



December 20, 2011

F. James Sensenbrenner, Jr.,
Chairman
House of Representatives
Committee on the Judiciary
Subcommittee on Crime,
Terrorism and Homeland Security
Rayburn Building
Washington, D.C. 20515

Robert "Bobby" C. Scott,
Ranking Member
House of Representatives
Committee on the Judiciary
Subcommittee on Crime,
Terrorism and Homeland Security
Rayburn Building
Washington, D.C. 20515

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: The House Judiciary's Subcommittee on Crime, Terrorism and Homeland Security's hearing on December 13, 2011 on H.R. 1823, the Criminal Code Modernization and Simplification Act of 2011

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we are writing about the December 13, 2011 hearing on H.R. 1823, the "Criminal Code Modernization and Simplification Act of 2011." We think that it is extremely important that the Crime Subcommittee is considering reorganizing and improving the federal criminal code. One critical task we hope the Subcommittee will take on is a review of all federal offenses to ensure each has a clear *mens rea* requirement.

The ACLU encourages the Subcommittee not only to consider reforms to the federal criminal code, but also to conduct a top to bottom review of the criminal justice system in this country. We think that such an evaluation should take place in a policy neutral manner, so that there can be thoughtful discussions about what policies and programs really work to reduce and prevent crime. Instead, while H.R. 1823 attempts to modernize the federal criminal code, it also includes controversial policy changes on issues such as abortion and immigration. We strongly disagree with such policy changes, but if those issues continue to be included as part of this package, there must also be a review of more fundamental problems with federal criminal justice system such as mandatory minimum sentences and federal drug conspiracy laws, which are discussed below.

One proposal that has been considered by Congress for the past few years is a comprehensive examination of the American criminal justice system included in Senator Jim Webb's (D-VA) legislation S. 306, the National Criminal Justice Commission Act of 2011. We strongly support this legislation, which would create a commission to conduct a thorough review of our justice system. Such a proposal would carve a path for reform without incorporating contentious issues that can doom legislation to failure even before it has been considered.

The National Criminal Justice Commission Act of 2011

Although there is no House companion bill, Senator Webb reintroduced S. 306, the National Criminal Justice Commission Act of 2011 with bipartisan support. The bill establishes an independent commission to undertake a comprehensive examination of America's criminal justice system and to make recommendations for fiscally responsible and effective reforms. The National Criminal Justice Commission would be the first time since the 1967 Commission on Law Enforcement and the Administration of Justice that there has been a comprehensive look at the criminal justice system in this country. It is clear that there is a need for a review of our justice system. At every stage of the criminal justice process – from the events preceding arrest to sentencing to the challenges facing those reentering the community after incarceration – serious problems undermine basic tenets of fairness and equity, as well as the public's expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system.

The United States incarcerates more than 2.3 million of its people, a greater percentage than any other nation in the world. A 2007 Pew study found that when the number of Americans on probation or parole are included, the total number of people under criminal justice supervision exceeds 7.3 million (1 in 31 adults), costing taxpayers over \$60 billion annually. In some states and local governments, criminal justice spending outpaces spending on education.

The National Criminal Justice Commission Act of 2011 creates a commission whose members would be appointed by the legislative and executive branch to address these concerns. The commission would be intergovernmental in nature, consisting of members from every level and facet of government—from mayors and county officials to Governors and state legislators. It would operate solely in an advisory capacity, charged with making non-binding findings and recommendations for governmental and intergovernmental reforms regarding crime prevention and deterrence strategies, cost effectiveness, and ensure the interests of justice at every step of the criminal justice system.

We hope House Judiciary Committee Members will consider supporting the approach taken by the National Criminal Justice Commission as a first step in developing evidence-based and cost-effective solutions to improving our criminal justice system and increasing public safety.

Mandatory Minimum Sentences

The ACLU supports the repeal or reform of mandatory minimum sentences because they generate unnecessarily harsh sentences, tie judges' hands in considering individual cases, create racial disparities in sentencing, and empower prosecutors to force defendants

to bargain away their constitutional rights. A recent study by the U.S. Sentencing Commission (USSC) found that people of color are sentenced to mandatory minimums for drug offenses far more often than their white counterparts¹. Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of such lengthy sentences to frustrate defendants' asserting their constitutional rights.

In 1991, the USSC issued a report to Congress denouncing mandatory minimums and calling for their abolition. The report gathered widespread support from policymakers, judges and practitioners in the field of federal sentencing. But in the years since the report, Congress has increased the number and length of mandatory minimum sentences.

In October 2011, the USSC released its most recent report on mandatory minimum sentences. In this report, the Commission concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984, but recommends reform to mandatory sentencing. Although the Commission did not come to a consensus about mandatory minimum penalties as a whole, it unanimously agreed that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently in the federal system.²

The Commission's report recommends Congress revisit certain statutory recidivist provisions in drug sentencing laws and consider reform that would allow for flexibility in sentencing low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties. Also, the report recommends that Congress reconsider so-called "stacking" (i.e. sentencing a person to consecutive mandatory sentences) of mandatory minimum penalties for some federal firearms crimes, because these penalties can be excessively severe and unjust.³

In addition, the Chair of the Sentencing Commission Judge Patti Saris acknowledges the mandatory minimum sentencing has contributed to federal prison overcrowding, with the federal Bureau of Prisons (BOP) currently over its capacity by 37 percent. The ACLU encourages the Subcommittee to consider the Sentencing Commission's recommendations regarding mandatory minimum sentences as a first step in an effort to reform the federal sentencing system.

Drug Conspiracy Laws

The ACLU also encourages Congress to amend federal drug conspiracy laws that often result in the sentencing of people with little knowledge or involvement in a drug operation to long terms in prison. Under current drug conspiracy laws, even those with little involvement in drug trafficking operations - often women in relationships with men involved in drug-related activities - are held liable for the entire quantity of drugs charged in connection with the conspiracy. For example, the girlfriend of a person involved in a drug conspiracy who answers the phone at her home or deposits money in a bank account

¹ U.S Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, p. xxviii.

² *Id.* at 367-369

³ *Id.*

could be held liable for the entire amount of drugs ever sold by the operation even if she never sold or saw any drugs. These laws disproportionately hurt those whose only crime was to be in the wrong place at the wrong time – oftentimes women.

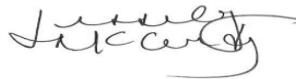
In addition to catching many low-level offenders in the net of a drug conspiracy, these laws sometimes result in high-level drug dealers receiving lower sentences than the women who have little involvement in the drug trade. A high level organizer in a drug trade knows the information necessary to testify against people who are under him in the drug pyramid. When a high-level drug dealer faces a long sentence, he is able to offer "substantial assistance" to prosecutors and receive a reduction in his sentence. On the other hand, when a low-level offender is confronted with charges, but has no knowledge of the drug operation, such a person cannot offer information to prosecutors in exchange for a lower sentence. Therefore, we have urged Congress to consider amending the federal drug conspiracy laws to require more culpability by offenders as well as to expand the "safety valve" provision in the federal sentencing guidelines that permits judges to impose reduced sentences for low-level, first time drug offenders and allow for more people to benefit from reduced sentences under this policy.

We hope this is just the beginning of the Judiciary Committee's consideration of not only improvements to the federal criminal code, but reforms to the criminal justice system. The ACLU urges the Subcommittee to take the approach proposed in the National Criminal Justice Commission and create a commission to take a comprehensive look at the numerous problems in our criminal justice system.

Sincerely,



Laura W. Murphy,
Director
Washington Legislative Office



Jesselyn McCurdy
Senior Legislative Counsel
Washington Legislative Office