



**Written Statement of the American Civil Liberties Union  
Before the United States Senate Judiciary Committee**

*Hearing on*

**“Reevaluating the Effectiveness of Federal Mandatory Minimum  
Sentences”**

*Wednesday, September 18, 2013  
at 10:00 am*

**Submitted by the  
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The American Civil Liberties Union (ACLU) commends the Senate Judiciary Committee for holding this hearing on “Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences.” The ACLU is a nationwide, nonprofit, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. For years, we have been at the forefront of the fight against over-incarceration due to its devastating impact on those who become ensnared in the criminal justice system, its failure to produce a proportional increase in public safety, and its disproportionate effect on poor communities of color. We are pleased to have this opportunity to submit testimony on the subject of mandatory minimum sentences which have contributed to the over-incarceration crisis in this country by creating unnecessarily harsh and lengthy punishments, taking away judges’ discretion to consider individual cases, creating racial disparities in sentencing and empowering prosecutors to force defendants to bargain away their constitutional rights.

### **Recent History of Mandatory Minimum Sentences**

Mandatory minimum penalties refer to criminal penalties requiring, upon conviction of a crime, the imposition of a specified minimum term of imprisonment.<sup>1</sup> In 1951, Congress began to enact more mandatory minimum penalties for more federal crimes.<sup>2</sup> The Boggs Act, which provided mandatory minimum sentences for drug offenses, was passed in 1951.<sup>3</sup> In 1956, Congress passed the Narcotics Control Act, which increased these mandatory minimum sentences to five years for a first offense and ten years for each subsequent drug offense.<sup>4</sup>

Since then, mandatory minimum sentences have proliferated in every state and federal criminal code. In 1969, President Nixon called for drastic changes to federal drug control laws. In 1970, Congress responded with the Comprehensive Drug Abuse Prevention and Control Act of 1970, supported by both Republicans and Democrats, which eliminated all mandatory minimum drug sentences except for offenders who participated in large-scale ongoing drug operations. President Nixon signed the Act on October 27, 1970.<sup>5</sup>

Mandatory minimum sentences for drug offenses emerged again, after the death of Len Bias. In 1986, University of Maryland basketball star Len Bias died of a drug overdose just hours after the Boston Celtics picked him in the NBA draft.<sup>6</sup> His death sparked a national media frenzy largely focused on the drug that was suspected, mistakenly, of killing him – crack cocaine. A few weeks after Bias’ death, Congress passed the Anti-Drug Abuse Act of 1986, establishing for the first time mandatory minimum sentences triggered by specific quantities of cocaine.<sup>7</sup> Two years later, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988 which created mandatory minimums for simple possession of crack cocaine.<sup>8</sup>

## **Mandatory Minimum Sentences are Flawed**

After the reemergence of mandatory sentences in federal law in the 1980's, many observers began to see the same problems that lead to the repeal of drug mandatory minimums in 1970. Mandatory sentences don't allow judges to reduce a defendant's sentence based on any number of mitigating factors, including circumstances of the case or a person's role, motivation, or likelihood of repeating the crime. This approach to sentencing is unfair; treating similar defendants differently and different defendants the same. It is ineffective at reducing criminal behavior, because it is not consistently applied (many factors affect whether prosecutors will charge the minimum).

Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of these lengthy punishments to frustrate defendants asserting their constitutional rights. Contrary to popular belief, mandatory minimum sentencing laws are neither mandatory nor do they impose minimum sentences. Under a truly mandatory sentencing law, everyone arrested for the same offense would end up receiving the same sentence if convicted. But that's not how mandatory sentencing laws work. They simply transfer the discretion that a judge should have to impose an individualized sentence (based on relevant factors, such as a defendant's role in the crime, criminal history, and likelihood of reoffending) and give that discretion to prosecutors.

Under mandatory sentencing laws, prosecutors have control over sentencing because they have unreviewable authority to decide what charges to pursue. In prosecutors' hands, the minimum transforms from a 'certain and severe sanction' to a tool for prosecutors to incentivize behavior and make judgment calls. Prosecutors use their charging power to cut deals, secure testimony against other defendants, and force guilty pleas where the evidence is weak. They also have the authority to under-charge defendants where they think that the mandatory would be too severe a sentence.

A prosecutor need never disclose his or her reasons for bringing or dropping a charge. Judges, on the other hand, must disclose their reasons for sentencing in the written public court record and aggravating factors can be contested by the defendant.<sup>9</sup> A defendant faced with a plea deal of 1.5 years or a risk of 20 years imprisonment if he goes to trial is likely to choose the former, no matter how weak the evidence. Defendants who choose to exercise their constitutional rights and go to trial are ultimately sentenced not only for their misconduct, but for declining to plead guilty on the prosecutor's terms.<sup>10</sup> The threat of mandatory minimum penalties may cause defendants to give false information,<sup>11</sup> to plead guilty to charges of which they may actually be innocent,<sup>12</sup> or to forfeit a strong defense.<sup>13</sup>

Federal mandatory minimum laws and some state laws afford defendants relief from the mandatory minimum in exchange for information helpful to prosecutors. Low-level defendants charged under mandatory minimums – drug couriers, addicts or those on the periphery of the drug trade, like spouses – often have no information to give to prosecutors for a sentence reduction.

Finally, it is extremely expensive to incarcerate people under mandatory sentences. By putting all discretion in the hands of prosecutors who have a professional interest in securing as many convictions as possible, mandatory minimums ensure that public policy concerns about cost, racial disparities and whether a particular punishment results in public safety are not a priority.<sup>14</sup> The decision regarding what level of incarceration will serve public safety is best left in the hands of judges, who have more of an incentive to balance public safety needs against the facts in an individual case.

### **Recent Research Reveals Impact of Mandatory Minimum Sentences**

The continuing impact of mandatory minimum sentencing is a major contributor to the growing federal Bureau of Prison (BOP) prison population. Federal courts are overwhelmed with staggering immigration and criminal caseloads. BOP is operating at almost 40% over capacity and accounts for over 25 percent of the Department of Justice's (DOJ) budget.<sup>15</sup> Currently, over 219,000 people are in federal prison and almost half of them are serving time for drug-related crimes - and in a majority of cases they are non-violent.

Research by the Urban Institute found that increases in federal law enforcement activity contributed to about 13% of the growth in the federal prison population between 1998 and 2010, though the effects were not consistent across offense types and time. For example, heightened immigration enforcement and increased investigation of weapons offenses contributed to approximately one-tenth of the population growth.<sup>16</sup> This Urban Institute report concluded that increases in expected time served, specifically for drug offense, contributed to half of the prison population growth between 1998 and 2010.<sup>17</sup>

A recent report by the Congressional Research Service (CRS) found that the increase in amount of time inmates were expected to serve likely resulted from inmates receiving longer sentences and inmates being required to serve approximately 85% of their sentences after Congress eliminated parole for federal prisoners.<sup>18</sup> The increased time served by drug offenders accounted for almost one-third of the total federal prison population growth between 1998 and 2010.<sup>19</sup> Drug offenders continued to make up almost 47% of the BOP population despite increases in the number of immigration and weapon offenders during the same time period.<sup>20</sup>

The CRS report concluded that mandatory minimums, the federal government

prosecuting more criminal cases and elimination of federal parole are major contributors to BOP overcrowding.<sup>21</sup> One of the few ways to address this unsustainable growth in the BOP prison population is to address the length of time people are serving sentences in the federal system. Legislation proposing expansion of safety valve relief and reducing drug sentences would in fact be viable ways to reduce the length of sentences without jeopardizing public safety.

In 1991, the U.S. Sentencing Commission (USSC) issued a report to Congress denouncing mandatory minimums and calling for their abolition.<sup>22</sup> The report gathered widespread support from policymakers, judges and practitioners in the field of federal sentencing. In October 2011, the USSC released its most recent report on mandatory minimum sentences. In a press release announcing the release of the report, the Chair of the Sentencing Commission, Judge Patti Saris acknowledges that mandatory minimum sentencing has contributed to federal prison overcrowding.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

The Commission's report recommend 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. In addition, 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.

Specifically, the ACLU endorses the following Sentencing Commission recommendations to Congress outlined in its 2011 Mandatory Minimum Report:

- Expanding the safety valve at 18 U.S.C. § 3553(f) to include offenders who receive two, or perhaps three, criminal history points under the guidelines.<sup>26</sup>
- Mitigating the cumulative impact of criminal history by reassessing both the scope and severity of the recidivist provisions at 21 U.S.C. §§ 841 and 960, including more finely tailoring the current definition of "felony drug offenses" that triggers the heightened mandatory minimum penalties.<sup>27</sup>
- Amending the mandatory minimum penalties established at 18 U.S.C. § 924(c) for firearm offenses, particularly the penalties for "second or subsequent" violations of the statute, to lesser terms.<sup>28</sup>

- Amending 18 U.S.C. § 924(c) so that the increased mandatory minimum penalties for a “second or subsequent” offense apply only to *prior* convictions to reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c).<sup>29</sup>
- Amending 18 U.S.C. § 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently to provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment.<sup>30</sup>
- Finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.<sup>31</sup>

### **ACLU Supports Attorney General Eric Holder’s Effort to “Rethink” the Department’s Approach to the Mandatory Minimums and the “War on Drugs”**

On August 12, 2013, Attorney General Eric Holder's gave a speech to the American Bar Association announcing critical reforms to the way the Department of Justice prosecutes and addresses drug crimes.<sup>32</sup> This speech was historic and long overdue. The federal government cannot maintain a federal prison system that since 1980 has grown at an astonishing rate of almost 800 percent. In 2012, on the federal, state and local levels it cost \$80 billion dollars to incarcerate 2.3 million people in this country.

Attorney General Holder’s willingness to “rethink[ing] the notion of mandatory minimum sentences for drug-related crimes,” comes as a welcome alternative to the status quo which was for the Department to ask for longer and harsher sentences.<sup>33</sup> Attorney General Holder’s modification of the Justice Department’s charging policies “so that certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences” is a critical step toward creating a fairer and more justice federal criminal justice system.<sup>34</sup> Addressing the length of sentences for non-violent crimes will ease overcrowding in federal prisons and help ensure that taxpayer dollars are spent in ways that improve public safety - such as reentry programs helping formerly incarcerated people seek employment and housing.

### **States Have Successfully Repealed Mandatory Minimums Laws**

Although the Department of Justice’s new approach to addressing drug crimes is an important step forward for smart criminal justice policy, it is not a new approach to reform. In states around the country, lawmakers have in recent years been taking a hard look at broken

criminal justice systems that fail to effectively respond to public safety needs or fix problems like addiction. Several states over the last 10 years have recognized the need to address the rising cost of incarceration and changed their laws to focus on people who truly need to be locked up.

- In 2003, **Michigan** repealed almost all mandatory minimums for drug offenses. From 2006-2010, its prison population fell 15 percent, spending on prisons declined by \$148 million, and both violent and property crime rates declined.
- Since 2003, New York has reduced its prison population by almost 17 percent. These reductions can be attributed to a sharp decline in felony drug arrests, increased diversion to treatment programs, legislation that allowed for more earned time credits for people in prison, and reforms to the Rockefeller Drug Laws including lower mandatory minimums. All these successful reforms took place while the state's crime rate decline by 13 percent.
- In 2009, **Rhode Island** repealed all mandatory minimum sentencing laws for drug offenses. Since then, its prison population has declined by 12 percent and the crime rate has declined by several percentage points.
- In 2010, **South Carolina** eliminated mandatory minimum sentences for first convictions of simple drug possession.
- In 2001, **Louisiana** repealed mandatory minimum sentences for simple drug possession and many other non-violent offenses and cut minimum sentences for drug trafficking in half.

### **Bipartisan Opposition to Mandatory Minimum Sentences**

Recent surveys have found that a majority of adults favor elimination of mandatory sentencing laws and support allowing judges to choose the appropriate sentence. In a 2012 Pew national survey, 70 percent agreed that “there are more effective, less expensive alternatives to prison” for those convicted of non-violent offenses and “expanding those alternatives is the best way to reduce the crime rate.” A 2008 StrategyOne national survey found that 60 percent of Americans oppose mandatory prison sentences for some nonviolent crimes. A 2005 Crime and Justice Institute survey of Massachusetts residents found that 88 percent opposed mandatory minimum sentences.

In addition to public opposition of mandatory penalties, many judges and conservative commentators have expressed opposition to mandatory minimums.

- **Anthony Kennedy**, Associate Justice, United State Supreme Court has indicated “I’m against mandatory sentences. They take away judicial discretion to serve the four goals of sentencing. American sentences are eight times longer than their equivalents in Europe.”<sup>35</sup>
- **Stephen Breyer**, Associate Justice, United States Supreme Court stated that “[i]n 1994 Congress enacted a ‘safety-valve’ permitting relief from mandatory minimums for certain non-violent, first-time drug offenders. This, in my view, is a small, tentative step in the right direction. A more complete solution would be to abolish mandatory minimums altogether.”<sup>36</sup>
- **William Rehnquist**, former Chief Justice of the United States Supreme Court said “[t]hese mandatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders...mandatory minimums have also led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space...they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish.”<sup>37</sup>
- **Pat Robertson**, Chancellor of Regent University and Chairman of the Christian Broadcasting Network said “[t]hese mandatory sentences needlessly cost our government millions of dollars when there are better approaches available.”<sup>38</sup>
- Former National Rifle Association president and former chair of the Conservative Union **David Keene** once said that “[m]y opposition to mandatory minimums . . . is rooted in conservative principles; namely, reverence for the Constitution and contempt for government action that ignores the differences among individuals. . . . [M]andatory minimums undermine [the separation of powers] by allowing the legislature to steal jurisdiction over sentencing, which has historically been a judicial function.”<sup>39</sup>
- Founder and president of Americans for Tax Reform **Grover Norquist** was quoted as saying “[t]he benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers. Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become a sort of poor man’s Prohibition: a grossly simplistic and ineffectual government response to a problem that has been around longer than our government itself. Viewed through the skeptical eye I train on



all other government programs, I have concluded that mandatory minimum sentencing policies are not worth the high cost to America's taxpayers."<sup>40</sup>

### **Congress Must Take the Next Step**

While the attorney general has taken some preliminary steps to address the mass incarceration crisis in this country, he cannot do this alone. We call on Congress to finish the work that the Administration has now started and where states have been leaders. And that work has already begun with today's hearing, but Congress must take the next step and pass two bipartisan bills that have been introduced that specifically focus on the problems in the federal criminal justice system.

The first, S. 1410, the Smarter Sentencing Act of 2013, which was introduced by Sens. Richard Durbin (D-IL), Mike Lee (R-UT) and Patrick Leahy (D-VT) is comprehensive legislation that would reduce the length of some drug mandatory minimum sentences, allow judges to use more discretion to determine sentences for low level drug offenses, and apply the Fair Sentencing Act (the law that reduced the crack-powder cocaine sentencing disparity) to those currently serving sentences for these offenses.

Similarly, S. 619 and H.R. 1695, the Justice Safety Valve Act of 2013, is bipartisan legislation introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and Sen. Rand Paul (R-Ky.) and in the House by Representative Robert C. "Bobby" Scott. This bill would give federal judges more discretion to sentence below a mandatory minimum sentence when appropriate. Today, we call on Congress to take the next important steps toward a just and fair criminal justice system by passing these two important pieces of legislation.

### **Conclusion**

Criminal sentences should be based on the nature of the offense and on relevant personal characteristics and circumstances of the defendant. Thus, the ACLU opposes mandatory sentences or any other sentencing scheme that unduly restricts a judge's ability to engage in individualized sentencing.<sup>41</sup> It is critical that both Congress and the Administration make sentencing reform a priority. Unless the number of people who are subjected to long and unfair mandatory minimum sentences is addressed, any effort to reform the federal criminal justice system will have little to no effect on the current crisis in the BOP.

Thus, we agree with the U.S. Sentencing Commission recommendations in its 2011 Mandatory Minimum Report, that "if Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties . . . such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such

punishment, and (3) be applied consistently.”<sup>42</sup>

In the absence of the abolition of mandatory minimum penalties, the ACLU encourages Congress to enact S. 1410, the Smarter Sentencing Act of 2013 and S. 619 and H.R. 1695, the Justice Safety Valve Act of 2013 which would reduce mandatory minimum sentences for drug offenses, apply the Fair Sentencing Act retroactively and enact a new statutory “safety valve” mechanism similar to that available for certain drug offenders at 18 U.S.C. § 3553(f) for people convicted of other offenses and with more serious criminal histories.

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<sup>1</sup> U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Washington, DC, October 2011, p. 4, [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm), hereinafter “*Mandatory Minimum Penalties in the Federal Criminal Justice System*.”

<sup>2</sup> *Id.* at 63.

<sup>3</sup> See Pub. L. No. 82–255, § 1, 65 Stat. 767, 767 (1951).

<sup>4</sup> See Narcotics Control Act of 1956, §§ 103, 105, 107, 108, Pub. L. No. 84–728, 70 Stat. 567, 568, 570-71.

<sup>5</sup> Pub. L. No. 91–513, 84 Stat. 1236 (1970).

<sup>6</sup> Marc Mauer, The Disparity on Crack-Cocaine Sentencing, THE BOSTON GLOBE, July 5, 2006, [http://www.boston.com/news/globe/editorial\\_opinion/oped/articles/2006/07/05/the\\_disparity\\_on\\_crack\\_cocaine\\_sen\\_tencing/](http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sen_tencing/)

<sup>7</sup> Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).

<sup>8</sup> Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

<sup>9</sup> See e.g., Justice Anthony Kennedy: “the trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way.” Justice Anthony M. Kennedy, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp\\_08-09-03.html](http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_08-09-03.html).

<sup>10</sup> [Prepared Statements of Michael Nachmanoff](#), Federal Public Defender, Eastern District of Virginia, to the Commission, at 12 (May 27, 2010); [Jay Rorty](#), American Civil Liberties Union, to the Commission at 2 (May 27, 2010) (“Then prosecutors used that threat [of mandatory minimum penalties] to force defendants to bargain away their constitutional rights to request bail, remain silent, move to suppress illegally acquired evidence, discover the evidence against them, and receive a trial by jury – all as the price for not being exposed to the higher minimum.”); and [Erik Luna](#), at 2 (suggesting such practices impose a “trial tax” on defendants who exercise their constitutional right to a jury trial).

<sup>11</sup> See Nachmanoff, *supra* at 13 (“The problem with mandatory minimums is that they have a coercive effect. . . . This extraordinary pressure can result in false cooperation and guilty pleas by innocent people.”); Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 *FORDHAM L. REV.* 917, 931 (1999) (“[F]ormer [Assistant United States Attorneys] . . . readily admit that, in some instances, they simply could not determine if the cooperator had told the truth.”); [Prepared Statement of Thomas W. Hillier, II](#), Constitution Project, to the Commission, at 6-7 (May 27, 2010) (explaining that mandatory minimum

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penalties “create a powerful incentive for informants and cooperators to provide exaggerated or false information [to prosecutors] . . . [that] is not subjected to the crucible of trial”).

<sup>12</sup> Nachmanoff, *supra* note 8, at 13.

<sup>13</sup> [Prepared Statement of Cynthia Hujar Orr](#), National Association of Criminal Defense Lawyers, to the Commission, at 8 (May 27, 2010) (“The risk of being sentenced under mandatory minimums effectively precludes defendants from exercising their Sixth Amendment right to a trial. . . . [E]ven if a defendant has minimal culpability or a strong defense, faced with a mandatory minimum sentence of ten years or more, a defendant will almost always forego his right to a trial.”).

<sup>14</sup> See, e.g., Richard T. Boylan & Cheryl X. Long, Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors, 48 J.L. & ECON. 627 (2005); Richard T. Boylan, What do Prosecutors Maximize? Evidence From the Careers of U.S. Attorneys, 7 AM. LAW & ECON. REV. 379 (2005); Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 CAL. L. REV. 1585, 1599-1600 (2005) [hereinafter Brown, Decline of Defense Counsel]; Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2470-76 (2004); Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 WIS. L. REV. 837, 902-03; Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REV. 125, 134-35 (2004); Todd Lochner, Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys’ Offices: The Role of U.S. Attorneys and Their Assistants, 23 JUST. SYS. J. 271 (2002); Edward L. Glaeser et al., What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes, 2 AM. L. & ECON. REV. 259 (2000); David T. Johnson, The Organization of Prosecution and the Possibility of Order, 32 LAW & SOC’Y REV. 247 (1998); DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE (1996); Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851 (1995); Stanley Z. Fisher, In Search of the Virtuous Prosecutor, 15 AM. J. CRIM. L. 197 (1988). Moreover, many young attorneys stay in a prosecutor’s office only for a few years, seeking to build their resumes and credentials as a means to achieve a high-paying job in the private sector. See, e.g., MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 207 (2004) [hereinafter TONRY, THINKING ABOUT CRIME].

<sup>15</sup> Nancy LaVigne, Julie Samuels, Urban Institute *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions* pgs.1 and 2 (2012) (hereinafter LaVigne Urban Institute Report).

<sup>16</sup> Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* pg. 9 (January 22, 2013) (hereinafter CRS report)

<sup>17</sup> LaVigne Urban Institute Report at 5

<sup>18</sup> CRS Report at 8.

<sup>19</sup> Kamala Mallik-Kane, Barbara Parthasarathy, William Adams, Examining Growth in the Federal Prison Population, 1998 to 2010 pg. 3 (2012)

<sup>20</sup> Federal Bureau of Prisons, Quick Facts about the Bureau of Prisons, <http://www.bop.gov/news/quick.jsp>

<sup>21</sup> *CRS report at 51*

<sup>22</sup> U.S. Sentencing Commission, Special Report To The Congress: Mandatory Minimum Penalties In The Criminal Justice System 9 (1991) [Hereinafter USSC 1991 Mandatory Minimum Report].

<sup>23</sup> New Release, *Sentencing Commission Issues Comprehensive Report On Statutory Mandatory Minimum Penalties, Sends Recommendations for Statutory Changes to Congress*, October 31, 2011.

<sup>24</sup> U.S.Sentencing Commission Report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, October 2011, [Hereinafter USSC 2011 Mandatory Minimum Report]

<sup>25</sup> *Id.* at xxx-xxxi.

<sup>26</sup> *Id.* at 355-56.

<sup>27</sup> *Id.* at 356.

<sup>28</sup> *Id.* at 364.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 365.

<sup>32</sup> See Attorney General Eric Holder American Bar Association Speech, August 12, 2013, San Francisco, California

<sup>33</sup> *Id.* at 5

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<sup>34</sup> Id.

<sup>35</sup> Kennedy, [William French Smith Memorial Lecture](#), Pepperdine University, February 3, 2010.

<sup>36</sup> Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180 (1999)

<sup>37</sup> Rehnquist, "[Luncheon Address](#)," in U.S. Sentencing Commission, *Drugs and Violence*, 2005.

<sup>38</sup> <http://www.famm.org/aboutsentencing/WhattheExpertsSay.aspx>

<sup>39</sup> See FAIMM *supra* at note 3

<sup>40</sup> <https://docs.google.com/viewer?url=http://www.texaspolicy.com/sites/default/files/documents/2010-01-PP02-conservativesaresaying-ml.pdf&chrome=true>

<sup>41</sup> *See generally* Federal Public Defender, Southern District of Texas, Public Comment on USSC Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2012.

<sup>42</sup> USSC 2011 Mandatory Minimum Report at 345.