



Association of
Prosecuting Attorneys

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November 25, 2013

Senator Richard Durbin
711 Hart Senate Office Bldg.
Washington, DC 20510

Senator Mike Lee
316 Hart Senate Office Bldg.
Washington, DC 20510

Senator Patrick Leahy
437 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senators Durbin, Lee and Leahy:

The Association of Prosecuting Attorneys (APA) is a private non-profit whose mission is to support and enhance the effectiveness of prosecutors in their efforts to create safer communities. We are the only national organization to include and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, city prosecutors, district attorneys, state's attorneys, attorneys general or U.S. attorneys.

On behalf of APA, I offer our support of your efforts in Congress to pass the Smarter Sentencing Act of 2013 (S.1410, H.R.3382), as this legislation improves public safety, helps redirect resources from federal incarceration of lower-level drug offenders to our most important law enforcement priorities, and promotes fairness of sentences for drug offenders who were sentenced prior to the enactment of the Fair Sentencing Act. As prosecutors, we are well aware of the need for proportionate sentencing and believe that adjustments should be made to the federal drug mandatory minimums that are evidence-based, take into consideration data from the Sentencing Commission, and are intended to reduce recidivism.

The bill reduces, but does not eliminate, certain mandatory minimums for non-violent drug offenses. However, it keeps in place a floor of significant custody time for swift, certain punishment. Prosecutors and judges should be allowed some reasonable discretion in cases involving non-violent drug offenses, and that discretion is provided by this bill. These reductions will allow courts to make appropriate, individualized assessments in non-violent drug cases, maintain some uniformity in sentencing for drug-related offenses, and continue to sentence the most serious offenders with appropriately long sentences. The bill also modestly expands the existing federal safety valve consistent with public safety.

The bill promotes fairness and justice in sentencing by allowing inmates serving sentences imposed before the Fair Sentencing Act to seek sentence reductions consistent with current law. It is unjust not to address those serving sentences Congress already determined to be unfair and racially disparate. Prosecutors will review each and every petition for a sentence reduction and oppose reductions where necessary before judges who can deny any petition consistent with public safety. Lastly, the bill requires the Attorney General to report on how the reduced expenditures on federal corrections and cost savings resulting from this Act will be used to help reduce overcrowding, increase investment in law enforcement and crime prevention, and reduce recidivism. This is important to study, as spending on federal incarceration has increased by more than 1100 percent in the last 30 years. Almost 50 percent of the federal prison population consists of offenders with commitments for drug or drug-related offenses.

This continued rise in prison population at the federal level is inconsistent with trends at the state level, which have plateaued or declined in recent years. This funding pressure has caused a shift from some of our most important law enforcement functions including prosecutors, investigators, state/local criminal justice assistance as well as crime prevention efforts. For example, since 2011 alone, DOJ has lost hundreds of positions in U.S. Attorney's Offices, the Drug Enforcement Administration and the U.S. Marshals Service. In addition, local assistance programs like Byrne JAG have been reduced over 40 percent. These local assistance funds are critical for the improvement of the administration of justice in this country.

We have made huge strides in terms of public safety and violent crime. With nearly a third of the Department of Justice budget now going to federal incarceration and detention, we are threatening our ability to provide sufficient law enforcement resources and keep our communities safe.

We are available to answer any questions you may have, and we thank you for your attention to this real and pressing law enforcement concern. This measure, when enacted into law, will help reduce overcrowding in the Federal Bureau of Prisons, help increase proper investment in law enforcement and crime prevention, and help reduce criminal recidivism, thereby increasing the effectiveness of Federal criminal justice spending.

Respectfully submitted,



David LaBahn
President and CEO

December 9, 2013

VIA ELECTRONIC MAIL

The Honorable Richard J. "Dick" Durbin
United States Senate
711 Hart Senate Office Building
Washington, DC 20510-1304

The Honorable Michael S. "Mike" Lee
United States Senate
316 Hart Senate Office Building
Washington, DC 20510-4404

RE: The Smarter Sentencing Act

Dear Senators Durbin and Lee:

As former judges, prosecutors and law enforcement officials, we write to express our support for the reforms to federal sentencing contained in the Smarter Sentencing Act (S.1410, H.R.3382). Your bill represents an important step in promoting public safety and addressing the consequences of federal mandatory minimum sentences on the explosive growth in incarceration costs and the fairness of sentences for nonviolent drug offenders.

Law enforcement has made great progress in curbing violent crime. At the federal level, we need to address the parts of our sentencing policies that are not working. Over the past three decades, what we spend on federal incarceration has increased by more than 1100 percent. Despite this massive investment, federal prisons are nearly 40 percent over capacity, with the ratio of prisoners to prison guards rising. As a nation, we are expending enormous amounts of money and still failing to keep pace with the growing prison population, with drug offenders comprising nearly half of this population.

In addition to being fiscally imprudent, maintaining the status quo in federal sentencing policy threatens public safety. Overcrowding threatens the safety of prison guards and inmates in federal prisons. Perhaps most important, spending on incarceration in this economy has started to jeopardize funding for some of our most important priorities, like crime prevention, law enforcement, and reducing recidivism. This includes possible reductions in the number of federal investigators and prosecutors. The Bureau of Prisons currently accounts for about 25 percent of the Department of Justice's budget and this is projected to increase. With more resources going to incarcerate nonviolent offenders, and fewer resources spent to investigate and prosecute violent crimes and support state and local law enforcement efforts, public safety will be at risk. Law enforcement will continue to maximize its resources to keep our communities safe. But Congress created our sentencing scheme and needs to act to help solve these problems.

The Smarter Sentencing Act reflects these concerns and embodies measured, bipartisan reforms. Its modest expansion of the current "safety valve," coupled with the reduction of some mandatory minimums for non-violent drug offenses—while maintaining statutory maximums—allows courts to make individualized assessments in nonviolent drug cases. This maintains consistency in sentencing for drug-related offenses, but allows for discretion to give less lengthy sentences, where appropriate. This approach is a step toward controlling the growth of incarceration costs, while maintaining public safety

and helping to ensure that prison sentences are appropriate for each offender. The bill does not repeal any mandatory minimums or affect the sentences for any violent offenses, but helps focus limited resources on the most serious offenders.

The bill also promotes fairness and consistency by acknowledging the numerous federal prisoners who are serving sentences imposed prior to the Fair Sentencing Act of 2010's reduction of the crack/powder cocaine sentencing disparity. The Smarter Sentencing Act would allow certain inmates sentenced under the old regime to petition courts and prosecutors for a review of their sentences and possible sentence reductions under current law. This not only addresses what is now widely recognized as an unjust disparity in sentences, but estimates also show that it could save more than \$1 billion in incarceration costs.

We appreciate your leadership in seeking bipartisan solutions to address the widely acknowledged problems with over-incarceration, to which mandatory minimum sentences have contributed. We are pleased to extend our help as you work with your colleagues in both the Senate and House to pursue reform in federal sentencing.

Signatories as of December 9, 2013:

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THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS

SAM A. CABRAL
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December 9, 2013

The Honorable Richard J. Durbin
United States Senate
Washington, D.C. 20510

The Honorable Michael S. Lee
United States Senate
Washington, D.C. 20510

Re: The Smarter Sentencing Act, S.-1410, H.R.3382

Dear Senators Durbin and Lee:

On behalf of the International Union of Police Associations, AFL-CIO (I.U.P.A.), I am proud to endorse the Smarter Sentencing Act. We believe that this critical legislation is needed to address the exploding federal prison population, containing a large number of non-violent drug offenders, and to restore the funding necessary for local law enforcement hiring, training and equipment.

As you know, the I.U.P.A. represents more than 100,000 rank and file, active duty, law enforcement and emergency medical personnel across this great nation, as well as in Puerto Rico and the Virgin Islands. Collectively, these men and women are largely responsible for the dramatic decrease in violent crime that this nation has realized. Many of our locals have increased public safety through augmentation of personnel and equipment through federal grants from the Justice Department. These necessary federal funds are rapidly declining as more resources are diverted towards the cost of federal incarceration. The Bureau of Prisons currently accounts for more than 25% of the Department of Justice's budget. If the situation is not soon addressed through measures like the Smarter Sentencing Act, this situation will worsen exponentially, leading to the erosion of the public safety accomplishments of our officers. With the law enforcement community continually doing more with less, we have long since passed the point where we are forced to critically determine how we can best spend the finite resources allocated to public safety.

Drug offenders currently account for nearly half of the federal prison population. Our prisons are critically over-crowded, jeopardizing the safety of the corrections personnel assigned to administer them. This legislation is a thoughtful, modest, and we believe, safe approach to address this growing concern. The legislation focuses on non-violent drug offenses, does not reduce maximum penalties, and helps ensure that resources will be focused on the most serious public safety risks. Additionally, it will restore vital funding to local law enforcement and help them keep our communities safe.

We applaud the introduction of this reasonable and bipartisan legislation, and look forward to working with you and your staff members to move this bill forward.

Very Respectfully,

Sam A. Cabral
International President



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

December 19, 2013

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I am writing to share the views of the Judicial Branch on legislation that is before the Judiciary Committee, specifically S. 619, the "Justice Safety Valve Act of 2013"; S. 1410, the "Smarter Sentencing Act of 2013"; S. 1675, the "Recidivism Reduction and Public Safety Act of 2013"; and S. 1783, the "Federal Prison Reform Act of 2013." This letter supplements the views expressed in a September 17, 2013, letter to you from Judge Robert Holmes Bell, then-Chair of the Judicial Conference's Criminal Law Committee, which was submitted in connection with the Judiciary Committee's September 18 hearing entitled "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences."

The Conference strongly supports the reforms to mandatory minimum sentencing proposed in S. 619 and S. 1410. These bills would help ameliorate the fiscal and social costs of mandatory minimum sentences. A copy of Judge Bell's letter, which thoroughly discusses this issue, is enclosed.

A number of the provisions contained in these bills would impose additional costs upon the Federal Judiciary. It is critical that Congress provide adequate resources when it imposes additional burdens on the Judicial Branch. Court staffing already is at 1997 levels, and budget allotments to the courts are at 2007 levels. S. 1675 would impose new workload requirements on the Federal Judiciary by, *inter alia*, mandating new recidivism reporting requirements on the probation system; establishing demonstration and pilot projects in the courts; and mandating new requirements for presentence reports. S. 1783 also would impose new workload requirements on the courts. For example, under S. 1783 judges would be required to consider recommendations from the Bureau of Prisons on whether inmates should serve the remainder of their sentences on

home confinement.¹ If home confinement is authorized, probation officers would be required to supervise the inmates using technology that allows them to “continuously monitor the locational status” of the offenders. The bill caps the cost of providing these services at \$16 per day per inmate – but the current daily cost of supervision (i.e., an officer’s time) and continuous location monitoring (e.g., active GPS monitoring) is roughly \$18 per day per offender, and the bill makes no accommodation for inflationary growth.²

S. 1410 also would impose costs on the Judiciary, including supervision by probation officers of offenders released from custody. In addition to new requirements on judges and probation officers, the workload of Federal Defenders and CJA panel attorneys also would increase under S. 1410, S. 1675, or S. 1783, especially with regard to sentencing preparation and other representational requirements. Congress must provide adequate resources for the Judiciary to meet these new workload requirements. The same holds true for any legislation that would impose new workload requirements on the Federal Judiciary.

Several reforms proposed by these bills are consonant with Conference policy. For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.³ In his letter, Judge Bell reiterated the Conference’s longstanding opposition to mandatory minimum sentences and its strong support for legislation such as the “Justice Safety Valve Act of 2013” that would help avoid the costs associated with mandatory minimum sentences. Although the “Smarter Sentencing Act of 2013” would implement a more modest expansion of the safety valve by extending eligibility to defendants whose criminal history categories were not higher than category two, it is consistent with the Conference’s view that a safety valve “is needed to ameliorate some of the harshest results of mandatory minimums.” The Conference continues to

¹ This provision would also require a judge to approve or deny a recommendation within 60 days of submission. If no decision is made within that time, the recommendation is deemed approved. The Judicial Conference has concerns over statutory time limits beyond those already established that would require a judge to prioritize certain cases; these concerns are heightened by the prospect of a prisoner being released by default.

² The potential additional workload that could result from these changes to federal supervision could be very significant, and so the Attorney General should be required to collaborate with the Director of the Administrative Office of the United States Courts when developing guidelines for supervision by probation officers under S. 1783 (including to determine appropriate lengths of home confinement for particular categories of offenders). Additionally, S. 1783 currently refers to the “Assistant Director of the Office of Probation and Pretrial Services.” As of October 1, 2013, the Probation and Pretrial Services Office is led by a Chief. We recommend, however, that the bill instead refer to the “Director of the Administrative Office of the United States Courts” throughout.

³ See JCUS-SEP 53, p. 29; JCUS-SEP 61, pp. 98-99; JCUS-MAR 62, pp. 20-21; JCUS-MAR 65, p. 20; JCUS-SEP 67, pp. 79-80; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45,56; JCUS-MAR 93, p.13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17.

pursue its overriding goal of persuading Congress to reduce or repeal mandatory minimum sentences (which S. 1410 also does for certain drug crimes).⁴

Section 3 of the “Smarter Sentencing Act of 2013” would make the “Fair Sentencing Act of 2010” (Public Law No. 111-220) – which reduced the disparity between sentences for crack and powder cocaine offenses – applicable to inmates who had been sentenced prior to August 3, 2010. This proposal is consistent with the Conference’s strategy to restore fairness to the sentences for defendants convicted of crack cocaine offenses. Noting concern that the disparity between the sentences for powder and crack cocaine offenses could have a corrosive effect on public confidence in the courts, the Judicial Conference agreed to oppose that disparity and to support the reduction of the difference.⁵

The Conference supports Congress’s efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. Far from benign, these unintended consequences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentencing.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



John D. Bates
Secretary

Enclosure

cc: Democratic Members of the Senate Committee on the Judiciary

Identical letter sent to: Honorable Charles E. Grassley

⁴ JCUS-SEP 91, p. 56.

⁵ JCUS-SEP 06, p. 18.



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Honorable Robert Holmes Bell, Chair

September 17, 2013

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As Chair of the Criminal Law Committee of the Judicial Conference of the United States, I am pleased that the Senate Judiciary Committee plans to convene a hearing on September 18, 2013, entitled "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimums and has supported measures for their repeal or to ameliorate their effects.¹ In anticipation of this upcoming hearing, I am writing to reiterate the Conference's long-standing opposition to mandatory minimum sentences and to express our strong support for legislation such as the "Justice Safety Valve Act of 2013" that would help avoid the fiscal and social costs associated with mandatory minimum sentences.

¹ JCUS-SEP 53, p. 29; JCUS-SEP 61, pp. 98-99; JCUS-MAR 62, pp. 20-21; JCUS-MAR 65, p. 20; JCUS-SEP 67, pp. 79-80; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45,56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17.

The Conference has had considerable company in its opposition to mandatory minimum sentences. As Judge William W. Wilkins testified, "It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion [T]he spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system."²

Judges routinely perform tasks in which the individual judge has no or very little discretion. "In fact, much of a judge's daily activity is consumed with executing 'mandatory' tasks, using a decision-making process that is 'mandated' by some other entity. Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge's possible disagreement with some of these instructions. Myriad other examples abound."³ But the Judicial Conference does not advocate for the repeal of these legislatively mandated tasks.

This belies the claim that judges are motivated by a parochial desire to increase their own power in sentencing. Rather, the Conference's opposition to mandatory minimums derives from a recognition, gained through years of experience, that they are wasteful of taxpayer dollars, produce unjust results, are incompatible with the concept of guideline sentencing, and could undermine confidence in the judicial system.

Part I of this letter describes some of the well-known objections to mandatory minimums. In part II, we discuss the Conference's support of interim legislative measures to reduce the effects of statutory minimums. There is a range of ways to address their unjust and unintended effects, from outright repeal to taking incremental steps. The Judicial Conference is supportive of Congress's efforts to make a thoughtful and thorough assessment of this continuing problem.

² See, e.g., *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66 (July 28, 1993) [hereinafter *1993 Hearing*] (statement of Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission).

³ *Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 39 (July 14, 2009) [hereinafter *2009 Hearing*] (statement of Chief Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States).

I. The Failure of Mandatory Minimum Sentences

Though mandatory minimums have been criticized on numerous grounds,⁴ there are three objections that we wish to highlight. First, statutory minimums cost taxpayers excessively in the form of unnecessary prison and supervised release costs. Second, they are inherently rigid and often lead to inconsistent and disproportionately severe sentences. Finally, they impair the efforts of the Sentencing Commission to fashion Guidelines in accordance with the principles of the Sentencing Reform Act, including the careful calibration of sentences proportionate to severity of the offense and the research-based development of a rational and coherent set of punishments.

A. Mandatory Minimum Sentences Unnecessarily Increase the Cost of Prison and Community Supervision

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, a proliferation of mandatory minimum penalties has occurred over the past 20 years. Between 1991 and 2011, the number of mandatory minimum penalties doubled, from 98 to 195.⁵ There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the federal prison population.⁶ This growth “is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates.”⁷

Longer prison sentences also mean longer terms of supervised release. Legislation ameliorating the effects of mandatory minimums can save taxpayer dollars, not only through a reduction in the prison population, but by lowering supervised release caseloads. It has been suggested that “persons who serve the longer terms of imprisonment that have resulted from mandatory minimum sentences and the sentencing guidelines may present greater problems in

⁴ See, e.g., U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), at 90-103, available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_05.pdf. (reviewing policy views against mandatory minimum penalties, including that: they are applied inconsistently; they transfer discretion from judges to prosecutors; they are ineffective as a deterrent or as a law enforcement tool to induce pleas and cooperation; they are indicative of the “overfederalization” of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government; and they unfairly impact racial minorities and the economically disadvantaged).

⁵ U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 71.

⁶ Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (January 2013), at 51, available at: <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

⁷ *Id.* See also U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 63 (“Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system . . . that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. [T]he changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.”).

supervision simply by virtue of the longer periods of incarceration.”⁸ In a 2010 report, the Sentencing Commission noted that the average term of supervised release for an offender subject to a mandatory minimum was 52 months, which compared to 35 months for an offender who was not subject to a mandatory minimum—a difference of 17 months.⁹ Based on fiscal year 2012 cost data, the cost of supervising an offender for one month is approximately \$279.¹⁰ Should the prison population be reduced due to legislation reducing the impact of mandatory minimums, the federal probation and pretrial services system could also play a role in reducing system-wide costs through the effective and efficient supervision of offenders in the community.¹¹

B. Mandatory Minimum Sentences Cause Disproportionality in Sentencing

Mandatory minimum statutes are structurally flawed and often result in disproportionately severe sentences. As past chairs of the Judicial Conference’s Criminal Law Committee have testified, there is an inherent difficulty in crafting a statutory minimum that can truly apply to every case. Unlike the Sentencing Guidelines, applied by judges on a case-by-case basis, allowing a consideration of multiple factors that relate to the culpability and dangerousness of the offender, mandatory minimum statutes typically identify one aggravating factor, and then pin the prescribed enhanced sentence to it. Such an approach means that any offender who is convicted of the particular statute, but whose conduct has been extenuated in ways not taken into account, will necessarily be given a sentence that is excessive. This reduces proportionality and creates unwarranted uniformity in treatment of disparate offenders. In short, as two former Criminal Law Committee chairs have put it, mandatory minimum penalties “mean one-size-fits-all injustice”¹² and are “blunt and inflexible tool[s].”¹³

⁸ See David Adair, *Revocation of Supervised Release - A Judicial Function*, 6 FEDERAL SENTENCING REPORTER 190, 191 (1994).

⁹ U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010), at 51-52, available at: http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf.

¹⁰ Memorandum from Matthew G. Rowland, Assistant Director, Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts (hereinafter “AO”), “Costs of Incarceration and Supervision,” (May 17, 2013) (on file with the AO).

¹¹ 1993 *Hearing*, *supra* note 2, at 110 (statement of Judge Vincent L. Broderick) (“There are a variety of alternative sanctions that can be safely managed in the community, ranging from low security residential correctional alternatives and home detention with electronic monitoring, to community supervision of offenders who are required to provide restitution, to submit urine tests for the detection of drug use, to perform compensatory service, and to pay fines. I have had the great privilege, these past three years, of exercising judicial supervision over the Federal Pretrial Services Officers and Probation Officers. They constitute an extremely talented and dedicated body of men and women who can effectively control convicted criminals outside of penal facilities.”).

¹² *Mandatory Minimum Sentencing Laws - The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 46 (June 26, 2007) [hereinafter 2007 *Hearing*] (statement of Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States) (“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.”).

¹³ 2009 *Hearing*, *supra* note 3, at 42 (statement of Chief Judge Julie E. Carnes). See also 1993 *Hearing*, *supra* note 2, at 67 (statement of Judge William W. Wilkins, Jr.) (“[Mandatory minimums] treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important

Mandatory minimum sentences typically are adopted to express opprobrium for a certain crime or in reaction to a particular case where the sentence seemed too lenient. And in some cases, of course, the mandatory penalty will seem appropriate and reasonable. When that happens, judges are not concerned that the sentence was also called for by a mandatory sentencing provision because the sentence is fair. Unfortunately, however, given the severity of many of the mandatory sentences that are most frequently utilized in our system, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the particular crime the judge has just examined and terribly cruel to the human being standing before the judge for sentencing.

This is frequently the case with drug distribution cases, where the only considerations are the type and amount of drugs.¹⁴ Former Criminal Law Committee Chair Judge Vincent Broderick testified two decades ago that mandatory minimums for drug distribution offenses are often unfair and result in sentences disproportionate to the level of culpability because they are based on the amount of drugs involved,¹⁵ they are based on the weight of drugs regardless of purity,¹⁶ they apply conspiracy principles to drug sentences,¹⁷ and the most culpable offenders are able to avoid mandatory minimums by cooperating with prosecutors because they have more knowledge of the drug conspiracy than lower-level offenders.¹⁸

offense or offender-related facts.”); U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 346 (“For . . . a sentence to be reasonable in every case, the factors triggering the mandatory minimum penalty must *always* warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender. This cannot necessarily be said for all cases subject to certain mandatory minimum penalties.”) (emphasis in original).

¹⁴ In its recent report to Congress, the Sentencing Commission reported, based on fiscal year 2010 data, that over three-quarters (77.4%) of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses. U.S. Sentencing Commission, *Report to the Congress*, *supra* note 4, at 146.

¹⁵ 1993 *Hearing*, *supra* note 2, at 106 (statement of Judge Vincent L. Broderick) (“Use of the amounts of drugs by weight in setting mandatory minimum sentences raises issues of fairness because the amount of drugs in the offense is more often than not totally unrelated to the role of the offender in the drug enterprise. Individuals operating at the top levels of drug enterprises routinely insulate themselves from possession of the drugs and participation in the smuggling or transfer functions of the business. It is the participants at the lower levels – those that transport, sell, or possess the drugs – that are caught with large quantities. These individuals make up the endless supply of low paid mules, runners, and street traders, many of them aliens.”).

¹⁶ *Id.* (“The weight of inert substances used to dilute the drugs or the weight of a carrier medium (the paper or sugar cube that contains LSD or the weight of a suitcase in which drugs have been ingeniously imbedded in the construction materials of the suitcase) is added to the total weight of the drug to determine whether a mandatory sentence applies. A defendant in possession of a quantity of pure heroin may face a lighter sentence than another defendant in possession of a smaller quantity of heroin of substantially less purity, but more weight because of the diluting substance. Since the relation of the carrier medium to the drug increases as the drug is diluted in movement to the retail level, the unfairness of imposing automatic sentences based on amount without regard to role in the offense is compounded by failure to take purity into account.”).

¹⁷ *Id.* (“Another significant factor of unwarranted unfairness in mandatory minimum sentencing is the application of conspiracy principles to quantity-driven drug crimes . . . [A]ccomplices with minor roles may be held accountable for the foreseeable acts of other conspirators in furtherance of the conspiracy. A low-level conspirator is subject to the same penalty as the kingpin . . . despite the fact that [he or she] ha[s] little knowledge of the nature [or amount of the drugs involved].”).

¹⁸ *Id.* 107 (“Who is in a position to give such ‘substantial assistance’? Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer . . . There are few federal judges engaged in criminal sentencing who have not had the disheartening experience

In her congressional testimony four years ago, Chief Judge Julie Carnes (my predecessor as Chair of the Criminal Law Committee) provided a specific example of how disproportionately severe sentences may result from the mandatory minimum structure governing drug-related offenses.¹⁹ Title 21 U.S.C. § 841(b)(1)(A) provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of 10 years imprisonment—e.g., 5 kilograms of cocaine—the defendant’s 10-year mandatory sentence shall be doubled to a 20-year sentence if he has been previously convicted of a drug distribution-type offense. Now, if the defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a 20-year sentence may be just. The amount of drugs may be a valid indicator of market share, and thus culpability, for leaders of drug manufacturing, importing, or distributing organizations. But, kingpins are, by definition, few in number, and they are not the drug defendant that judges see most frequently in federal court.

Instead of a drug kingpin, assume that the defendant is a low-level participant who is one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving in a boat. The quantity of drugs in the boat will easily qualify for a 10-year mandatory sentence. This is so even though in cases of employees of these organizations or others on the periphery of the crime, the amount of drugs with which they are involved is often merely fortuitous. A courier, unloader, or watchman may receive a fixed fee for his work, and not be fully aware of the type or amount of drugs involved. A low-level member of a conspiracy may have little awareness and no control over the actions of other members. Further, assume that the low-level defendant has one prior conviction for distributing a small quantity of marijuana, for which he served no time in prison. Finally, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his wife and children. This defendant will now be subject to a 20-year mandatory minimum sentence. It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.²⁰

C. Mandatory Minimum Sentences are Incompatible with the Sentencing Reform Act

Mandatory minimum statutes are incompatible with guideline sentencing and impair the efforts of the Sentencing Commission to fashion Sentencing Guidelines in accordance with the principles of the Sentencing Reform Act. In 1984, Congress passed the Sentencing Reform Act after years of consideration and debate. The Act created the Sentencing Commission and charged it with the responsibility to create a comprehensive system of guideline sentencing.

of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.”)

¹⁹ 2009 Hearing, *supra* note 3, at 43 (statement of Chief Judge Julie E. Carnes).

²⁰ See, e.g., *United States v. Leitch*, No. 11-CR-00609(JG), 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013) (“[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimum sentences that Congress explicitly created only for the leaders and managers of drug operations.”).

But mandatory minimum sentences have severely hampered the Commission in its task of establishing fair, certain, rational, and proportional Guidelines. They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy. Since the Commission has embodied within its Guidelines the mandatory minimum sentences,²¹ the Guidelines have been skewed out of shape and upward by the inclusion of sentence ranges which have not been empirically constructed.²² Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses and offenders.

As the Commission explained in its 1991 report to Congress on mandatory minimums, the simultaneous existence of mandatory sentences and Sentencing Guidelines skews the "finely calibrated . . . smooth continuum" of the Guidelines, and prevents the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.²³ The Commission concluded that the two systems are "structurally and functionally at odds."²⁴ Similarly, in 1993, Chief Justice William Rehnquist stated 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."²⁵ Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.²⁶

²¹ The Sentencing Commission has taken the position that minimum sentences mandated by statute require the Sentencing Guidelines faithfully to reflect that mandate. The Commission has accordingly reflected those mandatory minimums at or near the lowest point of the Sentencing Guideline ranges. The Criminal Law Committee has expressed its concerns to the Commission about the subversion of the Sentencing Guideline scheme caused by mandatory minimum sentences. The Committee believes that setting the Sentencing Guidelines' base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing what are essentially two competing approaches to criminal sentencing. See, e.g., Letter from Judge Sim Lake, Chair, Committee on Criminal Law, Judicial Conference of the United States, to members of the U.S. Sentencing Commission (Mar. 8, 2004) (on file with the AO); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Mar. 16, 2007) (on file with the AO); see also *U.S. v. Leitch*, *supra* note 20, at *2 ("[T]he Commission can fix this problem by delinking the Guidelines ranges from the mandatory minimum sentences and crafting lower ranges based on empirical data, expertise, and more than 25 years of application experience demonstrating that the current ranges are not the 'heartlands' the Commission hoped they would become.").

²² 1993 Hearing, *supra* note 2, at 108 (statement of Judge Vincent L. Broderick) ("This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward . . . As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.").

²³ U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991), available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm

²⁴ *Id.*

²⁵ Chief Justice William H. Rehnquist, *Luncheon Address* (June 18, 1993), in U.S. Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).

²⁶ Hon. 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).

II. Solutions to Ameliorate the Effects of Mandatory Minimum Statutes

Today, the Conference endorsed seeking legislation “such as the ‘Justice Safety Valve Act of 2013,’ . . . that is designed to restore judges’ sentencing discretion and avoid the costs associated with mandatory minimum sentences.”²⁷ Though it favors the repeal of all mandatory minimum penalties, the Conference also supports steps that reduce the negative effects of these statutory provisions.

The Judicial Conference historically has supported legislative measures short of outright repeal of mandatory minimum statutes. In 1991, for instance, it 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.²⁸ 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.”²⁹ In 1993, the Conference considered the Controlled Substances Minimum Penalty–Sentencing Guideline Reconciliation Act of 1993, legislation presented by the Chairman of the Sentencing Commission that attempted to reconcile mandatory minimum sentences with the Sentencing Guidelines.³⁰ The Criminal Law Committee believed that, although the proposed legislation would not have solved all of the problems associated with mandatory minimum sentences, it addressed the essential incompatibility of mandatory minimums and Sentencing Guidelines and represented a promising approach.³¹ On recommendation of the Committee, the Conference endorsed the concept.³²

Conclusion

The Conference supports Congress’s efforts to review and ameliorate the deleterious and unwanted consequences spawned by mandatory minimum sentencing provisions. The good intentions of their proponents notwithstanding,³³ mandatory minimum sentencing statutes have created what the late Chief Justice Rehnquist aptly identified as “unintended consequences.”³⁴ Far from benign, these unintended consequences waste valuable taxpayer dollars, create tremendous

²⁷ JCUS-SEP 13, p. ___.

²⁸ JCUS-SEP 91, p. 56. The proposed legislation for drug offenses would have required the Commission to use mandatory minimum penalties only in establishing base offense levels, and would otherwise permit the guidelines through downward adjustments or departures to provide for sentences below the mandatory minimum penalties. See *1993 Hearing, supra* note 2, at 70 (statement of Judge William W. Wilkins, Jr.).

²⁹ JCUS-SEP 91, p. 56.

³⁰ JCUS-SEP 93, p. 46.

³¹ *Id.*

³² *Id.*

³³ *2009 Hearing, supra* note 3, at 37 (statement of Chief Judge Julie E. Carnes) (“I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimum sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws.”).

³⁴ Chief Justice William H. Rehnquist, *Luncheon Address, supra* note 25 (suggesting that federal mandatory minimum sentencing statutes are “perhaps a good example of the law of unintended consequences”).

Honorable Patrick J. Leahy
Page 9

injustice in the sentencing, undermine guideline sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentencing.

If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the United States Courts, at 202-502-1700.

Sincerely,



Robert Holmes Bell

Identical letter sent to: Honorable Charles E. Grassley

RECEIVED NOV 26 2013



November 26, 2013

Senator Patrick Leahy, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Chuck Grassley, Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Leahy and Grassley,

The United States Sentencing Commission is pleased that the Senate Judiciary Committee plans to take up legislation next month on important sentencing issues, including federal mandatory minimum penalties. We want to draw your attention to the written statement submitted for the Committee's September 18 hearing on "Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences." That statement (attached) made several recommendations relevant to the legislation before the Committee and drew heavily upon the research and conclusions from the Commission's 2011 report on Mandatory Minimum Penalties in the Federal Criminal Justice System.

As set out in that statement, the Commission is concerned about rising federal prison costs and about federal prison populations far exceeding prison capacity. We believe that modifying certain severe mandatory minimum penalties is an important step toward addressing that problem and improving the fairness of federal sentences.

Specifically, the Commission unanimously recommends that Congress consider the following statutory changes:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.
- The provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.

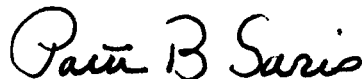
- Congress should consider expanding the so-called “safety valve,” allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.
- The safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, should be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

The Commission is also pleased that the Judiciary Committee is considering clarifying the calculation of good time credit for federal inmates to specify that inmates are eligible for 54 days of good time credit per year of sentence imposed. We support Congress addressing this longstanding issue.

As set out in more detail in the attached statement, the Commission reached these conclusions based on its analysis which indicates that mandatory minimum penalties in general have contributed to the overall federal prison population, that certain severe mandatory minimum sentences can lead to disparate charging decisions by prosecutors, and that, in the drug context, statutory mandatory minimum penalties often apply more broadly than to just the high-level drug offenders that it appears Congress intended to target. The Commission’s recommendations are also informed by recidivism data showing that crack cocaine offenders released early after modest sentence reductions did not demonstrate an increased propensity to reoffend after a two-year study period.

The Commission stands ready to assist the Judiciary Committee as it prepares to consider these vitally important federal sentencing issues. We are happy to provide any data, analysis, or other assistance that would be useful to the Committee. Please don’t hesitate to reach out to me or my staff if we can be helpful in any way.

Sincerely,



Patti B. Saris
Chair

cc: Senate Judiciary Committee Members

Statement of Judge Patti B. Saris
Chair, United States Sentencing Commission
For the Hearing on
“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”
Before the Committee on the Judiciary
United States Senate

September 18, 2013

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, thank you for providing me with the opportunity to submit this statement on behalf of the United States Sentencing Commission about mandatory minimum sentences in the federal criminal justice system.

We are particularly pleased that the Judiciary Committee is addressing this vital issue that has been a key focus for the Commission for several years. The bipartisan seven-member Commission¹ unanimously agrees that mandatory minimum sentences in their current form have led to unintended results, caused unwarranted disparity in sentencing, and contributed to the current crisis in the federal prison population and budget. We unanimously agree that statutory changes to address these problems are appropriate.

In our 2011 report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,² the Commission set out in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. We set out a series of recommendations for modifying the laws governing mandatory minimum penalties that would make sentencing laws more uniform and fair and help them operate as Congress intended. It is gratifying that members of this Committee, including Senators Leahy, Durbin, and Lee, and other Republican and Democratic members of the Senate and House have proposed legislation corresponding to many of these key recommendations.

Since 2011, circumstances have made the need to address the problems caused by the current mandatory minimum penalties still more urgent. Even as state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has continued to grow, increasing by almost four percent in the last two years alone and by about a third in the past decade.³ The size of the Federal Bureau of Prisons’ (BOP) population exceeds the BOP’s capacity by 38 to 53 percent on average.⁴ Meanwhile, the nation’s budget crisis has become more acute. The overall Department of Justice budget has decreased, meaning that as

¹ By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

² U.S. Sentencing Comm’n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011) (Mandatory Minimum Report), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

³ E. Ann Carson & Daniela Golinelli, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts 2* (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

⁴ U.S. Dep’t of Justice, *Federal Prison System FY 2013 Congressional Budget 1* (2013) <http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf>.

more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety. Federal prisons and detention now cost more than \$8 billion a year and account for close to one third of the overall Department of Justice budget.⁵ For these reasons, the Commission feels even more strongly now than in 2011 that congressional action is necessary and has also identified reducing costs of incarceration as a Commission priority for this year.⁶

I will set out the Commission's findings as to why changes in the law are necessary and our recommendations for the changes the Commission believes Congress should consider. The Commission found that certain severe mandatory minimum sentences lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders. The Commission further found that, in the drug context, statutory mandatory minimum penalties often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population. Finally, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission unanimously recommends that Congress consider a number of statutory changes. The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking. We recommend that the provisions of the Fair Sentencing Act of 2010,⁷ which Congress passed to reduce the disparity in treatment of crack and powder cocaine, be made retroactive. We further recommend that Congress consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted. Finally, the Commission recommends that the safety valve provision, and potentially other measures providing relief from current mandatory minimum penalties, be applied more broadly to extend beyond drug offenders to other low-level non-violent offenders in appropriate cases.

Republican and Democratic members of this Committee and others in Congress have proposed legislation to reform certain mandatory minimum penalty provisions. The Commission strongly supports these efforts to reform this important area of the law. While there is a spectrum of views among the members of the Commission regarding whether Congress should exercise its power to direct sentencing power by enacting mandatory minimum penalties in general, the Commission unanimously believes that a strong and effective system of sentencing

⁵ U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dep't of Justice FY 2014 Budget Request), www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf#bs; see also Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013) (http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf).

⁶ See U.S. Sentencing Comm'n, *Notice of Final Priorities*, 78 Fed. Reg. 51,820, 51,821 (Aug. 21, 2013) (Notice of Final Priorities).

⁷ Pub. L. No. 111-220, 124 Stat. 2373 (2010).

guidelines best serves the purposes that motivated Congress in passing the Sentencing Reform Act of 1984.

I. The Commission's Findings on Mandatory Minimum Sentences

Congress created the United States Sentencing Commission as an independent agency to guide federal sentencing policy and practices as set forth in the SRA.⁸ Congress specifically charged the Commission not only with establishing the federal sentencing guidelines and working to ensure that they function as effectively and fairly as possible, but also with assessing whether sentencing, penal, and correctional practices are fulfilling the purposes they were intended to advance.⁹

In section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, a provision that originated with members of this Committee, Congress directed the Commission to evaluate the effect of mandatory minimum penalties on federal sentencing.¹⁰ In response to that directive, and based on its own statutory authority, the Commission reviewed legislation, analyzed sentencing data, studied scholarship, and conducted hearings. The Commission published the Mandatory Minimum Report in October 2011 and has continued to perform relevant sentencing data analysis since the report was published. That comprehensive process has led the Commission to several important conclusions about the effect of current mandatory minimum penalty statutes.

A. Severe Mandatory Minimum Penalties Are Applied Inconsistently

The Commission determined that some mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them. These mandatory minimum penalties are triggered by a limited number of aggravating factors, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower penalty.¹¹ This broad application can lead to a perception by those making charging decisions that some offenders to whom mandatory minimums could apply do not merit them. As a result, certain mandatory minimum penalties are applied inconsistently from district to district and even within districts, as shown by the Commission's data analyses and our interviews of prosecutors and defense attorneys. Mandatory minimum penalties, and the existing provisions granting relief from them in certain cases, also impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups.

Interviews with prosecutors and defense attorneys in thirteen districts across the country revealed widely divergent practices with respect to charging certain offenses that triggered

⁸ See 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

⁹ 28 U.S.C. § 991.

¹⁰ Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190, 2843 (2009).

¹¹ Mandatory Minimum Report, *supra* note 2, at 345-46.

significant mandatory minimum penalties. These differences were particularly acute with respect to practices regarding filing notice under section 851 of title 21 of the United States Code for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence. In some districts, the filing was routine. In others, it was more selectively filed, and in one district, it was almost never filed at all.¹² Our analysis of the data bore out these differences. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty.¹³

Similarly, the Commission's interviews revealed vastly different policies in different districts in the charging of cases under section 924(c) of title 18 of the United States Code for the use or possession of a firearm during a crime of violence or drug trafficking felony. In that statute, different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. The Commission found that districts had different policies as to whether and when they would bring charges under this provision and whether and when they would bring multiple charges under the section, which would trigger far steeper mandatory minimum penalties.¹⁴ The data bears out these geographic variations in how these mandatory minimum penalties are applied. In fiscal year 2012, just 13 districts accounted for 45.8 percent of all cases involving a conviction under section 924(c) even though those districts reported only 27.5 percent of all federal criminal cases that year. In contrast, 35 districts reported 10 or fewer cases with a conviction under that statute.

When similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA. Yet the Commission has found severe, broadly applicable mandatory minimum penalties to have that effect.

The current mandatory minimum sentencing scheme also affects different demographic groups in different ways. Hispanic offenders constituted 41.1 percent of offenders convicted of an offense carrying a mandatory minimum penalty in 2012; Black offenders constituted 28.4 percent, and White offenders were 28.1 percent.¹⁵ The rate with which these groups of offenders qualified for relief from mandatory minimum penalties varied greatly. Black offenders qualified for relief under the safety valve in 11.6 percent of cases in which a mandatory minimum penalty applied, compared to White offenders in 29.0 percent of cases, and Hispanic offenders in 42.9 percent.¹⁶ Because of this, although Black offenders in 2012 made up 26.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 35.2 percent of the drug offenders still subject to that mandatory minimum at sentencing.

¹² *Id.* at 111-13.

¹³ *Id.* at 255.

¹⁴ *Id.* at 113-14.

¹⁵ *Id.* at xxviii.

¹⁶ Offenders were most often disqualified from safety valve relief because of their criminal history or because of involvement of a dangerous weapon in connection with the offense. *See* Mandatory Minimum Report, *supra* note 2, at xxviii.

B. Mandatory Minimum Drug Penalties Apply to Many Lower-Level Offenders

In establishing mandatory minimum penalties for drug trafficking, it appears that Congress intended to target “major” and “serious” drug traffickers.¹⁷ Yet the Commission’s research has found that those penalties sweep more broadly than Congress may have intended. Mandatory minimum penalties are tied only to the quantity of drugs involved, but the Commission’s research has found that the quantity involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. A courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization.

Mandatory minimum penalties currently apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who bring large quantities of drugs into the United States.¹⁸ For instance, in the cases the Commission reviewed, 23 percent of all drug offenders were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences. The category of drug offenders most often subject to mandatory minimum penalties at the time of sentencing – that is, those who did not obtain any relief from those penalties – were street level dealers, who were many steps down from high-level suppliers and leaders of drug organizations.¹⁹ While Congress appears to have intended to impose these mandatory penalties on “major” or “serious” drug traffickers, in practice the penalties have swept more broadly.

C. Mandatory Minimum Penalties Have Contributed to Rising Prison Populations

The federal prison population has increased dramatically over the past two decades, and offenses carrying mandatory minimum sentences have played a significant role in that increase. The number of inmates housed by the BOP on December 31, 1991 was 71,608.²⁰ By December 31, 2012, that number had more than tripled to 217,815 inmates.²¹

¹⁷ See U.S. Sentencing Comm’n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm; see also 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) (“For the kingpins ... the minimum term is 10 years. ... [F]or the middle-level dealers ... a minimum term of 5 years.”); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”).

¹⁸ To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special analysis project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the presentence report. The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form. For more information on the Commission’s analysis, please see Mandatory Minimum Report, *supra* note 2, at 165-66.

¹⁹ *Id.* at 166-70.

²⁰ Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin 1 (1995).

²¹ Carson & Golinelli, *supra* note 3, at 2.

Offenses carrying mandatory minimum penalties were a significant driver of this population increase.²² The number of offenders in custody of the BOP who were convicted of violating a statute carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent.²³ Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing – who had not received relief from that mandatory sentence – increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.²⁴

These increases in prison population have led not only to a dramatically higher federal prison budget, which has increased more than six fold from \$1.36 billion for fiscal year 1991²⁵ to \$8.23 billion this year,²⁶ but also to significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective.²⁷ Changing the laws governing mandatory minimum penalties would be an important step toward addressing the crisis in the federal prison population and prison costs.

D. Recent Reductions in the Sentences of Some Drug Offenders Have Not Increased Offenders' Propensity to Reoffend

The Commission recognizes that one of the most important goals of sentencing is ensuring that sentences reflect the need to protect public safety.²⁸ The Commission believes based on its research that some reduction in the sentences imposed on drug offenders would not lead to increased recidivism and crime.

In 2007, the Commission reduced by two levels the base offense level in the sentencing guidelines for each quantity level of crack cocaine and made the changes retroactive. The average decrease in sentences among those crack cocaine offenders receiving retroactive application of the 2007 amendment was 26 months, which corresponds to a 17 percent reduction in the total sentence.²⁹ In order to determine whether drug offenders serving reduced sentences

²² An increase in the number of prosecutions brought and individuals convicted overall, including for offenses without mandatory minimum penalties, has also contributed to the increasing federal prison population. *See* Mandatory Minimum Report, *supra* note 2, at 81-82.

²³ *Id.* at 81.

²⁴ *Id.*

²⁵ Pub. L. No. 101-515, 104 Stat. 2101, 2114 (1990).

²⁶ U.S. Dep't of Justice FY 2014 Budget Request, *supra* note 5.

²⁷ Mandatory Minimum Report, *supra* note 2, at 83 (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Comm'n (Mar. 17, 2011)); *Brown v. Plata*, 563 U.S. ___, 131 S.Ct. 1910, 1923 (2011) (finding the "exceptional" overcrowding in the California prison system was the "primary cause of the violation of a Federal right" and affirming a decision requiring the prison system to reduce the population to 137.5% of its capacity).

²⁸ 18 U.S.C. § 3553(a)(2)(B) and (C).

²⁹ U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010).

posed any increased public safety risk, the Commission undertook a study in 2011 of the recidivism rates of the offenders affected by this change. The Commission studied the recidivism rate of offenders whose sentences were reduced pursuant to retroactive application of this guideline amendment and compared that rate with the recidivism rate of offenders who would have qualified for such a reduction, but were released after serving their full sentence before the 2007 changes went into effect.³⁰ The analysis showed no statistically significant difference between the two groups.³¹

Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the 2007 sentencing amendment, 30.4 percent recidivated within two years. Of the 484 offenders studied who were released in the year before the new amendment went into effect after serving their full sentences, 32.6 percent recidivated within two years. The difference is not statistically significant.³²

The Commission's study examined offenders released pursuant to retroactive application of a change in the sentencing guidelines, not a change in mandatory minimum penalties. Still, the Commission's 2011 study found that federal drug offenders released somewhat earlier than their original sentence were no more likely to recidivate than if they had served their full sentences. That result suggests that modest reductions in mandatory minimum penalties likely would not have a significant impact on public safety.

II. The Commission's Recommendations for Statutory Changes

Based on the Commission's research and analysis in preparing our 2011 report and in the years since, we support several statutory changes that will help to reduce disparities, help federal sentencing work more effectively as intended, and control the expanding federal prison population and budget.

A. Reduce Mandatory Minimum Penalties for Drug Offenses

In the Mandatory Minimum Report, the Commission recommended that, should Congress use mandatory minimum penalties, those penalties not be excessively severe. The Commission focused in detail on the severity and scope of mandatory minimum drug trafficking penalties. The Commission now recommends that Congress consider reducing the mandatory minimum penalties governing drug trafficking offenses.

Reducing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission's

³⁰ U.S. Sentencing Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

³¹ *Id.* at 2.

³² *Id.* at 4-7.

report. It would also reduce the likelihood that low-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.

Reducing mandatory minimum penalties for drug trafficking offenses would reduce the prison population substantially. For example, under one scenario, a reduction in drug trafficking mandatory minimum penalties from ten and five years to five and two years, respectively, would lead to savings for those offenders sentenced in the first fiscal year after the change of 45,312 bed years over time.³³ That bed savings would translate to very significant cost savings,³⁴ with corresponding savings over time for each subsequent year of reduced sentences, unless offense conduct or charging practices change over time.

A reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking. These changes would lead to reduced minimum penalties for all offenders currently subject to mandatory minimum penalties for drug trafficking. As noted above, currently available forms of relief from mandatory minimum penalties affected different demographic groups differently, particularly in the case of Black offenders, who qualify for the “safety valve” much less frequently than other offenders.

³³ The following broad assumptions, some or all of which might not in fact apply should the law change, were made in performing this analysis:

(a) The sentences for all offenders subject to an offense carrying a 10-year mandatory minimum penalty at the time of sentencing would be lowered by half (as a reduction from a 10-year mandatory minimum to a 5-year minimum is a 50% reduction). For those offenders who were convicted of an offense carrying a 10-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission’s rough estimate was that their sentence would be reduced by 25% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(b) The sentences for all offenders convicted of an offense carrying a 5-year mandatory minimum penalty would be lowered by 60 percent (as a reduction from a 5-year mandatory minimum to a 2-year minimum is a 60% reduction). For offenders who were convicted of an offense carrying a 5-year mandatory minimum penalty but who would receive relief from the penalty by the date of sentencing, the Commission’s rough estimate was that their sentence would be reduced by 30% to reflect the fact that the court already had the discretion to sentence them without regard to any mandatory minimum penalty;

(c) The analysis did not include any estimate of a change in sentence for offenders for whom a mandatory minimum penalty did not apply (e.g., drug trafficking offenders with drug quantities below the mandatory minimum thresholds);

(d) For offenders who were also convicted of additional (i.e., non-drug) mandatory minimum penalties, those penalties were left in place.

See id. at 3-7.

³⁴ The Bureau of Prisons estimated the average annual cost per inmate to be \$26,359. Bureau of Prisons, *Federal Prison System Per Capita Costs* (2012), http://www.bop.gov/foia/fy12_per_capita_costs.pdf. This cost estimate does not take into account potential increased costs for the United States Parole Commission, the United States Probation Office, and other aspects of the criminal justice system should certain offenders be released earlier.

B. Make the Fair Sentencing Act Statutorily Retroactive

The Fair Sentencing Act of 2010 (FSA),³⁵ in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.³⁶ The law did not make those statutory changes retroactive. The Commission recommends that Congress make the reductions in mandatory minimum penalties in the FSA fully retroactive.

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and made these guideline changes retroactive. In making this decision,³⁷ the Commission considered the underlying purposes behind the statute, including Congress's decision to act "consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere'"³⁸ and Congress's statement in the text of the FSA that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction."³⁹ The Commission also concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively, that although a large number of cases would be affected, the administrative burden caused by retroactivity would be manageable.⁴⁰ To date, 11,937 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,317 of those cases.⁴¹ The average sentence reduction in these cases has been 29 months, which corresponds to a 19.9 percent decrease from the original sentence.⁴²

The same rationales that prompted the Commission to make the guideline changes implementing the FSA retroactive justify making the FSA's statutory changes retroactive. Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions

³⁵ Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2373 (2010) (FSA).

³⁶ FSA § 2.

³⁷ The Commission, in deciding whether to make amendments retroactive, considers factors including "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." USSG §1B1.10, comment. (backg'd).

³⁸ U.S. Sentencing Comm'n, *Notice of Final Action Regarding Amendment on Retroactivity*, Effective November 1, 2011, 76 Fed. Reg. 41,332, 41,333 (Jul. 13, 2011) (Notice of Final Action Regarding Retroactivity).

³⁹ See generally FSA.

⁴⁰ Notice of Final Action Regarding Retroactivity, *supra* note 38 at 10.

⁴¹ U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report Fair Sentencing Act*, Table 3 (July 2013), http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendment/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf.

⁴² *Id.* at Table 8.

already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, 8,829 offenders would likely be eligible for a sentence reduction, with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and to significant cost savings. The Commission estimates that 87.7 percent of the inmates eligible for a sentence reduction would be Black.

C. Consider Expanding the Statutory Safety Valve

In the Mandatory Minimum Report, the Commission recommended that Congress consider “expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines.”⁴³ The “safety valve” statute allows sentences below the mandatory minimum in drug trafficking cases where specific factors apply, notably that the offense was non-violent and that the offender has a minimal criminal history. The Commission recommended that Congress consider allowing offenders with a slightly greater criminal history to qualify.

The Commission found that the broad sweep and severe nature of certain current mandatory minimum penalties led to results perceived to be overly severe for some offenders and therefore to widely disparate application in different districts and even within districts.⁴⁴ The Commission also found that in the drug context, existing mandatory minimum penalties often applied to lower level offenders than may have been intended. It would be preferable to allow more cases to be controlled by the sentencing guidelines, which take many more factors into account, particularly in those drug cases where the existing mandatory minimum penalties are too severe, too broad, or unevenly applied. Accordingly, Congress should consider allowing a broader group of offenders who still have a modest criminal history, but who otherwise meet the statutory criteria, to qualify for the safety valve, enabling them to be sentenced below the mandatory minimum penalty and in accordance with the sentencing guidelines.

In 2012, 9,445 offenders received relief under the safety valve provision in the sentencing guidelines. If the safety valve had been expanded to offenders with two criminal history points, 820 additional offenders would have qualified. Had it been expanded to offenders with three criminal history points, a total of 2,180 additional offenders would have qualified.⁴⁵ While this

⁴³ Mandatory Minimum Report, *supra* note 2, at xxxi.

⁴⁴ *Id.* at 346.

⁴⁵ These totals include offenders not convicted of offenses carrying a mandatory minimum sentence, but subject to safety valve relief under the sentencing guidelines because they meet the same qualifying criteria. The guidelines would need to be amended to correspond to the proposed statutory changes to realize this level of relief. These totals also represent the estimated maximum number of offenders who could qualify for the safety valve since one of the requirements, that the offender provide all information he or she has about the offense to the government, is impossible to predict. *See* 18 U.S.C. § 3553(f).

change would start to address some of the disparities and unintended consequences noted above, it would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders because the demographic characteristics of the offenders who would become newly eligible for the safety valve would be similar to those of the offenders already eligible.⁴⁶ For reduced sentences to reach a broader demographic population, Congress would have to reduce the length of mandatory minimum drug penalties.

D. Apply Safety Valve and Other Relief to a Broader Set of Offenses

The Mandatory Minimum Report recommended that a statutory “safety valve” mechanism similar to the one available for drug offenders could be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.⁴⁷ Such safety valve provisions should be constructed similarly to the existing safety valve for drug cases with specific factors to ensure consistent application regardless of the location of the offense, the identity of the offender, or the judge. The Commission stands ready to work with Congress on safety valve criteria that could apply in a consistent manner. The Commission has also recommended that Congress consider reducing the length of some mandatory minimum penalties outside of the drug context.⁴⁸

The concerns set out above about disparities resulting from severe mandatory minimum sentences apply in contexts beyond drug offenses, as do the concerns about the effect on the prison population and costs. While drug offenders make up a significant proportion of those subject to mandatory minimum penalties, the number of offenders subject to other mandatory minimum penalties is also substantial. In 2012, 20,037 offenders were convicted of an offense carrying a mandatory minimum penalty. Of those, 4,460 were convicted of non-drug-related offenses subject to a mandatory minimum penalty, and 3,691 of these were still subject to that penalty at the time of sentencing. Statutory provisions allowing for relief when appropriate for this pool of offenders would address the same concerns the Commission has highlighted.

In the Mandatory Minimum Report, the Commission recommended several other legislative provisions to address specific problems documented with existing mandatory minimum penalties, particularly in connection with section 924(c) of title 18 of the United States Code for the use of a firearm during a crime of violence or drug trafficking felony. The Commission recommended that Congress consider amending section 924(c) so that enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, not for multiple violations charged together. The Commission further recommended that Congress consider reducing the length of some of the penalties in that firearms statute and giving courts discretion to impose mandatory sentences concurrently for multiple violations of section 924(c), following the structure currently in place for aggravated identity theft offenses, rather than mandating that the sentences be imposed consecutively.⁴⁹ The

⁴⁶ Mandatory Minimum Report, *supra* note 2, at 356.

⁴⁷ *See id.* at xxx.

⁴⁸ *See, e.g., id.* at xxxi.

⁴⁹ *See id.* at 364.

Commission also recommended that Congress reassess the scope and severity of the recidivist provisions for drug offenses in sections 841 and 960 of title 21 of the United States Code, which can lead to what some perceive as over-counting for criminal history.⁵⁰

III. The Role of the Sentencing Commission and the Guidelines

These recommendations, all of which impact statutory mandatory minimum penalties and require statutory change, can only be effectuated by Congress. However, the Commission is dedicated to working within its authority and responsibilities to address the issues of unwarranted sentencing disparities and over-incarceration within the federal criminal justice system. First, the Commission is committed to working with Congress to implement the recommendations of the Mandatory Minimum Report. We have identified doing so as the first item in our list of priorities for the coming year.⁵¹ This will entail supporting legislative initiatives and working with Congress to help members craft and pass appropriate legislative provisions that are consistent with our recommendations. We are gratified that Senators on and off this Committee have introduced legislation to reform certain mandatory minimum penalty provisions, and the Commission strongly supports these efforts to reform this important area of the law. We have also called on Congress to request prison impact analyses from the Commission as early as possible when it considers enacting or amending mandatory minimum penalties. This analysis may be very helpful for congressional consideration particularly at this time of strained federal resources.⁵²

The Commission is also considering whether changes to the sentencing guidelines are appropriate to address similar concerns about prison populations and costs, noting an intention overall to “consider the issue of reducing costs of incarceration and overcapacity of prisons” pursuant to 28 U.S.C. § 994(g).⁵³ Specifically, the Commission has listed as its second priority for the coming year review and possible amendment of guidelines applicable to all drug offenses, possibly including amendment of the Drug Quantity Table across all drug types.⁵⁴ Should the Commission determine that such action is appropriate, such an amendment would have a significant impact on federal prison sentences for a large number of offenders, though as was the case with the Commission’s 2007 crack cocaine amendment, the impact would be limited by current mandatory minimum penalties.

Finally, and most fundamentally, the Commission believes that a strong and effective sentencing guidelines system best serves the purposes of the SRA. Should Congress decide to limit mandatory minimum penalties in some of the ways under discussion today, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing. The Commission will continue to work to ensure that the guidelines are amended as necessary to most appropriately

⁵⁰ See *id.* at 356.

⁵¹ See Notice of Final Priorities, *supra* note 6.

⁵² See Mandatory Minimum Report, *supra* note 2, at xxx.

⁵³ See Notice of Final Priorities, *supra* note 6.

⁵⁴ *Id.*

effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.

IV. Conclusion

The Commission is pleased to see the Judiciary Committee and others in Congress undertaking a serious examination of current mandatory minimum penalties and considering options to make the federal criminal justice system fairer, more effective, and less costly. The bipartisan Commission strongly supports legislative provisions currently being considered that are consistent with the recommendations outlined above and stands ready to work with you and others in Congress to enact these statutory changes. We will also work closely with you as we seek to address similar concerns through modifications of the sentencing guidelines. The Commission thanks you for holding this very important hearing and looks forward working with you in the months ahead.