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"Statutory Mandatory Minimum Penalties in Federal Sentencing"
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On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than 500,000 members, countless additional activists and supporters, and fifty-three affiliates nationwide, we applaud the United States Sentencing Commission for its continued willingness to take a critical look at mandatory minimum sentences, and we thank the Commission for the opportunity to testify today. Speaking as a former federal public defender and as the Director of a division of the ACLU dedicated to reducing drug-related over-incarceration, I hope to offer the Commission the perspective of both an experienced criminal law practitioner and a policy advocate committed to restoring fairness and effectiveness to federal sentencing law.

Almost twenty years ago, the Commission delivered a report to Congress denouncing mandatory minimums for a series of flaws that have practically become common knowledge among policymakers, judges, and practitioners in the field of federal sentencing.[1] As the Commission explained in its 1991 report to Congress, mandatory minimums create sentencing disparities that correlate with race,[2] disparities among similarly-situated offenders,[3] sentencing "cliffs" for drug offenses (that is, quantity thresholds at which sentences increase dramatically),[4] formalism in sentencing based on charging decisions and not offense conduct,[5] and inflexibility to consider an individual offender's personal culpability.[6] Mandatory minimums add to the United States' drastic over-incarceration[7] problem without increasing public safety or deterring crime.[8]

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[1] *See* U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) [hereinafter "USSC 1991 Report"].
[2] *Id.* at 51, 52.
[3] One of the fundamental objectives of the Guidelines was to reduce disparity in sentences given to similarly-situated defendants. *See United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007); USSC 1991 Report 16.
[4] USSC 1991 Report 1.
[5] *Id.* at 25-26, 53.
[6] *Id.* at 26.
[7] U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 48 (Nov. 2004) [hereinafter "USSC Fifteen Year Review"]; U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 68-70 (June 18, 1987).
[8] All of the empirical evidence shows that mandatory minimums do not deter criminal conduct. *See* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 102 (2009). In fact, increased sentence length in general has no deterrent effect. *See generally* Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of*

Mandatory minimums create excessive prosecutorial discretion, which is exercised in an arbitrary manner and used to coerce defendants into relinquishing their constitutional rights and punish defendants when they exercise those rights.[9] One other unfortunate by-product of mandatory minimums has become particularly salient in these troubled economic times: by requiring long prison sentences for individuals who would not otherwise receive them, the law commits precious federal dollars to paying for years' worth of unnecessary incarceration.[10]

The policy of the U.S. Attorney's Office for the Northern District of California illustrates how mandatory minimums can be used to compromise constitutional rights and dramatically intensify sentences. In that district, until recently, prosecutors as a matter of policy threatened to file informations under 21 U.S.C. § 851 against defendants with prior convictions; the effect of such an information is to double the mandatory minimum or require a mandatory life sentence. Then prosecutors used that threat to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury — all as the price for not being exposed to the higher minimum.[11] Prosecutors' use of mandatory minimums as coercive bargaining tools is at odds with the purpose Congress expressed in creating the guideline system. Congress sought to create a uniform baseline for sentencing that reflects all relevant factors, including offense conduct, actual social harms of the offense, and offender role and circumstances[12] — not to make prosecutors' jobs easier and facilitate the abrogation of defendants' rights.

All of these flaws with mandatory minimums are well known and well documented. It is unsurprising, therefore, that a majority of Americans oppose mandatory minimums.[13]

Many in the judiciary, too, have come to see mandatory minimums as antithetical to fair sentencing. Judges across the country and across the ideological spectrum have decried determinate sentencing schemes like mandatory minimums that tie judges' hands and

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Recent Research (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 23, 28 (2006); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

[9] *See, e.g.*, *United States v. Hungerford*, 465 F.3d 1113, 1118-22 (9th Cir. 2006) (Reinhardt, J., concurring in the judgment) ("Hungerford's case is a textbook example of how [18 U.S.C.] § 924(c) permits a prosecutor, but never a judge, to determine the appropriate sentence."); *United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *1 (N.D. Cal. Sep. 9, 2009); *United States v. Redondo-Lemos*, 754 F. Supp. 1401, 1406 (D. Ariz. 1990).

[10] *See, e.g.*, Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting, at 2 (Aug. 9, 2003) ("Our resources are misspent, our punishments too severe, our sentences too long."); Statement of Stephen R. Sady, *Federal Bureau of Prisons Oversight Hearing: The Bureau of Prisons Should Fully Implement Ameliorative Statuses To Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration* 1 (July 21, 2009), *at* http://judiciary.house.gov/hearings/pdf/Sady090721.pdf.

[11] *See, e.g.*, *United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *1 (N.D. Cal. Sep. 9, 2009).

[12] *See* 18 U.S.C. § 3553(a); 28 U.S.C. § 994(c)(1)-(7).

[13] *See* Amanda Paulson, *Poll: 60 Percent of Americans Oppose Mandatory Minimum Sentences*, C.S. Monitor, Sep. 25, 2008, *at* http://www.csmonitor.com/USA/Justice/2008/0925/p02s01-usju.html.

force them to impose harsher-than-necessary sentences.[14] The United States Supreme Court in *United States v. Booker*[15] and subsequent cases[16] has emphasized the importance of judicial discretion in sentencing — the very opposite of the approach required under a mandatory minimum. Today, in the wake of *Booker*, mandatory minimums are the chief obstacle to a system in which judges can craft rational, individualized sentences that balance public safety with rehabilitation.

For all of these reasons — most significantly racial disparity, over-incarceration, and the undermining of core constitutional liberties — the ACLU joins with our colleagues at the Federal Public and Community Defenders, Families Against Mandatory Minimums, the Sentencing Project, and the Constitution Project, to urge the Commission to issue a report to Congress calling for the complete abolition of all federal mandatory minimum sentences.

Although we believe the correct policy choice is clear, we understand that good policy and good politics do not always align, and that Congress may not yet be prepared to abolish all federal mandatory minimums, even if this body takes the courageous and well-justified step of urging Congress to do so. For this reason, there is value in considering what other steps, short of abolition, Congress and the Commission could take to ameliorate the injustices caused by mandatory minimums. The ACLU will propose several such steps, in the hope that the end result of this dialogue between the Commission and Congress, if not complete abolition of mandatory minimums, will nonetheless sharply curtail their use and effects.

There are several means by which to reduce the footprint of mandatory minimums on federal sentencing, some legislative and others within the purview of the Commission.

First and most simply, the best way to fix mandatory minimums — short of repealing them — is to lower them. Five-year minimums can become one-year minimums; ten can become two; twenty can become five. Congress could also make clear that counts under 18 U.S.C. § 924(c) need not run consecutive to a guideline sentence or, in the case of multiple 924(c) allegations, to each other. Alternatively, or in conjunction with lowering the sentences, Congress might choose to eliminate a subset of mandatory minimums — mandatory minimums for drug crimes — that have a disproportionate influence on federal sentencing relative to other mandatory minimums.[17] Drug mandatory minimums are a particularly important area for reform, because of their history of writing racial discrimination into the United States Code via the infamous crack-powder disparity,[18]

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[14] *See, e.g., Harris v. United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and concurring in the judgment); Remarks of Chief Justice William H. Rehnquist, Nat'l Symposium on Drugs and Violence in America 9-11 (June 18, 1993); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008).

[15] 543 U.S. 220 (2005).

[16] *See, e.g., Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

[17] *See* USSC 1991 Report 11.

[18] *Compare, e.g.*, 21 U.S.C. § 841(b)(1)(B)(ii)(II) (500 grams of cocaine, a drug predominantly used by whites, triggers five-year minimum), *with* 21 U.S.C. § 841(b)(1)(B)(iii) (5 grams of crack, a drug predominantly used by African-Americans, triggers five-year minimum).

and the need to revisit guidelines that (like the crack guideline) were set entirely in response to congressional directives rather than empirical, scientific evidence.[19]

Lowering minimums or eliminating a subset of minimums would have many salutary effects beyond simply decreasing sentences. First, it would expand judicial discretion to consider individual offenders' circumstances and roles in their offenses, and thus to craft fairer sentences. Second, reducing the impact of the mandatory minimums on the ultimate sentence would reduce their outsized influence as a prosecutorial scare tactic that can be deployed to force defendants to trade in their constitutional rights to avoid facing draconian sentences. Third, reducing mandatory minimums will reduce the racial disparities that result when different prosecutors make different charging decisions for different defendants. Fourth, as a by-product of decreased sentences, federal prison populations — and therefore federal prison expenditures — will experience a long-term decline, resulting in substantial savings to the public.

A second type of mandatory-minimum reform — assuming Congress is unwilling to abolish them, eliminate a subset of them, or lower the minimums themselves — is to expand the so-called "safety valve" exception to mandatory minimums. Created by statute, the safety valve instructs that mandatory minimums do not apply to drug offenders who satisfy all of the following specific criteria: (1) the defendant has little or no criminal history; (2) no violence, threat, or firearm was used in the offense; (3) no death or serious injury resulted; (4) the defendant's role was minor; and (5) the defendant told the government all he knew about the offense and related offenses.[20] The safety valve is an important device in limiting the applicability of mandatory minimums, but the safety valve itself is limited in application, because it contains several specific and stringent criteria.[21] Broadening these criteria — for example, by expanding the safety valve to offenders in criminal history categories II and III, by expanding the range of offenses to which the safety valve applies, or by increasing the amount of the automatic reduction awarded to those who qualify — would increase judicial flexibility and fairness by contracting the universe of cases to which mandatory minimums would apply. An expanded safety valve would also avoid circumstances in which an offender with a criminal record filled with nothing but minor offenses, such as driving on a suspended license, is ineligible for relief and is instead sentenced like an offender with serious, violent prior convictions. Expanding the types of crimes to which the safety valve can apply is appropriate because drug defendants are not the only ones for whom mandatory minimums can produce harsh results.

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[19] *See Kimbrough*, 552 U.S. at 108-10. Although it does not involve a mandatory minimum, another troubling departure from the Commission's institutional role in drug sentencing is the guideline for MDMA, which was amended in 2001 based largely on MDMA studies that have since been repudiated because the researchers accidentally used an entirely different substance in their studies. *See* Donald G. McNeil Jr., *Research on Ecstasy Is Clouded By Errors*, N.Y. Times, Dec. 2, 2003, at F1.

[20] 18 U.S.C. § 3553(f).

[21] In fiscal year 2008, only 5,764 (35%) of defendants subject to a mandatory minimum qualified for the safety valve, while 10,369 (65%) did not. *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2008), tbl. 44.

A third useful reform would address the problem of culpability squarely, by reforming the criteria for imposing mandatory minimums in the first place. As we have noted, one of the principle flaws of mandatory minimums is that they apply one-size-fits-all sentences to defendants who are not equally culpable. The most glaring example of this phenomenon is in drug sentencing, where the combination of quantity-driven minimums and conspiracy liability can lead to defendants with minor to moderate roles in a drug operation being saddled with decades of prison time based on quantities of drugs they never handled, saw, or even knew about.[22] For instance, the ACLU has filed a commutation petition on behalf of Hamedah Hasan, who came to stay with her cousin to flee a violent boyfriend and became caught up in the cousin's drug operation. Though her role was not major, based on the total quantity of drugs involved in the entire conspiracy, Hamedah is still in prison serving a 27-year sentence.[23] Drug sentences should be more closely tied to individuals' roles and the harms they cause, and not simply to the amount of drugs involved. Reform along these lines would ideally come both from Congress and the Commission: Congress in reformulating the triggers for mandatory minimums away from mere drug quantity, and the Commission in eschewing reliance on drug quantity as the driving factor in offense level.

A final incremental step that could mitigate the effects of mandatory minimums is one that this body can take on its own: we urge the Commission to eliminate the ripple effects of mandatory minimums throughout the guideline system by abandoning offense levels that are calibrated to mandatory minimums.[24] We recognize that the Commission perceives itself to be constrained from taking such action by the congressional stipulation that the guidelines be set "consistent with all pertinent provisions of any Federal statute."[25] We do not read this instruction as mandating proportionality to applicable federal sentencing ranges, but rather as a general admonition to avoid affirmative conflict with other federal statutes. More importantly, the vaguely-expressed preference for proportionality (if indeed it is so understood) should not take precedence over the more compelling and specifically articulated congressional mandate to set offense levels based on the real harms of each offense, its seriousness, its circumstances, and the goal of deterrence.[26] Though proportionality in the abstract is a laudable principle, it is necessary to consider what sentences should be proportional to. Too often, because mandatory minimums are based on drug quantities, the sentences they prescribe are not proportional to the seriousness of the offense conduct, the harm it causes, or the defendant's culpability. Linking the drug guidelines to mandatory minimums maintains proportionality only with mandatory punishment levels that are overly severe — in effect

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[22] *See, e.g.*, Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009) (noting that drug quantity "is not significantly correlated with role in the offense" and suggesting that this "lack of association" shows "unwarranted or excessive uniformity in federal drug sentencing").

[23] Hamedah's story told in her own words, as well as her commutation petition, can be found at http://www.dearmrpresidentyesyoucan.org/.

[24] *See, e.g.*, U.S. Sentencing Comm'n, Public Hearing, Tr. at 25-27 (Atlanta, Ga., Feb. 10 & 11, 2009), *at* http://www.ussc.gov/AGENDAS/20090210/Transcript.pdf.

[25] 28 U.S.C. § 994(a).

[26] *See* 28 U.S.C. § 994(c)(1)-(7); *see also Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application.").

spreading the *dis*proportionality inherent in mandatory minimums to every offender at every quantity level. The result is both unwarranted racial disparity and excessive uniformity among differently-situated offenders.[27] Eliminating "proportionality" as a basis for offense levels would not eliminate all sentencing "cliffs," but it would eliminate some of them. As one judge has noted: "It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences."[28] We urge the Commission to recognize that it can adhere to its statutory duty without the proportionality principle, and that in any event such a principle must be secondary to the Commission's more specific charge to tailor offense levels to the nature and circumstances of offenses and offenders. Accordingly, the Commission should revise the Guidelines to minimize the ripple effect of mandatory minimums and the unjustified disparities they create.

This body courageously took the lead twenty years ago by documenting to Congress that its mandatory minimum system failed to achieve congressional goals for federal sentencing policy, and in fact produced effects that undermined those very goals. We applaud the Commission's role as an agent of reform and urge the Commission to continue that tradition today by sending a strong and unequivocal condemnation of mandatory minimums and by proposing specific solutions. If Congress passes currently pending legislation to reform the crack-powder disparity, the abolition or reform of mandatory minimums would become the most significant step that Congress could take to reduce unfairness, racial disparities, and the abridgement of constitutional rights in federal sentencing. The Commission should urge Congress to eliminate mandatory minimum sentences entirely. The Commission should also recommend a series of corrective measures that, in the event Congress cannot muster the political will for abolition, would produce substantial and positive change; these measures include lowering mandatory minimum terms, eliminating the subset of mandatory minimums that apply to drugs, expanding the applicability of the safety valve, and replacing drug quantity-based criteria for mandatory minimums with role-based and harm-based criteria. Finally, this body can take corrective action directly by amending the Guidelines themselves to avoid replicating mandatory minimums throughout the system via the proportionality principle.

It is the ACLU's fervent hope that this body, working together with Congress, will take steps to reduce excessive incarceration and create a federal sentencing system that is both fair and effective. The necessary first step toward this goal is reforming or abolishing mandatory minimums. Thank you.

[27] As the Judicial Conference has said, "the goal of proportionality should not become a one-way ratchet for increasing sentences." Letter from Hon. Sim Lake, Chair of the Judicial Conference Comm. on Criminal Law. to Members of the U.S. Sentencing Comm'n, March 8, 2004.
[28] USSC Fifteen Year Review 136.