corrections provisions of this legislation would bring a greater measure of rationality and fairness to federal sentencing. The components of this bill also provide the potential for a significant reduction of the federal prison population, with consequent cost savings, and no adverse effect on public safety. Hopefully, this legislation can be considered a substantial first step toward a broad consideration of federal sentencing and corrections policy. In that regard, let me conclude with a few thoughts on possible future directions for public policy.

In the area of programming expansion in federal prisons I would encourage consideration of certain modifications to the programming structure. Since there is a broad need for effective programming in federal prisons we would be better served if such programming were open to all individuals. Research in the field has documented that the most cost-effective corrections programming is that which targets high-risk individuals. This is because many low-risk participants would be likely to succeed even in the absence of programming, whereas higher risk persons would be far more likely to recidivate without such interventions.

In regard to mandatory sentencing, the provisions of this legislation would ameliorate some of the most egregious effects of this policy, but still leave intact the overall structure. It has become increasingly clear that mandatory minimums do not play a significant role in producing public safety, but distort sentencing outcomes in a substantial portion of cases. Therefore, it would be reasonable for the Congress to assess these outcomes in a comprehensive manner, with a goal of reducing or eliminating such policies overall.

Finally, it is encouraging to note that many of the provisions in this legislation would not only result in more rational sentencing outcomes, but would contribute to reducing racial disparities in incarceration. Even so, the scale of disparity in both federal and state prisons is so dramatic that it will require ongoing attention and reform by both policymakers and practitioners. By doing so we can hopefully transform the criminal justice system to deliver more effective and more compassionate outcomes for all.