

Testimony and Statement for the Record of
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Hearing before the
House Government Reform Subcommittee on
Criminal Justice, Drug Policy and Human Resources
On
Drug Sentencing Policy
May 11, 2000

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the National Association of Criminal Defense Lawyers (NACDL). My name is William B. Moffitt. I am an attorney of twenty-five years with a practice that is dedicated to representing citizens accused of crime in our society. I currently serve as the President of the National Association of Criminal Defense Lawyers.

I would like to begin today by commending the subcommittee for its decision to take a fresh look at the subject of mandatory minimum sentences. In our view mandatory minimum sentences have a detrimental effect on the functioning of both the federal criminal justice system and on society in general. I hope that your inquiry into the continued viability of mandatory minimum sentences heralds the beginning stages of Congress taking a critical step towards restoring public faith in the federal criminal justice system by repealing mandatory minimum sentences.

NACDL's opposition to mandatory minimum sentencing is long standing. We have raised our concerns with law makers in Congressional hearings on previous occasions. Because we believe mandatory minimum sentences have a detrimental impact on society and the criminal justice system we have made their repeal one of our top legislative priorities. I will address some of our concerns in this testimony but I would like all of you to keep one statistic in mind as I proceed:

On April 19, 2000 the Justice Department's Bureau of Justice Statistics (BJS) announced that at midyear 1999, one in every 147 U.S. residents was incarcerated, with an estimated 1,860,520 men and women held in the country's prisons and jails. Overall the incarceration rate had more than doubled in the past 12 years. If the current growth continues, BJS noted, the future jail population may reach 2 million around the end of 2001.¹

The cause, in large part, is the implementation of federal mandatory minimum sentencing policy.

History of Mandatory Minimum Sentencing Laws

In the United States mandatory minimum sentencing was first broadly used in the 1950's. In 1951, Senator Hale Boggs (D-LA) championed a series of harsh mandatory minimum sentences for drug offenses. Known as the Boggs Act they comprised penalties for drug offenses which by

1956 increasing penalties for many drug offenses to include a sentence of five-to-twenty years for any first offense sale or smuggling conviction and the death penalty for sale of narcotics by an adult to a minor under eighteen years of age.

By the late 1960s, the Boggs Act penalties had created many of the same problems we see with today's mandatory minimum drug punishments. Just as today, mandatory minimums were criticized then for treating casual violators as severely as they treat hardened criminals, interfering with the judicial role of making individualized sentencing judgements, and perhaps more importantly, producing no reduction in drug violations. As part of the 1970 Comprehensive Drug Abuse and Control Act, Congress recognized that federal crime policy needed a shift in approach and repealed virtually all mandatory minimums for drug offenses.² Congress reasoned that mandatory minimums were overly severe and inflexible.³

The repeal was praised by many lawmakers, including conservative freshman Congressman George Bush who spoke on the House floor in support of the repeal bill:

Contrary to what one might imagine, however, this bill will result in better justice and more appropriate sentences. ... Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion. ... As a result [of repealing mandatory minimums], we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences.⁴

The repeal of mandatory minimum sentencing was short lived. The 1980's saw Congress rush to pass legislation that created a series of mandatory minimum sentences. The impetus was, in large part, real and perceived public pressure to address a rise in drug use and the crime that was attributed to this increased usage. This public pressure was converted into the perception that support for mandatory minimum sentencing was equated with being tough on crime.

The 1986 Anti-Drug Abuse Act marked a profound shift not only in America's drug-control policy but also in the workings of the criminal justice system. The Act established the bulk of drug-related mandatory minimums, including the five- and ten-year mandatory sentences for drug distribution or importation, tied to the quantity of any "mixture or substance" containing a "detectable amount" of the prohibited drugs most frequently used today. More importantly, these mandatory sentences completed the transfer of sentencing power from federal judges to prosecutors.⁵

Concerns with Mandatory Minimum Sentencing Policy

It is the belief of NACDL that mandatory minimum sentencing creates restrictively rigid sentencing policy and frustrates the intent of the sentencing guidelines. There is recognition among all individuals who work in the justice system that justice is not served in a system that apportions sentencing without regard to circumstance. Every case is unique and thus a fair and equitable criminal justice system requires judicial discretion. A judge should be able to consider aggravating and mitigating circumstances when sentencing is to be considered. Mandatory

minimum sentencing eliminates this discretion and puts it in the hands of the prosecutor. One of our chief concerns regarding the shift of discretion from the judge to the prosecutor is that judicial discretion is subject to review, prosecutorial discretion is not.

Concern for this lack of judicial discretion has been raised by the Sentencing Commission and a host of State and Federal Judges including United States Supreme Court Chief Justice William Rehnquist and Supreme Court Justice Stephen Breyer. Justice Breyer, in a speech at the University of Nebraska College of Law in Lincoln, NE, stated "Mandatory sentencing laws should be abolished." Justice Breyer said he remains "cautiously optimistic" about sentencing guidelines but feels the system, designed to reduce disparity, has "become too complex and too intertwined with the mandatory minimum sentences that Congress has attached by the dozens to the criminal code."

Justice Breyer's condemnation of mandatory sentences echoes that of Chief Justice William Rehnquist, who in a 1993 speech said that mandatory sentences "are a good example of the law of unintended consequences" and "frustrate the careful calibration of sentences" the guidelines intended to accomplish.

The proponents of mandatory minimum sentencing have touted that it is a policy that can be used to eliminate sentencing disparity, in fact such disparities are rampant within the criminal justice system. This is highlighted by the 1991 United States Sentencing Commission Report to Congress. The Commission found that in thirty five percent of cases which meet the criteria for mandatory minimum sentencing, defendants were charged with offenses carrying non-mandatory minimum or reduced mandatory minimum provisions. This is a "behind closed doors" process and thus the honesty and truth in sentencing intended by the guidelines is compromised.

In the current system, federal judges who wish to depart from sentencing guidelines must publicly explain their reasons. Their explanation is then subject to appellate review. By contrast, prosecutorial or executive decisions which avoid the effect of mandatory minimum sentencing provisions are not subject to any review. These prosecutorial decisions which are not reviewable lead to the dissimilar punishment of similar offenders, directly contrary to the intent of current federal sentencing regime.

Compounding NACDL's serious concern regarding mandatory minimums, is the body of evidence that shows rampant racial and ethnic sentencing disparities. Studies by both the United States Sentencing Commission and the Federal Judicial Center have revealed that white defendants whose criminal conduct falls within the scope of mandatory minimum statutes are much more likely than African American defendants and Hispanic defendants to avoid application of mandatory minimum penalties. Racial disparities in sentencing and incarceration have never been worse. Fifty years ago, black men comprised five percent of the nation's population and a disturbing thirty percent of the nation's prison population. Today African American men constitute six percent of the population and an astounding fifty percent of the burgeoning prison population.

In 1993, Whites accounted for over thirty percent of all convicted federal drug offenders, Blacks and Hispanics each accounted for over thirty three percent.⁶

These racial disparities are exacerbated by the inequity of the current sentencing regime which sees the existence of a 100 : 1 ratio between the weight of crack cocaine and all other forms of cocaine. Findings in a recent BJS study suggest that between 1986 and 1990 both the rate and the average length of imprisonment for federal offenders increased for Blacks in Comparison to Whites. The researchers found that this was caused in large measure by mandatory minimum sentences for drug offenses and more specifically by the 100 : 1 quantity ratio of powder and crack cocaine.⁷

There is a belief among many individuals involved in criminal justice work that the policy behind this disparity is a policy of racial and ethnic prejudice.⁸ This disparity is an irrational sentencing policy which, when coupled with mandatory minimum sentencing, compounds the error of the broader irrational sentencing policy. This is a key reason why mandatory minimum sentencing most greatly impacts the minority community.

Congress established the United States Sentencing Commission for the purpose of developing sentencing policies and practices that address congressional concerns, to evaluate policy effectiveness, to refine the sentencing guidelines, and to recommend needed legislation. The Commission has accordingly made recommendations to correct the sentencing disparity between crack versus other forms of cocaine. The Commission has recommended that it be allowed to treat all forms of cocaine in the same manner, with sentencing enhancements for relevant, case specific harms like weapon use, violence, use of juveniles and criminal history. Such a reform coupled with the repeal of mandatory minimum sentencing would remove some of the racial and ethnic bias in the criminal justice system.

Our current criminal justice system hands out disparate sentences that disproportionately impact our most economically vulnerable communities, namely our minority communities. As of 1998, 1.4 million black men have been deprived of their right to vote or hold political office and of their opportunities for meaningful work because of disproportionate convictions. One simple question that must be asked is whether current sentencing regimes are catching the drug king-pins Congress professes to be targeting. A partial answer to this question can be found in a Department of Justice "Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories" from Feb. 4, 1994. The Department of Justice report found that more than one in five federal prisoners (21.5 percent) are low-level drug offenders with no record of violence, no involvement in sophisticated criminal activity, and no prior prison record.

Similarly a Rand Drug Policy Research Center study which undertook to determine whether mandatory minimum sentencing regimes can be considered fiscally cost effective, from a crime fighting perspective, found that a jailed supplier is often replaced by another supplier. Thus the problem continues unabated and the low-level dealer is incarcerated, at great fiscal expense, for an unreasonably long period of time, causing considerable individual, societal and community loss. The Rand study finds that high level dealers, the king-pins, are impacted by long sentences, however the study finds that it is difficult to identify those dealers solely by quantity of drug possessed. It seems that it would be easier to find them if the criminal justice system could consider additional factors such as a dealer's position in the hierarchy. Such factors, ignored by

mandatory minimum sentencing policy can be taken into account by judges working under discretionary sentencing.

It is clear to the NACDL, the United States Sentencing Commission, the Chief Justice of the United States Supreme Court, the American Bar Association and a greater portion of the public than Congress may recognize, that mandatory minimum sentencing policy is flawed throughout. It removes discretion from the judge, creates a uniform approach to sentencing that is unfair, reduces transparency in the criminal justice system, leads to racial and ethnically disparate sentencing, is not cost effective, does not reduce crime and has led to a prison population that will soon hit the two million mark. It is up to all of you to consider when our breaking point will be reached. By this I do not mean the time when, as a society, we cry enough. I do not mean this for such a cry has been heard for many years past as we have locked up our sons and daughters in the name of a war...a war on ourselves.

No; my question to you is when will our society be unable to pay, fiscally, for incarcerating our own? When will our society be unable to cope with our bloated prison population? When will our very fabric crumble as the hundreds of thousands of individuals who we have locked away for five, ten or twenty years, return to our midst, unenlightened and disfranchised? For I do not believe that they have assimilate and become "one of us." I believe that they will feel betrayed and angry and we will have no answers only regrets.

The question that remains is when will you, our elected officials recognize that we cannot continue down this path of ever-increasing incarceration. I will end my testimony with some remarks from Don Williamson, *Philadelphia Daily News*, November 4, 1985.

If for no more honorable reason than our own societal self-preservation, we need to heed where the current state of affairs is taking us: A raging epidemic of poor, dumb children in the richest, most educated nation on earth can be ignored (for now) because these children have no power, no constituency. They cannot vote.

They have no money. They own no property. There is no well-financed, influential Washington based lobby group ensuring that their birth right is protected.

But there will be more of them every day. And they are having babies who will be poorer, and dumber than they are. They will be poorer and dumber and have no allegiance to this or any nation, no concept of right or wrong, no adherence to cherished traditions and no compassion or regard for the elders who abandoned them. Soon fourteen million poor children will become fourteen million unskilled uneducated, angry dangerous adults. There will not be enough jails, enough bullets, enough quick fix federal programs. There will be them and an older feeble, increasingly dependent us. They will blot out the sky, foul the air, make the water unfit to drink. They will steal tomorrow. They are time bombs.

They will steal tomorrow. And society will have aided and abetted the theft.

Notes

1. Department of Justice Press Release Wednesday, April 19, 2000
2. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970)
3. S. REP. No. 613, 91st Cong., 1st Sess. 2 (1969)
4. Congressional Record, House (116 CONG. REC. H 33314) (Sept. 23, 1970)
5. At this time Congress repealed the parole laws ensuring that defendants served at least eighty five percent of their sentences.
6. United States Sentencing Commission 1995 Report to Congress on Cocaine and Federal Sentencing Policy.
7. see generally NACDL's written comments regarding the Commissions February 1995 Report to Congress on the Current 100-1 Federal Sentencing Disparity Between "Crack" and Powder Cocaine Offenses.
8. see generally NACDL's written testimony before the United States House Judiciary Committee, Subcommittee on Crime, June 29, 1995