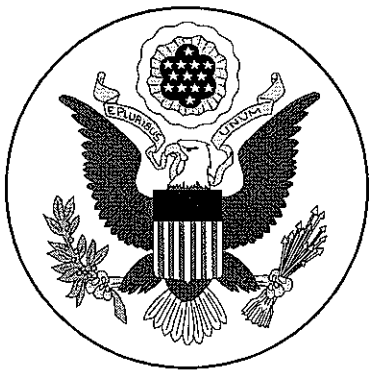
JUDICIAL CONFERENCE OF THE UNITED STATES

TESTIMONY OF JUDGE IRENE KEELEY

CHAIR OF THE COMMITTEE ON CRIMINAL LAW



BEFORE

THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
OVER-CRIMINALIZATION TASK FORCE OF 2014

"AGENCY PERSPECTIVES"

FRIDAY, JULY 11, 2014

Chairman Sensenbrenner, Ranking Minority Member Scott and Distinguished Members of the Task Force,

Thank you for soliciting the views of the Judicial Conference of the United States. My name is Irene Keeley and I am a District Court Judge in the Northern District of West Virginia. I also serve as the Chair of the Judicial Conference's Committee on Criminal Law. The Criminal Law Committee is tasked with overseeing the federal probation and pretrial services system and reviewing legislation and other issues relating to the administration of criminal law.

My Committee is keenly interested in the work of the Task Force and is closely following the policy initiatives being considered and implemented throughout the federal criminal justice system. I am pleased to have the opportunity to share with the Task Force several views of the Judicial Conference related to the administration of the federal criminal justice system: curbing over-federalization of criminal law; reforming mandatory minimum sentences, which are inefficient, wasteful, and create sentencing disparities; and, amending the Sentencing Guidelines.

The entire Judicial Branch's appropriation is less than two-tenths of one percent of the federal budget. To put this figure in further perspective, the current appropriation for the entire Judiciary is approximately one-fourth of the Department of Justice's current appropriation alone. Any policy reform, even if it achieves overall net savings to taxpayers, that would shift additional costs onto the Judicial Branch would severely impact the Judiciary's budget and programming, given the small size of our budget.

The Judicial Conference appreciates the support that Congress has shown the Judiciary and hopes that it can continue to rely on that support in the years ahead, especially in light of the

serious discussions occurring in all three branches of government related to sentencing and corrections reforms. The Conference is closely following these efforts, which are designed, in part, to reduce the "crisis" that has been reported in the Federal Bureau of Prisons (BOP) stemming from an inmate population that is over its rated capacity.

In addressing this crisis – whether through legislation; executive action, such as clemency; or policy changes, such as amending the Sentencing Guidelines – policy-makers must not create a new public safety crisis in our communities by simply transferring the risks and costs from the prisons to the caseloads of already strained probation officers and the full dockets of the courts. Instead, lasting and meaningful solutions can be attained only if the branches work together to ensure that the correct cases are brought into the federal system, just sentences are imposed, and offenders are appropriately placed in prison or under supervision in the community.

I. Curbing the Over-Federalization of Criminal Law

The Judicial Conference has long opposed the over-federalization of criminal law, which is a cause of overcrowding in our federal prisons. For nearly a century, the Judiciary has encouraged preserving the limited role of the federal criminal justice system. For example, Chief Justice William Howard Taft expressed concerns about the federalization of crime during a 1922 address to the American Bar Association.[1] The Judicial Conference since has reiterated its "long-standing position that federal prosecutions should be limited to charges that cannot or should not be prosecuted in state courts,"[2] and has suggested that the "jurisdiction of the federal courts

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[1] *See* Hon. William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601 (1922).

[2] JCUS-SEP 91, p. 45.

should be limited, complementing and not supplanting the jurisdiction of the state courts."[3]

The Judiciary appreciates the importance of reducing crime. Accordingly, in 1995 the Conference adopted policies encouraging Congress "to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism," and emphasized that "[i]n principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."[4] At that time, the Conference specifically identified five types of criminal offenses deemed appropriate for federal jurisdiction:

1. Offenses against the federal government or its inherent interests;
2. Criminal activity with substantial multistate or international aspects;
3. Criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
4. Serious, high-level or widespread state or local government corruption; and,
5. Criminal cases raising highly sensitive local issues.[5]

The Conference recommends that Congress review existing federal criminal statutes with the goal of eliminating provisions that no longer serve an essential federal purpose. In addition, the Conference recommends that Congress consider using "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created. Finally, the Conference recommends that Congress and the Executive Branch undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in

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[3] JCUS-SEP 93, p. 51.
[4] JCUS-SEP 95, pp. 39, 40.
[5] *Id.* at 40.

the federal or state systems.[6]

II. Reforming Mandatory Minimum Sentences

A. The Failure of Mandatory Minimum Sentences

For sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences and has supported measures for their repeal or to ameliorate their effects.[7] The Conference has had considerable company in its opposition to mandatory minimum sentences,[8] which belies the claim that judges are motivated by a parochial desire to increase their own power in sentencing. Judges routinely perform tasks in which the individual judge has no or very little discretion—but the Judicial Conference does not advocate for the repeal of these legislatively mandated tasks.[9]

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[6] *See id.*

[7] JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; 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; JCUS-SEP 13, p. 17.

[8] *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 (1993) [hereinafter *1993 Hearing*] (statement of Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Commission) ("The conference of every circuit with criminal jurisdiction in the federal judicial system,...the U.S. Sentencing Commission, prosecutors and defense attorneys, [and] federal corrections experts...have all spoken of their concerns [about mandatory minimum sentencing]. 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.").

[9] *See 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 (2009) [hereinafter *2009 Hearing*] (statement of Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States) ("In reality..., district judges are continually dictated to in a variety of ways, in both civil and criminal cases. 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. Judges understand and accept these constraints because judges know that they do not create the law; this is Congress's role. Rather, judges interpret that law and apply it to the facts of the case, within whatever ambit of discretion is deemed permissible for the particular issue.").

Though mandatory minimums have been criticized on numerous grounds,[10] 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 impair the efforts of the United States Sentencing Commission to fashion Guidelines according to 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. Finally, mandatory minimums are inherently rigid and often lead to inconsistent and disproportionately severe sentences.

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

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, mandatory minimums have proliferated over the past twenty years. Between 1991 and 2011, the number of mandatory minimum penalties more than doubled, from 98 to 195.[11] There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the

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[10] *See, e.g.*, U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Oct. 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); Hon. Eric Holder, Attorney General of the United States, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 2013), *available at*: http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html ("Because they oftentimes generate unfairly long sentences, [mandatory minimums] breed disrespect for the system. When applied indiscriminately, they do not serve public safety. They – and some of the enforcement priorities we have set – have had a destabilizing effect on particular communities, largely poor and of color. And, applied inappropriately, they are ultimately counterproductive.").

[11] U.S. Sentencing Commission, *Report to the Congress*, *supra* note 10, at 71.

federal prison population.[12] 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."[13]

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 also by lowering supervised release caseloads.[14] 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.[15] Based on fiscal year 2013 cost data, the cost of supervising an offender for one month is approximately $264. Thus, mandatory minimums cost the Judiciary alone, on average, almost $4.5 million in supervision costs per 1,000 offenders (i.e., $264 x 17 months x 1,000 offenders = $4.488 million). If the Judiciary were called upon to play a role in reducing prison over-crowding (which

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

[13] *Id.*; *see also* U.S. Sentencing Commission, *Report to the Congress*, *supra* note 10, 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.").

[14] *See also* David Adair, *Revocation of Supervised Release - A Judicial Function*, 6 FED. SENT'G REP. 190, 191 (1994) ("[S]ome argue 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 supervision simply by virtue of the longer periods of incarceration.").

[15] 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.

is a direct result of mandatory minimums) through legislative or executive action transferring inmates to supervision by probation officers, then the Judiciary certainly would require increased appropriations to carry this new burden.

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

Mandatory minimum statutes impair the congressional mandate 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.

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 mandatory minimum sentences,[16] the Guidelines have been skewed out of shape and upward by the

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[16] 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 Administrative Office of the U.S. Courts); 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 Administrative Office of the U.S. Courts); *see also United States v. Leitch*, No. 11-CR-00609(JG), 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013) ("[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.").

inclusion of sentence ranges which have not been empirically constructed.[17] 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 their 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.[18] The Commission concluded that the two systems are "structurally and functionally at odds."[19] 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."[20] Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.[21]

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[17] *1993 Hearing*, *supra* note 8, 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.").

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

[19] *Id.*

[20] 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* 287 (1993).

[21] *See* 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).

3. Mandatory Minimum Sentences Cause Unwarranted Disproportionality in Sentencing

By deviating from the carefully calibrated Sentencing Guidelines, mandatory minimums 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 should apply to every case. Unlike the Sentencing Guidelines, applied by judges on a case-by-case basis and allowing a consideration of multiple factors that relate to the culpability and dangerousness of the offender, mandatory minimums typically identify one aggravating factor and then pin the prescribed enhanced sentence to it. Such an approach means that any offender who is convicted under 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. As two former Criminal Law Committee chairs have put it, mandatory minimums "mean one-size-fits-all injustice"[22] and are "blunt and inflexible tool[s]."[23]

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[22] *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 (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.").

[23] *2009 Hearing*, *supra* note 9, at 42 (statement of Judge Julie E. Carnes); *see also 1993 Hearing*, *supra* note 8, at 67 (statement of Judge William W. Wilkins) ("[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 offense or offender-related facts."); U.S. Sentencing Commission, *Report to the Congress*, *supra* note 10, 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).

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 person 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.[24] 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,[25] the weight of which is calculated regardless of purity,[26] they

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[24] In its recent report to Congress, the Sentencing Commission reported, based on fiscal year 2010 data, that over 75% 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 10, at 146.

[25] *1993 Hearing*, *supra* note 8, at 106 ("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.").

[26] *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."); *Neal v. United States*, 516 U.S. 284, 296 (1996) (a

apply conspiracy principles to drug sentences,[27] and the most culpable offenders (who often are not caught personally in possession of large quantities of drugs) are able to avoid mandatory minimums by cooperating with prosecutors because they have more knowledge of the drug conspiracy than lower level offenders.[28]

In her congressional testimony five years ago, Judge Julie Carnes (former 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.[29] Section 841(b)(l)(A) of Title 21 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 ten years imprisonment—e.g., five kilograms of cocaine—the defendant's ten-year mandatory sentence shall be doubled to a twenty-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 twenty-year sentence may be just. The amount of drugs may be

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sentencing court is required by statute to take into account actual weight of blotter paper with its absorbed LSD in determining whether there is sufficient weight of LSD to require mandatory minimum sentence).

[27] *1996 Hearing*, *supra* note 8, at 106 ("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].").

[28] *Id.* at 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 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.").

[29] *See 2009 Hearing*, *supra* note 9, at 43.

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 whom we 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 by boat. The quantity of drugs in the boat will easily qualify for a ten-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 family. This defendant will now be subject to a twenty-year mandatory minimum sentence–*but should he receive the same sentence as the kingpin?* It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.[30]

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[30] *See, e.g.*, *Leitch*, *supra* note 16, at *2 ("[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.").

4. Stacking of Firearms Counts Exacerbates the Unwarranted Disproportionality of Mandatory Minimum Sentences

Section 924(c) of Title 18 provides for enhanced punishments for using or carrying a firearm during the commission of a crime of violence or a drug trafficking offense. Specifically, depending on whether the gun was carried, brandished, or discharged, the defendant must be sentenced to at least five, seven, or ten years, respectively, and that sentence must be made to run consecutively to any other sentence imposed.[31] The same statute provides that, "[i]n the case of a second or subsequent conviction under this subsection," the defendant shall be sentenced to a term of not less than twenty-five years, which again must run consecutively to any other sentence imposed.[32]

Congress did not define the term "second or subsequent conviction" when it enacted Section 924(c). Ambiguity about the meaning of this phrase led to litigation about whether conviction on two counts charged in one indictment would render the second count "a second or subsequent conviction" that would trigger the twenty-five-year enhancement. The Supreme Court determined that each Section 924(c) count for which a defendant is convicted constitutes a conviction subject to the enhanced penalties provided for in Section 924(c).[33] The Court's holding therefore permits the "stacking" of mandatory Section 924(c) sentences based on one judgment for an indictment containing multiple Section 924(c) counts.

The injustice of stacking mandatory minimum sentences is starkly illustrated by the case of *United States v. Angelos*, in which a first-time offender received a 55-year prison sentence for

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[31] 18 U.S.C. § 924(c)(1)(A), (D)(ii).
[32] *Id.* § 924(c)(1)(C)(i).
[33] *Deal v. United States*, 508 U.S. 129 (1993).

carrying a gun to two $350 marijuana deals; several additional handguns were found at his home when the police executed a search warrant.[34] Because he was convicted of distributing marijuana and related offenses, the prosecution and the defense agreed that Angelos, a twenty-four-year-old with two young children, should serve about six-and-a-half years in prison. But Angelos was also subject to three Section 924(c) offenses. The government recommended a prison term of no less than 61½ years: 6½ years for drug distribution followed by 55 years for three counts of possessing a firearm in connection with a drug offense. The judge concluded that a sentence of 660 months (55 years) was adequate, and that he did not need to punish Angelos with an additional 78 months. Accordingly, he used his authority under 18 U.S.C. § 3553(a) and imposed a 55-year sentence.

Because Section 924(c) penalties are mandatory minimums, the judge in *Angelos* was unable to impose a lesser punishment proportionate to the crimes. The judge later denounced the situation as "irrational."[35] The same day that this judge imposed a 660-month sentence upon Angelos, he followed the prosecution's recommendation and sentenced the second-degree murderer of an elderly woman to 262 months (21 years, 10 months).[36] To put this in perspective, *Angelos' sentence was two-and-a-half times longer than the second-degree murderer's* and more than double the sentence for many other serious crimes under the Guidelines (e.g., aircraft hijacker, 293 months;[37] terrorist who detonated a bomb in a public place, 235 months;[38] racist

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[34] *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

[35] *United States v. Booker: One Year Later–Chaos or Status Quo? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 62 (2006) (statement of Judge Paul G. Cassell, Chair, Committee on Criminal Law).

[36] *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005).

[37] U.S.S.G. § 2A5.1 (2003) (base offense level 38). All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I, under the 2003 Sentencing Guidelines.

[38] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

who attacked a minority with the intent to kill and inflicted permanent or life-threatening injuries, 210 months;[39] second-degree murderer, 168 months;[40] rapist, 87 months[41]).

B. Solutions to Ameliorate the Effects of Mandatory Minimum Penalties

Last year, 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."[42] Though it favors the repeal of all mandatory minimum penalties, the Conference also supports steps that reduce the negative effects of these statutory provisions. Thus, the Judicial Conference supports the policies contained in the Smarter Sentencing Act of 2013.

The Judicial Conference also endorses an amendment to 18 U.S.C. § 924(c) to preclude the "stacking" of counts and to clarify that additional penalties apply only when one or more convictions of such person have become final prior to the commission of such offense.[43] The Judicial Conference specifically recommends that Section 924(c) be amended to make it consistent with 21 U.S.C. § 962(b). Section 962(a) sets forth the penalty for second or subsequent offenses under subchapter II of Title 21 but, unlike Section 924(c), Section 962(b) defines the phrase "second or subsequent offense." Section 962(b) provides that "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of such person for a felony drug offense have become final." Under the Conference's approach, an offender would be subject to an enhanced twenty-

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[39] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[40] U.S.S.G. § 2A1.2 (base offense level 33).

[41] U.S.S.G. § 2A3.1 (base offense level 27).

[42] JCUS-SEP 13, p. 17.

[43] JCUS-MAR 09, pp. 16-17.

five-year sentence if he or she had been convicted in the past of a Section 924(c) offense and, following that conviction, committed and was again convicted of another Section 924(c) offense.

All mandatory minimum sentences can produce results contrary to the interests of justice, but Section 924(c) is particularly egregious. Stacked mandatory sentences (counts), even more so than most mandatory terms, may produce sentences that undermine confidence in the administration of justice. The Conference recommends that 18 U.S.C. § 924(c) be amended to preclude stacking so that additional penalties apply only for true repeat offenders.

The good intentions of their proponents notwithstanding,[44] mandatory minimums have created what Chief Justice Rehnquist aptly identified as "unintended consequences."[45] Far from benign, these unintended consequences waste valuable taxpayer dollars, undermine guideline sentencing, create tremendous injustice in sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentences.

III. Amending the Drug Quantity Table of the Sentencing Guidelines

On January 17, 2014, the Sentencing Commission published for comment several proposed amendments to the Sentencing Guidelines Manual, including one that would lower by two levels the offense levels in the Drug Quantity Table.[46] At its April 10, 2014, public hearing, the Commission voted to approve the amendment, and assuming that Congress does not take

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[44] *See 2009 Hearing*, *supra* note 9, at 37 (statement of 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 minimums 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.").

[45] *Luncheon Address*, *supra* note 20, at 286 (suggesting that federal mandatory minimum sentencing statutes are "perhaps a good example of the law of unintended consequences").

[46] Request for Public Comment, 79 Fed. Reg. 3279 (Jan. 17, 2014).

action to the contrary, the amendment will become effective on November 1, 2014. The Commission expects the lower guidelines to prospectively impact 70 percent of all drug cases, and reduce sentences by an average of eleven months. The Criminal Law Committee submitted a letter to the Commission supporting the prospective amendment citing, among other things, its longstanding view that the Guidelines, which were calibrated to be consistent with mandatory minimum penalties, should be set irrespective of any mandatory minimum.

Also at its April meeting, the Commission voted to publish a notice seeking public comment on whether the amendments to the Drug Quantity Table should be applied retroactively.[47] The Commission sought comments on whether any guidance or limitations should be put in place in connection with the amendment.

At its June 2014 meeting, the Criminal Law Committee discussed at length whether to support the retroactive application of the proposed amendment.[48] Before its deliberations, the Committee reviewed the impact analysis prepared by the Sentencing Commission's staff and solicited the viewpoints of judges in many of the districts most affected by the amendment if it were applied retroactively. The Committee also received input from the Administrative Office of the United States Courts' Probation and Pretrial Services Chiefs Advisory Group and will work collaboratively with the Judicial Conference's Defender Services Committee to ensure the right to counsel would be protected. Members of the Committee wrestled with many difficult issues

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[47] Request for Public Comment, 79 Fed. Reg. 25996 (May 6, 2014).

[48] In September 1990, the Judicial Conference authorized the Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the guidelines. JCUS-SEP 90, pp. 69-70. On several prior occasions (e.g., 1994, 2007, and 2011) the Committee supported retroactive application of amendments lowering the offense levels in the Drug Quantity Table.

including how to balance fairness and public safety, and the reality of significant financial pressures on the Judiciary and other components of the criminal justice system.

After significant and careful thought and evaluation, the Committee voted, by a large majority, to support making the proposed amendment retroactive, but only if: (1) the courts are authorized to begin accepting and granting petitions on November 1, 2014; (2) any inmate who is granted a sentence reduction will not be eligible for release until May 1, 2015; and (3) the Commission helps coordinate a national training program that facilitates the development of procedures that conserve scarce resources and promote public safety. On June 10, 2014, I testified before the Sentencing Commission at its public hearing and conveyed the Judicial Conference's position on this matter (the Committee is authorized to speak for the Conference on amendments to the Sentencing Guidelines).

A majority of the Committee's members do not believe that the date a sentence was imposed should dictate the length of imprisonment; rather, whenever possible, fundamental fairness dictates that the defendant's conduct and characteristics should drive the sentence. The retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future. Another important consideration for the Committee's position is that the retroactive application of the amendment will further reduce the influence of mandatory minimums on the Sentencing Guidelines and, in turn, reduce the disproportionate effect of drug quantity on the sentence length.

However, the Conference is acutely aware of the diminished resources of the probation and pretrial services system,[49] and of the significant demands that will be imposed on the system by the retroactive application of the amendment. The Conference hopes that a six-month delay in cases being released to supervision will allow additional time for the probation system to be provided needed resources and fill probation officer vacancies. The additional time also will allow the probation and pretrial services system to marshal its existing resources as much as possible to process petitions and to minimize the threat to community safety stemming from too many inmates being released without adequate planning and supervision.

CONCLUSION

Thank you for soliciting the views of the Judiciary as your Task Force continues its diligent study of the issue of over-criminalization in the federal system. Curbing over-federalization of criminal law and reforming mandatory minimums are significant reforms that would strengthen our system while conserving taxpayer dollars. With adequate resources, including a six-month delay in the release of inmates to supervision and a national training program coordinated by the Sentencing Commission, the Judicial Conference supports retroactivity for the pending amendments to the Drug Quantity Table of the Sentencing Guidelines. Working together, the branches can ensure that the correct cases are brought into the federal system, just sentences are imposed, and offenders are appropriately placed in prison or under supervision in the community.

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[49] Between fiscal years 2003 and 2013, staffing strength in probation and pretrial services declined by 5 percent, falling from 8,176 full-time equivalents (FTEs) to 7,745. During the same time period, the daily post-conviction supervision population increased by 19 percent, growing from 110,621 to 131,869 persons.