

**Testimony of Mary Price**  
**Vice President and General Counsel**  
**Families Against Mandatory Minimums (FAMM)**  
**Prepared for the Standing Committee on Legal and Constitutional Affairs, Canada**  
**October 28, 2009**

I thank the Standing Committee on Legal and Constitutional Affairs for inviting me to share the views of Families Against Mandatory Minimums as you consider adopting mandatory minimum sentences in the Controlled Drugs and Substances Act.

United States federal law has long recognized that a healthy system of justice requires a judiciary that is free to exercise reasoned discretion. It seems beyond remark that the trial court, rather than members of Congress or federal prosecutors, is in the best position to evaluate the defendant standing to be sentenced, in light of the crime, public safety, and mitigating and aggravating factors. Sentencing rules should reflect appropriate suggestions for sentence length and provide guidance to help cabin undue disparity, but be flexible enough to permit proportionality.

This recognition of the need for judicial discretion is enshrined in the statute that governs sentencing, 18 U.S.C. § 3553. This elegant statute is the roadmap of judicial discretion at the sentencing phase. It contains much guidance but only a single mandate to the court at sentencing: impose a sentence “sufficient but no greater than necessary” to

- Reflect the seriousness of the offense, promote respect for the law, and provide just punishment;
- Provide adequate deterrence;
- Protect the public from further crimes of the defendant; and

- Provide the defendant with training, care, and correctional treatment.<sup>1</sup>

The statute outlines a set of factors for judges to consider in reaching the ultimate sentence. They include the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted disparity, and the guidelines and policy statements promulgated by the U.S. Sentencing Commission.<sup>2</sup> The most remarkable feature of this remarkable statute is its parsimony mandate: the sentence must not exceed that necessary to comply with the need to punish.

The parsimony command, together with the menu of considerations set out for the court in § 3553(a), assumes and supports the use of judicial discretion. Section 3553(a) compels careful consideration about why we punish and what should go into the decision about the form and length of punishment.

There is no place for mandatory minimums or mandatory guidelines in a criminal justice system that purports to treat defendants with reasoned judgment. Mandatory minimums have proved a popular political choice for lawmakers seeking to burnish tough-on-crime credentials or to attack political opponents with the charge of being soft on crime.

Mandatory minimums take a charge-centered approach to sentencing. Conviction for certain crimes, generally those involving drugs and guns, will result in a pre-determined and generally inescapable sentence. They were designed to deter would-be criminals, incapacitate offenders, and promote uniformity of punishment for similarly situated defendants. As originally designed, the only way a defendant could receive a sentence below the mandatory minimum was

---

<sup>1</sup> 18 U.S.C. § 3553(a)(2) (2008).

<sup>2</sup> § 3553(a)(2).

if he cooperated to the satisfaction of the prosecution, who held the power to move the court for a downward departure for “substantial assistance.”<sup>3</sup>

The modern-day mandatory minimum era was ushered in on the heels of the death of basketball star Len Bias as a result of a cocaine overdose. Congress wasted no time in responding to the high-profile death by spouting tough-on-crime solutions to the drug war. The House Judiciary Committee passed the laws in less than one week, without hearings, debate, or study.<sup>4</sup> Under the drug mandatory minimums, Congress sought to punish “serious” traffickers with minimum sentences of five years, “major” traffickers with ten-year minimums, and repeat offenders with sentences as long as life in prison, even for victimless, non-violent offenses.<sup>5</sup>

In 1988, Congress extended mandatory minimums to reach conspirators as well as principals, ensuring that mandatory minimums would apply with equal force to peripheral players in drug conspiracies.<sup>6</sup> The horror stories began piling up, of girlfriends and lowly couriers sentenced to the same or greater sentences than the heads of drug conspiracies, whose ability to name their underlings resulted in substantial assistance departures.<sup>7</sup> In partial mitigation, Congress enacted the so-called “safety valve” in 1994, providing relief from mandatory minimums to certain low-level, non-violent, first-time drug offenders who provide

---

<sup>3</sup> 18 U.S.C. § 3553(e).

<sup>4</sup> See FAMILIES AGAINST MANDATORY MINIMUMS, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS 18 (2008) (citations omitted), available at [http://www.famm.org/Repository/Files/8189\\_FAMM\\_BoggsAct\\_final.pdf](http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf) [hereinafter “CORRECTING COURSE”].

<sup>5</sup> H.R. Rep. No. 99-845, pat. 1, at 16-17 (1986).

<sup>6</sup> 18 U.S.C. § 846.

<sup>7</sup> See 18 U.S.C. § 3553(e); see also FAMILIES AGAINST MANDATORY MINIMUMS, PROFILES OF INJUSTICE, available at <http://www.famm.org/ProfilesOfInjustice/FederalProfiles.aspx> (last visited July 28, 2009) (detailing individual stories of people subject to lengthy sentences due to mandatory minimum sentencing rules).

the government all the information about their offense.<sup>8</sup> The safety valve directs judges to sentence a defendant according to the Sentencing Guidelines (rather than the mandatory minimum) when the defendant meets the strict qualifying criteria. Today, roughly a quarter of all defendants subject to mandatory minimums benefit from the safety valve.<sup>9</sup>

Mandatory minimum sentencing is plagued with problems, has led to extraordinary injustice, and has caused more problems than it has solved.

***Mandatory minimums reduce culpability to one or two factors.*** For example, in Armed Career Criminal Act (“ACCA”) cases, the mere presence of a gun (for drug cases, it is drug type and quantity<sup>10</sup>) is deemed sufficient to capture enough information about blameworthiness to trigger the appropriate sentence. But we know that bare elements of the offense are poor proxies for culpability, particularly in a sentencing system otherwise as attuned as ours to nuance, individualization, and the avoidance of unwarranted disparity. This means that people who anyone would argue should at least get a chance to be considered for a sentence below the mandatory minimum are ineligible for such a sentence by operation of law.

***Mandatory minimums cause unwarranted disparity and insupportable uniformity.*** Intended to, among other things, reduce unwarranted disparity among similarly situated defendants, mandatory minimum sentencing has instead produced both unwarranted uniformity and unwarranted disparity. Mandatory minimums rely on a limited number of factors that, if found, trigger the sentence. In the drug context, the type and quantity of drugs alone engage the

---

<sup>8</sup> See 18 U.S.C. § 3553(f).

<sup>9</sup> See U.S. SENTENCING COMMISSION, OVERVIEW OF STATUTORY MANDATORY MINIMUM SENTENCING 8, tbl. 4 (July 10, 2009), available at [http://www.ussc.gov/MANMIN/man\\_min.pdf](http://www.ussc.gov/MANMIN/man_min.pdf) [hereinafter “MANDATORY MINIMUM OVERVIEW”].

<sup>10</sup> See, e.g., 21 U.S.C. § 841(b)(1)(A) (describing mandatory minimum penalties for a range of drug offenses).

trigger. This means the law must treat very different offenders, with varying degrees of culpability, the very same for sentencing purposes. This unwarranted uniformity means that a drug “mule” carrying a backpack filled with drugs on several occasions, for relatively small amounts of remuneration, is sentenced to the same time in prison as the drug kingpin, who arranges the trips and enjoys enormous profits. In its 1991 study of mandatory minimums, the Sentencing Commission called the exaggerated role of drug quantity the “tariff” effect and criticized it for prohibiting the consideration of traditional sentencing factors.<sup>11</sup>

The crack and powder cocaine structure nicely illustrates this dual consequence. The much-maligned “100-to-1” disparity between federal crack and powder cocaine sentences describes a system that subjects people convicted of possession or possession with intent to distribute five grams of crack cocaine to the same five-year mandatory minimum meted out to a powder cocaine dealer who handles one hundred times that amount, or 500 grams.<sup>12</sup> The Sentencing Commission has routinely published reports decrying the widely different sanctions for two forms of the same drug.<sup>13</sup> It has also brought to light (and condemnation) the extreme racial disparity in sentencing black defendants (the overwhelming majority of crack defendants) to longer sentences than their powder cocaine counterparts (who tend to be white or Hispanic).<sup>14</sup>

---

<sup>11</sup> See U.S. SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM, 26 (Aug. 1991), available at [http://www.ussc.gov/r\\_congress/MANMIN.PDF](http://www.ussc.gov/r_congress/MANMIN.PDF).

<sup>12</sup> See 21 U.S.C. § 841(b)(1)(B)(iii).

<sup>13</sup> U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1, n.1 (May 2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf) (recounting history of crack cocaine reports since 1995) (hereinafter “2007 COCAINE REPORT”).

<sup>14</sup> U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY vii (May 2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm).

On the one hand, the crack cocaine sentencing structure results in a race-based disparity that is the most significant factor contributing to *overall* racial disparity in federal sentencing.<sup>15</sup> On the other hand, it treats very dissimilar people the same for purposes of sentencing. For example, a crack cocaine defendant convicted of cooking and selling 50 grams of crack is subject to a ten-year mandatory minimum sentence, while the drug kingpin who supplied the powder cocaine, directed the cook, and reaps the rewards is not subject to the same ten-year sentence unless convicted of handling ten times more powder cocaine. Even then, he can see his own ten-year sentence reduced for substantial assistance by cooperating and turning in the cook.

***Mandatory minimums distort traditional roles of judge and prosecutor.*** Discretion is hydraulic and must reside somewhere at sentencing. Mandatory minimums place that function squarely in the hands of prosecutors, who control which crimes to charge, which to drop, which facts to bargain, or when and whether to charge a crime bearing a mandatory minimum or bury the conduct to be addressed later as sentencing factors. Prosecutorial control of sentencing takes place out of open court and is thus unreviewable. It alters the careful balance among the branches of government.<sup>16</sup>

Most disturbing is the use of mandatory minimum charges and the threat of their use to induce cooperation and plea agreements. Illustrative of the problem are several cases highlighted by the Honorable Julie Carnes, Chair of the Criminal Law Committee of the Judicial Conference of the United States (“CLC”), in recent testimony to Congress. She discussed the now notorious

---

<sup>15</sup> U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 132 (November 2004), available at: [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm).

<sup>16</sup> The Hon. Nancy Gertner (D. Ma) describes the limitation of discretion as “hydraulic. Discretion passes to other players in the system.” See Nancy Gertner, *Federal Sentencing Guidelines: View From the Bench*, 29 SPG HUM. RTS. 6 (Spring 2002), available at <http://www.abanet.org/irr/hr/spring02/gertner.html> (last visited July 28, 2009).

case of Weldon Angelos, presided over by her predecessor on the CLC, then-Judge Paul Cassell. When Weldon Angelos was sentenced, Judge Cassell was forced to impose a sentence of 55 years due to the stacking provision of 18 U.S.C. § 924(c). But originally, the government had offered a plea agreement to one drug and one § 924(c) charge that would have limited Angelos's sentence to 15 years. In other words, the government believed that Mr. Angelos's conduct merited a sentence of no more than 15 years. Mr. Angelos did not plead guilty but elected instead to go to trial, despite the warning that if he did so "prosecutors would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time."<sup>17</sup> Mr. Angelos was undeterred, and the government charged a total of twenty counts, including five § 924(c) counts. It was his convictions on three of the gun counts that drove his sentence. As Judge Carnes reminded the committee, Judge Cassell calculated that Mr. Angelos's sentence exceeded that recommended for more serious offenses. For example:

Mr. Angelos faced a prison term more than double the sentence of . . . an aircraft hijacker (293 months), a terrorist who detonates a bomb in a public place (235 months), a racially motivated defendant who attacks a minority victim with the intent to kill and inflicts permanent or life threatening injuries (210 months), or a second-degree murderer (168 months). Indeed, Mr. Angelos faced prison term more than *five times* as long as the Guidelines sentence of someone who rapes a ten-year-old child (135 months) and more than eight times as long as that of a rapist (87 months).<sup>18</sup>

---

<sup>17</sup> See *Hearing on Mandatory Minimums and Unintended Consequences Before the Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary*, 111<sup>th</sup> Cong (July 14, 2009) (statement of the Honorable Judge Julie E. Carnes, Chair of the Criminal Law Committee on Behalf of the Judicial Conference 15), available at <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf> (hereinafter "Carnes Statement").

<sup>18</sup> *Id.* at 18. In her testimony, Judge Carnes also described the case of Marion Hungerford, a woman whose mental illness precluded her from recognizing her culpability and whose accompaniment of a boyfriend who used a gun to hold up banks led to her 159-year sentence, due to the stacking of seven § 924(c) counts. See *id.* at 19-20.

Mandatory minimums cause other unintended<sup>19</sup> but very real consequences beyond the daily and personal injustice of subjecting many defendants to sentences that everyone recognizes are too long but no one, especially the judge at sentencing, can do anything about.

***Mandatory minimums drive enormous prison costs.*** Ours is a country addicted to mandatory minimums. There are 171 statutes with mandatory minimums in the federal code.<sup>20</sup> In 2008, fully 21,023 people were sentenced to 31,239 counts of conviction carrying mandatory minimum sentences.<sup>21</sup> If each person were sentenced to the lowest mandatory minimum (five years), they would serve a cumulative 105,115 years at a cost of \$25,895 per person per year.<sup>22</sup> Of course, mandatory minimums range from five to ten, 15, 20 or 25 years and even life. The so-called “stacking provision” of 18 U.S.C. § 924(c) can generate sentences for first offenders of 25, 50, or 150 years or more.<sup>23</sup>

***Mandatory minimums lead to over-incarceration fed by unduly lengthy sentences.*** The federal prison population stands at 208,909.<sup>24</sup> This represents nearly a five-fold increase over the population in the mid-1980s, when mandatory minimums and the guidelines were adopted. The increases come with increased costs. The federal prison population is currently 37 percent over

---

<sup>19</sup> See 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) (stating that mandatory minimum sentences are “perhaps a good example of the law of unintended consequences.”).

<sup>20</sup> MANDATORY MINIMUM OVERVIEW, *supra* note 9, at 1.

<sup>21</sup> *Id.*

<sup>22</sup> See Matthew Rowland, Deputy Assistant Director, Administrative Office of the United States Courts Memorandum (May 6, 2009), *Cost of Incarceration and Supervision*.

<sup>23</sup> See Carnes Statement, *supra* note. 17.

<sup>24</sup> FEDERAL BUREAU OF PRISONS, *Weekly Population Report*, available at [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp) (last modified, Oct. 22, 2009).

capacity,<sup>25</sup> and the Federal Bureau of Prisons struggles to maintain safety for prisoners and guards in such adverse conditions. Of the 24,321 people convicted of drug trafficking in 2008, the majority, 16,787, were subject to mandatory minimums of five, ten, or more than ten years.<sup>26</sup> This is notwithstanding the fact that almost 83 percent of those defendants had no weapons and 63 percent were people with no or limited criminal history.<sup>27</sup> It should surprise no one that “[t]he major cause of the prison population explosion is the increase in sentence length for drug trafficking, from 23 months before the guidelines to 73 months in 2001. About 75 percent of this increase was due to mandatory minimums, and 25 percent was due to guideline increases above mandatory minimum levels.”<sup>28</sup>

***Mandatory Minimums fail to live up to their promise to reduce drug crime.*** Proponents of mandatory minimums point to reduced national crime rates as evidence that the tough sentences work. Despite more than 50 years of experimenting with mandatory minimums, however, backers can point to no conclusive studies that demonstrate any positive impact of federal mandatory minimum sentences on *drug crime* rates.<sup>29</sup> Moreover, national crime rate statistics and fluctuations do not include drug crimes, so they cannot show whether mandatory

---

<sup>25</sup> *Hearing on Federal Bureau of Prisons Oversight, Before the Subcomm. on Crime, Terrorism and Homeland Security of the U.S. Comm. On the Judiciary*, 111<sup>th</sup> Cong. (July 21, 2009) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons 2), available at <http://judiciary.house.gov/hearings/pdf/Lappin090721.pdf>.

<sup>26</sup> U.S. SENTENCING COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 43 (2008), available at <http://www.ussc.gov/ANNRPT/2008/Table43.pdf> (last visited July 28, 2009) [hereinafter “2008 SOURCEBOOK”].

<sup>27</sup> *Id.* at Tables 37, 39.

<sup>28</sup> *See Public Hearing on the Sentencing Reform Act of 1984: 25 Years Later, Before the United States Sentencing Commission*, (July 9, 2009) (statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia 5)(internal citations omitted) , available at [http://www.ussc.gov/AGENDAS/20090709/Nachmanoff\\_testimony.pdf](http://www.ussc.gov/AGENDAS/20090709/Nachmanoff_testimony.pdf).

<sup>29</sup> All sides in the debate agree that proving causality between longer mandatory sentences and crime rates is difficult. Yet the burden falls on the proponents of mandatory minimums to provide evidence that they are working. The proponents have shown none

sentences are effective in reducing the rate of drug crimes.<sup>30</sup> In fact, data from both the Federal Bureau of Investigation<sup>31</sup> and the Bureau of Justice Statistics<sup>32</sup> show steady *increases* in the numbers of drug offenders arrested and charged at both the state and federal levels over the last decades.

Drug use and addiction are at the root of a large portion of federal drug crimes. In 2004, almost 60 percent of federal drug *traffickers* reported using drugs in the month before their offense, and a third of all traffickers were using drugs at the time of their offense.<sup>33</sup> A full quarter of all federal drug offenders committed their crimes to get money to buy drugs.<sup>34</sup> Of the 26 percent of *all* federal offenders who admitted they committed their current offenses while

---

<sup>30</sup> See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, PRELIMINARY ANNUAL UNIFORM CRIME REPORT (June 9, 2008), available at <http://www.fbi.gov/ucr/2007prelim> (last visited June 17, 2008) (describing nation-wide statistics only for violent crimes such as murder, robbery, rape, and arson, but not for drug crimes). The only data the FBI collects regarding drug crimes is the annual number of arrests for state and local "drug abuse violations."

<sup>31</sup> Cf. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2006, Table 29, available at [http://www.fbi.gov/ucr/cius2006/data/table\\_29.html](http://www.fbi.gov/ucr/cius2006/data/table_29.html) (last visited June 17, 2008), with FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2005, Table 29, available at [http://www.fbi.gov/ucr/05cius/data/table\\_29.html](http://www.fbi.gov/ucr/05cius/data/table_29.html) (last visited June 17, 2008) (showing an increase in state drug abuse violation arrests by 43,459, from 1,846,351 in 2005 to 1,889,810 in 2006).

<sup>32</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS, 2003, at 1 (August 2006) (showing increase in federal drug offense arrests, from 23,268 arrests in 1994 to 34,217 arrests in 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf> (last visited June 18, 2008); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, *Defendants Charged With Violation of Drug Laws in U.S. District Courts*, available at <http://www.albany.edu/sourcebook/pdf/t5372007.pdf> (last visited June 18, 2008) (showing steady increases in number of federal drug defendants between 1985 and 2007).

<sup>33</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 5 (Oct. 2006) (revised Jan. 2007), available at <http://www.ojp.gov/bjs/pub/pdf/dudsfp04.pdf> (last visited July 30, 2008).

<sup>34</sup> *Id.* at 6.

under the influence of drugs, almost a third (32%) were drug offenders.<sup>35</sup> Over half of all federal drug offenders in 2004 met the official criteria for having a drug abuse or dependence problem.<sup>36</sup>

### ***Conclusion***

Mandatory minimums make no pretense of accommodating the traditional § 3553(a) factors that account for individual characteristics at sentencing, such as role in the offense. They make no effort to accommodate the studied inquiry of that law, much less any consideration of parsimony. They are frequently longer than needed to comply with the purposes of punishment, only crudely reflect the seriousness of the offense, and completely fail to account for individual characteristics of the offense or offender.

Mandatory minimum sentencing is “[i]n short . . . a blunt and inflexible tool”<sup>37</sup> that has failed to deliver on its promises and produced unintended results that distort the operation of the criminal justice system, fill our prisons, and result in sentences that are too often unduly harsh.

---

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> Carnes Statement, *supra* note 17.