



Testimony of
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on behalf of the
CONSTITUTION PROJECT
before the
UNITED STATES SENTENCING COMMISSION
for the hearing on
MANDATORY MINIMUM SENTENCING PROVISIONS
UNDER FEDERAL LAW
Washington, D.C.
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Chairman Sessions and distinguished members of the United States Sentencing Commission: Good morning and thank you for the opportunity to testify before you regarding mandatory minimum sentences under federal law. My name is Tom Hillier, and I currently serve as the Federal Public Defender for the Western District of Washington. The bulk of my 37-year legal career has involved the public practice of criminal defense, with the past 28 years in my present position. I appear today on behalf of the Constitution Project, as a member of its Sentencing Initiative Blue Ribbon Committee (hereinafter “Committee”). Though I testify on behalf of the Constitution Project, there are times, which I will distinguish, when my testimony reflects my experience and opinions as a federal public defender.

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards. It specializes in developing bipartisan policy solutions to controversial legal issues. As with all of the Constitution Project’s initiatives, the Constitution Project’s Sentencing Initiative was guided by a bipartisan and diverse group that included current and former judges, prosecutors, defense attorneys, scholars, and other sentencing experts. It was chaired by former United States Attorney General Edwin Meese III and former Deputy Attorney General of the United States Philip Heymann. In 2006, the Committee issued two separate reports outlining principles for the design of and recommendations for the reform of criminal sentencing systems. Those reports are *Principles for the Design and Reform of Sentencing Systems: A Background Report* and *Recommendations for Federal Criminal Sentencing in a Post-Booker World*.¹ The

¹ The full reports are available at www.constitutionproject.org.

Committee's views in these two reports remain relevant today and provide the foundation for my testimony.

While specifically critical of the Federal Sentencing Guidelines in many particulars, the Committee concluded that "the best mechanism for providing the desired combination of consistency, individualization, transparency, and enhanced due process is a system of sentencing guidelines."² In the Committee's view, "mandatory minimum sentences are generally incompatible with the operation of a guidelines system and thus should be enacted only in the most extraordinary circumstances."³ In accordance with these conclusions, the Constitution Project and I urge the Commission to recommend and support legislation that will reduce the number of mandatory minimum sentencing laws.

I. Mandatory Minimum Penalties Are at Odds With a Sentencing Guidelines Structure Designed to Allow for Individualization in Addition to Consistency.

Primary problems with mandatory minimum sentences identified by the Committee centered in three interrelated areas. First, mandatory minimums "deprive sentencing judges of the power to take appropriate account of exceptional circumstances and the individual characteristics of atypical offenders."⁴ Second, mandatory minimums "impose on large classes of offenders punishments that are both severe and mandatory."⁵ Third, the routine enactment of statutory mandatory minimum sentences suggests a legislative disregard for the process of consultation with the Sentencing Commission and other interested parties, and thereby contributes to an institutional imbalance that is at the

² The Constitution Project, *Principles for the Design and Reform of Sentencing Systems: A Background Report*, 23 (2005) [hereinafter *Principles*].

³ *Id.* at 27.

⁴ *Id.* at 26.

⁵ *Id.* at 27.

heart of the many difficulties confronting the federal sentencing system.⁶ These observations and conclusions of the Committee are unremarkable in the sense that these same concerns have been expressed by judges, public defenders, sentencing experts and academicians for years.

In my view, the role mandatory minimum statutes play in inappropriately skewing the balance of power in the sentencing system offers the most compelling reason to forcefully recommend their repeal. Our Committee reported that its “most important conclusion . . . is that a reasonable distribution of sentencing authority among the institutions responsible for sentencing is critical to the long-term success of any sentencing system” Expressed negatively, the Committee’s conclusion is that a system that concentrates sentencing authority disproportionately in the hands of one or even two institutional sentencing actors may be prone to difficulty.”⁷ We observed:

Since the advent of the Sentencing Guidelines in 1987, local United States Attorneys and their assistants have exercised an increasing amount of power over sentencing outcomes in individual cases. This development is a direct consequence of a fundamental attribute of guidelines systems: increasing the complexity of a sentencing guidelines system tends to confer power on prosecutors at the same time as it tends to limit the power of judges. *This is particularly true if the guidelines are overlaid on a complex criminal code containing an array of fact-dependent statutory minimum sentencing provisions.* As the number of fact-dependent rules potentially applicable to the sentence of each defendant increases, so too does the number of opportunities for a prosecutor to control each defendant’s sentence – by charging or not charging crimes or statutory enhancements, proving or not seeking to prove facts determinative of guideline adjustments, or moving or not moving for various types of departures. Because the Federal Sentencing Guidelines and associated statutory provisions are, taken together; one of the most complex sentencing regimes ever devised, the effect is to confer on

⁶ *Id.*

⁷ *Id.* at 21-22.

prosecutors a very high degree of control over sentencing outcomes.⁸ (Emphasis added.)

Booker and its progeny have had the desirable effect of lessening the degree of power government attorneys wield in the sentencing process when a mandatory minimum is not implicated. But when mandatory minimums are implicated, the “blunt instrument”⁹ of mandatory minimum statutes continues to contribute to sentencing injustices in every district court in the country. The following comments reflect my experience-based observations concerning the impact of mandatory minimum statutes.

II. Mandatory Minimums Erode Confidence in Our Criminal Justice System And Obstruct Rather than Promote the Goals of the Sentencing Commission.

On many occasions, lawyers from my office and I have watched as a judge tells a defendant “I don’t think this sentence is fair—it is too long. But, my hands are tied.” It is difficult to conceive of a more damaging comment. I believe it reflects poorly on our criminal justice system and even the sentencing judge.

When a courtroom observer hears a judge say that the sentence imposed is unfair, they wonder why. Their confidence in the impartiality of judges and the integrity of our system is necessarily undercut. Typically, a courtroom observer will blame the judge. The public believe it is a judge’s job to decide a case fairly. People – not expert in the influence of mandatory minimum statutes in the sentencing decision – leave the court angry at the judge rather than Congress or, perhaps, the prosecutor who made the charging decision. The Sentencing Commission can promote public confidence in judges by persuading Congress to repeal mandatory minimum statutes except in the most extraordinary circumstances.

⁸ *Id.* at 37.

⁹ *Id.* at 35.

Perhaps more importantly, the defendant, who we hope is moved to accept his or her punishment as the just consequence of a just system, enters prison having been informed that the punishment is unfair, but there is nothing to be done about it. This is a bitter pill to swallow. How can we expect these people to leave prison committed to a crime-free future? I think it is fair to say that mandatory minimums risk, rather than promote, public safety because people who know they have been treated unfairly are more likely to leave prison angry, increasing the possibility of recidivism.

III. Mandatory Minimum Sentencing Provisions Unjustly Impact Charging Decisions and Plea Negotiations.

The Constitution Project's Sentencing Committee observed that "[t]he existence of mandatory minimum sentences tied to conviction of particular offenses permits manipulation of sentences through differential prosecutorial charging and plea bargaining policies. Such manipulation undercuts the object of reducing disparity."¹⁰ This observation is correct but not the principal problem associated with the effect of mandatory minimum statutes in the plea bargaining process. Indeed, to the extent that prosecutors refrain from bringing charges that carry mandatory penalties in order to avoid unwarranted punishment, sentencing purposes are furthered. In such cases, the disparity is warranted.

However, it is my personal experience that mandatory penalties are commonly threatened to induce pleas, often in cases where, by any civilized standard, the threatened penalty would be unfair and unjustified. This institutional imbalance threatens the truth-seeking function of our criminal justice system. Mandatory minimums create a powerful incentive for informants and cooperators to provide exaggerated or false information.

¹⁰ *Id.* at 27.

That information is not subjected to the crucible of trial. The Innocence Project has found that 15% of cases of wrongful conviction overturned by DNA testing involved the false testimony of informants.¹¹ The risk of false and embellished testimony to sustain convictions is a problem that was described as “systemic” in *United States v. Colomb*, No. 02-cr-60015, Order on Defendant’s Motion for New Trial (W.D. La. Aug. 31, 2006). It is a simple fact that many defendants plead guilty to lesser offenses, even though claims concerning culpability are exaggerated, because they are afraid to litigate legitimate claims.

Some defendants don’t capitulate. For exercising a constitutional right, they may suffer horrific penalties. For example, in *United States v. Angelos*, 345 F. Supp. 2d, 1227 (D. Utah 2004) *aff’d*, 433 F.3d 738 (10th Cir. 2006), after the defendant declined a plea to drug trafficking and one § 924(c) count with a 16-year sentence, the government stacked five § 924(c) counts, which would have resulted in a 105-year sentence. The defendant was acquitted of two of the counts, thus resulting in a 55-year sentence for a 24-year-old first offender – with a good job and two young children. In *United States v. Looney*, 532 F.3d 392 (5th Cir. 2008), a 53-year-old woman with no prior convictions received a 45-year sentence, 10 years of which was for drug conspiracy and possession with intent to distribute drugs, and 30 years of which was for two counts of possessing guns in furtherance of drug dealing. There was “no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.” *United States v. Looney, supra*, at 396. In *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), a severely mentally ill 52-year-old woman who had led a

¹¹ <http://www.innocenceproject.org/understand/Snitches-Informants.php>.

completely law-abiding life was sentenced to 159 years imprisonment, 150 years of which was for seven stacked § 924(c) counts. She was unable to plead guilty on the prosecutor's terms because she held a fixed belief, due to her mental illness, that she was innocent. The prosecutor, taking the position that she had no one to blame but herself, concluded, in his sole discretion, that the defendant should be imprisoned for the rest of her life. In *United States v. Nanquilada*, No. CR08-323TSZ (W.D. Wa. 2008), the government agreed to a binding plea agreement that would result in the defendant being sentenced to 12 years in prison for his involvement in drug trafficking and illegal possession of firearms. When the defendant declined to plead, the government re-indicted, stacking § 924(c) charges in a scheme that required a mandatory minimum of 60 years imprisonment. In other words, for asserting his right to go to trial, the government attorney unilaterally decided he should be penalized to the tune of 48 years of additional time in prison. In this case, the defendant's courage paid off. The evidence was suppressed and the charges dismissed because, as it turns out, the arresting officer lied.

These examples bear several similarities. The penalties imposed or threatened were unjust by any civilized standard. Also, each case involved situations where government prosecutors upped the punishment ante not for a sentencing purpose but because defendants exercised constitutional rights. Further, each case diminished the stature and reputation of the Department of Justice because the participants in those cases, including the judges, recognized that what was happening was abusive, wrong and unjust. The courts described the government's actions with such terms as "irrational, inhumane and absurd," as "immensely cruel, if not barbaric," as "unjust, cruel and even irrational," and as "abusive." Finally, none of the defendants who suffered government-

wrought catastrophic sentencing consequences was a murderer, terrorist, drug kingpin, gangster or other notorious criminal such as one could imagine might receive such a harsh penalty. The defendants included first time offenders, parents and the mentally ill.

The focus of the Constitution Project Committee's work was not the nitty gritty of the effect of mandatory penalties on the plea bargaining process. But the theoretic problems, particularly those related to institutional imbalance, identified by our Committee are manifest in the actual case examples set forth above. It is my hope that the Sentencing Commission will recognize such injustices in reporting to Congress on the undesirability of maintaining mandatory minimum penalty statutes. It is my hope that by recognizing the mischief mandatory minimum statutes bring to the plea bargaining process, the Department of Justice will be moved to modify its own plea bargaining and sentencing advocacy policies. In that regard the potential for reform is readily available.

The United States Attorney's Manual (USAM)¹² lays out principles addressing the range of decisions a government attorney must make in deciding whether to charge an individual, what charges to bring, whether to entertain a plea agreement, and whether to make a recommendation at the time of sentencing. The principles are designed to both ensure the fair and effective exercise of prosecutorial discretion and to promote confidence on the part of the public and individual defendants that prosecutorial decisions will be made rationally and objectively on the merits of each case.¹³

The principles are remarkable in recognizing that every case requires a full individualized assessment of both the circumstances of the offense and the participation of the defendant in that offense. Federal prosecutors are instructed to consider the impact

¹² 9 USAM Ch. 9-27.

¹³ 9 USAM 9-27.001.

of their charging decisions on the purposes of sentencing when deciding whether a particular charge, or potential mandatory minimum charge, “is proportional to the seriousness of the defendant’s conduct.”¹⁴ But as we know, these principles are often sidelined by the still extant directive of former Attorney General John Ashcroft requiring charging decisions that “yield the most substantial sentence.”¹⁵ The Sentencing Commission’s observations concerning the impact of mandatory minimums on plea bargaining and fairness in sentencing may influence the Department to reevaluate current policies.

IV. Conclusion

Because mandatory minimums “deprive[] sentencing judges of the power to take appropriate account of exceptional circumstances and the individual characteristics of atypical offenders,”¹⁶ Congress should craft legislation that limits the use of mandatory minimum statutes to extreme cases with clear public safety concerns. Currently, Guideline sentencing ranges almost always suffice as at least enough punishment to achieve sentencing purposes without resort to mandatory minimums. Thus, the Commission should recommend repeal of most mandatory minimum laws.

Additionally, I believe that policies concerning the use of mandatory minimums should take into account the circumstances of the defendant and mandatory minimum charges should be discouraged where the defendant has no prior record, is mentally ill, or is apparently eligible for a variance from sentencing ranges based upon individual

¹⁴ 9 USAM 9-27.300.

¹⁵ Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Part I, September 22, 2003 (Ashcroft Memo).

¹⁶ *Principles* at 26.

circumstances, a variance that would be prevented by a mandatory minimum. In its role as a neutral and expert sentencing authority, the Commission should encourage positive change in the Department's current charging policies.

The Constitution Project's Sentencing Committee recommends that "criminal defendants should not be punished more severely than they deserve".¹⁷ It is in keeping with that ideal that the Constitution Project hopes the Sentencing Commission will support legislative and policy changes that limit the use of mandatory minimums.

Thank you for the opportunity to address you today.

¹⁷ *Id.* at. 15-16.