

**Statement of Michael J. Sullivan**  
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**before the**  
**Subcommittee on Crime, Terrorism, and Homeland Security**  
**Committee on the Judiciary**  
**United States House of Representatives**  
*Mandatory Minimums and Unintended Consequences*

**July 14, 2009**

Chairman Scott, Ranking Member Gohmert, and Members of the Committee, thank you for the opportunity to appear before you to discuss mandatory minimum sentencing policy.

Since the early days of our nation, Congress has recognized its important and legitimate role in the formulation of appropriate criminal sentences, and has prudently exercised this responsibility in setting fair and effective sentences, including minimum mandatory sentences, for certain serious offenses and/or offenders.

History has shown great leadership and foresight by legislative bodies at both the federal and state levels in understanding the important value of mandatory (minimum) sentences, as both a deterrent for potential offenders and a safety net against unbridled judicial sentencing discretion. This insight dates back to 1790 and is shown throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries<sup>1</sup> and includes crimes such as murder, carjacking resulting in death, aggravated sexual assault, gun and drug dealing offenses, reentry after deportation, manufacturing and distribution of child pornography and national security type offenses. Throughout our history there are scores of examples of Congress proposing and enacting mandatory (minimum) sentences to address public safety and public policy concerns.

Mandatory minimum sentencing was first introduced as a comprehensive scheme at the federal level in 1984 with the creation of the United States Sentencing Commission. The principal, though not exclusive, purpose of the passage of the legislation creating the United States Sentencing Commission was to provide greater consistency and uniformity in federal sentencing.<sup>2</sup> Prior to the establishment of the United States Sentencing Commission and the development of a body of sentencing factors, oftentimes it was difficult to reconcile sentences from jurisdiction to jurisdiction or between similar conduct by defendants with comparable criminal histories. The goal beyond this important goal of uniformity in sentencing was to have a sentencing system that provided an appropriate punishment, helped to send the right deterrent message, ultimately leading to a reduction of crime and working toward improving a suspicious public's confidence in our criminal justice system. History has shown that the goals of uniformity, appropriate punishment, deterrence and building public confidence were achieved.

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<sup>1</sup> United States Sentencing Commission, 1991 *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Justice System* (as directed by section 1706 of Pub. L. 101-647) at 6-7 (hereinafter "USSC 1991 Report").

<sup>2</sup> *Id.* at 14-15.

Congress' interest and commitment to fair and effective sentencing as an important public policy didn't stop with the passage and establishment of the United States Sentencing Commission. Congress recognized the important correlation between crime and punishment, the danger of drug dealers being armed, and the growing criminal use of guns as part of the drug dealing trade and passed the Comprehensive Crime Control Act of 1984. The Act established certain minimum sentences for using a firearm during the commission of drug trafficking offenses.<sup>3</sup> As part of that comprehensive legislation, Congress also drew a line in the sand around schools and playgrounds and said clearly, especially don't sell drugs there! President Ronald Reagan said in 1984 "That legislation . . . is the most comprehensive revision of federal criminal statutes to be enacted in many years."

Congress demonstrated its continued commitment to positively impacting public safety through crime reduction and greater uniformity in sentencing by enacting the Anti-Drug Abuse Acts of 1986<sup>4</sup> and 1988.<sup>5</sup> These effective, crime-reducing laws were enacted during a Democratic-controlled Congress and received strong bipartisan support.<sup>6</sup> This strong bipartisan support reflected the public's expectation that Congress should continue to pass laws that have certainty in consequences for those that fail to comply.

Congress was not finished with its work and support of mandatory minimums and passed other laws with mandatory minimums, including provisions of the 1990 Crime Control Act, which provided a 10-year mandatory sentence for organizing, managing, or supervising a continuing financial crimes enterprise.<sup>7</sup>

The mandatory minimum sentencing scheme for drug crimes oftentimes receives attention, scrutiny, and some criticism. This may be due to the victimization these crimes have on law abiding citizens, families, neighborhoods, and our health care systems together with the violence that is part of the drug dealing business.<sup>8</sup> However, many other crimes and criminal histories appropriately trigger minimum sentences at the federal and state levels. For example, we can look at certain gun violations, crimes against children, violent sexual offenses, civil rights violations, and even certain financial crimes and find that Congress and many state legislatures have had the wisdom to and are willing to shape public policy and sentencing outcomes with the enactment of mandatory minimum sentences.

The 108<sup>th</sup> Congress alone enacted "a flurry of new or enhanced mandatory minimum sentencing provisions." These included, the PROTECT Act ("Amber Alert"), the Unborn

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<sup>3</sup> Pub. L. 98-473, 98 Stat. 1976 (1984).

<sup>4</sup> Pub. L. 99-570, 100 Stat. 3207 (1986).

<sup>5</sup> Pub L. 100-690, 102 Stat. 4181 (1988).

<sup>6</sup> The Anti-Drug Abuse Act of 1986 had strong bipartisan support: 207 Democratic and 94 Republican House co-sponsors of H.R.5484, and 15 Democratic and 14 Republican Senate co-sponsors of S.2878.

<sup>7</sup> Pub..L. 101-647, 104 Stat. 4789 (1990).

<sup>8</sup> Drug offenders charged with another offense were most often charged in tandem with a firearm offense (57% of offenders charged with a drug crime were charged in tandem with a firearm offense. Scalia, John. (2001). Office of Justice Programs, Bureau of Justice Statistics *Special Report: Federal Drug Offenders, 1999, with trends: 1984-1999* (NCJ 187285) (hereinafter "BJS August 2001 Report"). Washington, DC: U.S. Department of Justice. Retrieved from Bureau of Justice Statistics reports online via DOJ access:

<http://www.ojp.usdoj.gov/bjs/pub/pdf/fdo99.pdf>

Victims of Violence Act, the Identity Theft Penalty Enforcement Act, the Intelligence Reform and Terrorism Prevention Act, the Anti-Terrorism and Port Security Act of 2003.<sup>9</sup>

The point is quite simple: mandatory minimums are an important legislative tool to clearly communicate to the American people the value that Congress puts on crime prevention, reduction of victimization and appropriate punishment. So there we have it, Congress has always played an important part, both substantively and as a leadership body, in a national crime and victimization reduction effort with remarkable results. The branch of government closest to the people they serve must continue to play this important public safety role. Many people closest to the criminal justice system – police, prosecutors, victims, community groups – recognize that the leadership of Congress in this area is as important today as any time in our nation’s history. And, in light of the recent decisions by the United States Supreme Court, beginning with *United States v. Booker*<sup>10</sup> and the cases that have followed *Booker* that have increased the opportunity for sentencing disparity, Congress’ role is even more important.

The question that needs to be asked and answered is “Has the role that Congress played in sentencing, including the passage of mandatory minimum sentences, had an impact on public safety and crime?” The answer to that question can easily be found in crime statistics and is buttressed by anecdotal story after story from across our nation. Crime rates over the past 30 years certainly paint a picture of continuing success of reducing crime and victimization through sound public policy. As these numbers show, our nation has experienced a substantial reduction in violent crime over the past 30 years. This achievement was not by accident, but by design. The formula for success was to ensure an appropriate punishment at the federal level for serious criminal offenders. This strategy once showing success has been replicated across our nation by state legislatures. In addition, one only has to listen to their constituents to learn about parks and playgrounds reclaimed, young children being able to walk to school without fear, and law abiding citizens being able to exercise their God given right to peaceful enjoyment of their home and their neighborhood.

Let’s look at the crime statistics, comparing where we were back in the early and mid-1980s that captured the nation and called upon Congress to do something, to the reduced crime levels of today that are a product of Congress’ tough-on-crime sentencing policies since 1984.

- According to the Department of Justice, the proportion of drug defendants sentenced to a term of imprisonment increased from 72% in 1984 to 89% in 1999; nearly 2/3 of those sentenced were subject to a statutory minimum prison term<sup>11</sup>
- Though the number of drug offenders incarcerated has greatly increased, a 2007 FBI CIUS report shows the violent crime rate in America has greatly declined. The violent crime rate (per 100,000 inhabitants) was down 173.7 in 2007 compared to

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<sup>9</sup> U.S. Congressional Research Service. *Federal Mandatory Minimum Sentencing Statutes: Legislative Proposals in the 108th Congress* (RS21597; Dec. 17, 2004), by Charles Doyle.

<sup>10</sup> *United States v. Booker*, 125 S. Ct. 738 (2005).

<sup>11</sup> BJS August 2001 Report.

1988. The year of lowest violent crime rate was 2004 with 463.2, followed by 2007 with 466.9. The highest was 1991 with 758.2.<sup>12</sup>

- the proportion of the sentence that drug offenders entering federal prison could expect to serve increased from 48% to 87%<sup>13</sup>. Mandatory minimum sentences are keeping serious offenders off our streets longer, keeping our communities safer.

In addition to these important goals being achieved -- uniformity in sentencing, certain offenses carrying certainty in punishment, and repeat violent offenders receiving enhanced punishment -- there has also been a collateral benefit of mandatory minimums. This collateral benefit deals with cooperation by the lower level offenders, providing critically important information to investigators and prosecutors that enhance investigations, identify more culpable and, in many instances, higher level players in the criminal organization. Mandatory minimums have allowed the government to make a case against the highest ranking members of national and international criminal organizations, from organized crime figures, to major drug traffickers, to those that manufacture child pornography. Nothing provides an incentive to cooperate with the government like the risk of a long mandatory sentence.

These hanging dark clouds of long prison sentences encourage offenders to help law enforcement to work their way up the criminal organization. Investigators and prosecutors across the country rely on the tools provided by Congress and state legislative bodies to open investigative windows into the organization and people of elaborate crime rings. Without the negotiation tool of mandatory minimum sentences, this crucial cooperation of lower level offenders might be impossible, and such access to the inside of the upper levels of the criminal organizations might be unattainable. This is particularly true as government prosecutors make cases against some of the most prolific, seemingly untouchable and very violent drug trafficking organizations. The heads of these organizations attempt to distance themselves from people and from the drugs. The mid-level offenders who often carry the large quantities of illicit drugs quickly see the value of cooperation in giving prosecutors information when facing long prison sentences. Statistics show that at the federal level, and I suspect at the state level as well, that more cooperation is provided to the government in drug investigations than any other type of crime.<sup>14</sup> Speaking from my personal experience as a former federal prosecutor, repealing mandatory minimums would make it much more challenging than it already is to target the leadership of these organizations by taking away the incentive to cooperate. The American public would suffer the harm of elevated crime rates in exchange for relaxed sentencing policies for serious criminals.<sup>15</sup>

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<sup>12</sup> See Table 1 of the Federal Bureau of Investigation, *Crime in the United States: 2007* (Sept. 2008). Washington, DC: U.S. Department of Justice. Available at: [http://www.fbi.gov/ucr/cius2007/data/table\\_01.html](http://www.fbi.gov/ucr/cius2007/data/table_01.html); Retrieved: 07/09/2009.

<sup>13</sup> BJS August 2001 Report.

<sup>14</sup> According to the U.S. Department of Justice, 28% of convicted drug defendants received a reduced sentence for providing substantial assistance to prosecutors. BJS August 2001 Report.

<sup>15</sup> See David Risley, *Mandatory Minimum Sentences: an Overview*. (May 2000) (discussing desensitization of judges and resulting trends of sentencing leniency in areas of high drug crime concentration). Available at: <http://www.drugwatch.org/Mandatory%20Minimum%20Sentences.htm>; Retrieved: 07/09/2009.

Congress has heard of the myths associated with mandatory minimum sentences, such as the unfairness of the sentence and that our prisons are filled with users and low level first time offenders. That information is simply not true. Several years ago, there was an effort by Families Against Mandatory Minimums and a handful of judges who wanted complete authority over sentencing to repeal all the minimum mandatory drug trafficking sentences in Massachusetts. They made the same arguments as above. However, an examination of the Massachusetts State prison population revealed that those being sent to the state prison for drug trafficking offenses were not first time, low level offenders. They had long criminal records (over thirty arraignments and over twenty adjudications and guilty findings). The criminal record of those being sent to the state prison in Massachusetts for drug offenses looked very similar to those being sent to prison for other violent offenses; they both had long criminal records and had victimized scores of people and their communities.

The federal story is similar in that though our federal prison population has grown over the last 30 years, very few are there as first offenders and only for drug related crimes. These convicted drug offenders are not the street corner dealers, but serious players in the intricate drug dealing operations that threaten our communities, trafficking substantial amounts of illicit drugs and contributing significantly to the violent crime rates in our country. In order to qualify for a federal mandatory minimum sentence of 5 years, a first-time offender must be in possession of a minimum of 500 grams of cocaine,<sup>16</sup> which is the equivalent of 2,500 to 5,000 doses and an estimated street value of between \$32,500 and \$50,000 dollars.

- According to a 2001 study by the U.S. Department of Justice, in 1999, 62% of convicted drug defendants had committed a drug offense so serious they were subject to a statutory minimum prison term: 29% 60 months or less; 30% 61 to 120 months; 3% 121 months or more (including life).<sup>17</sup>
- According to 2008 U.S. Sentencing Commission data on prisoners under mandatory minimum sentences:
  - 6,905 (27.3%) drug offenders received mandatory minimums for 5-years; 9,882 (39.0%) received for 10-years; total = 16,787<sup>18</sup>
  - 10,359 (43.1%) drug offenders received mandatory minimum with no safety valve; 5,764 received mandatory minimum but safety valve (24.0%)<sup>19</sup>

Incarceration under a mandatory minimum sentence is infrequent for simple possession, accounting for approximately 2% – less than 800 – of all suspects merely investigated by U.S. prosecutors in 1999.<sup>20</sup> According to the testimony of Ricardo H. Hinojosa, Acting Chair of the U.S. Sentencing Commission, before the Subcommittee on May 21, 2009:

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<sup>16</sup> See U.S. Drug Enforcement Agency: *Federal Trafficking Penalties*. Available at: <http://www.usdoj.gov/dea/agency/penalties.htm>; Retrieved: 07/09/2009.

<sup>17</sup> BJS August 2001 Report.

<sup>18</sup> See Table 43 of the U.S. Sentencing Commission Datafile FY 2008 USSCFY08.

<sup>19</sup> See Table 44 of the U.S. Sentencing Commission Datafile FY 2008. USSCFY08.

<sup>20</sup> BJS August 2001 Report, at 3. See Table 2, *Drug suspects evaluated for prosecution by U.S. Attorneys, by statutory offense and drug type, 1999*.

- In FY 2008, there were 105 federal cases for simple possession of crack cocaine, in which 58 offenders were subject to the statutory mandatory minimum penalty. 14.3% of crack cocaine offenders received the benefit of a safety valve provision compared to 43% of powder cocaine offenders<sup>21</sup>
- In FY 2007, there were 109 such cases, in which 49 offenders were subject to the statutory mandatory minimum penalty<sup>22</sup>

Consider a 1997 Bureau of Justice Statistics survey of federal prison inmates that shows how many drug offenders reported they had a substantial role in the drug conspiracy for which they were convicted. Of those incarcerated drug offenders,

- 16% reported they were either an importer or manufacturer of illicit drugs; and
- 25% reported they were responsible for distributing drugs to street-level drug dealers (total = 41%)<sup>23</sup>

The “safety valve”<sup>24</sup> implemented by Congress provides additional protection for first-time defendants without prior criminal history, who don’t use the threat of violence in committing their drug offense, and who aren’t the highly culpable offenders the mandatory minimum sentencing policy aims to target.

In closing, let me state that Congress should continue to examine our sentencing scheme. You should find opportunities to improve public safety through punishment and deterrence and you should be willing, especially in this post-*Booker* world, use minimum mandatory sentencing to accomplish the laudable goals that a Congress before you set out to achieve. Mr. Chairman, Ranking Member Gohmert, and Members of the Committee, thank you again for holding this very important hearing and allowing me to comment on the effectiveness of mandatory minimum sentencing. I will be glad to answer any question you may have.

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<sup>21</sup> Hinojosa, Ricardo H. Statement to the House, Committee on the Judiciary. Subcommittee on Crime, Terrorism, and Homeland Security. *Unfairness in Federal Cocaine Sentencing: Is it time to Crack the 100 to 1 Disparity?*, Hearing, May 21, 2009. Available at: [http://www.ussc.gov/testimony/Hinojosa\\_HouseTestimony\\_20090521.pdf](http://www.ussc.gov/testimony/Hinojosa_HouseTestimony_20090521.pdf); Accessed: 07/09/09.

<sup>22</sup> *Id.*

<sup>23</sup> BJS August 2001 Report, at 11.

<sup>24</sup> *See*, 18 U.S.C. § 3553(f).