TEXAS PUBLIC POLICY FOUNDATION
Testimony

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Center for Effective Justice

Reining In Unnecessary Criminal Law

Testimony before House Judiciary Committee Overcriminalization Task Force

by Marc Levin, Director, Center for Effective Justice

Introduction

I am very pleased this Task Force on Overcriminalization and distinguished members of both parties have come together to identify ways we can improve the federal criminal justice system. We applaud Congress for examining various options for reining in unnecessary criminal laws that are properly the province of state governments, revising mandatory minimums for nonviolent offenses, implementing evidence-based practices in community supervision, improving programming within federal prisons, and strengthening reentry. As an organization committed to the Tenth Amendment and the founders' vision of states serving as laboratories of innovation, I am pleased to share with you today that many states, particularly those led by conservative Governors, have taken these steps and found great success in reducing costs, and much more importantly, reducing their crime rate. I am attaching a document that summarizes the recent successful reforms in many states.

Keeping Americans safe, whether accomplished through our military or justice system, is one of the few functions government should perform and perform well. As crime began increasing in the 1970s, Americans and particularly conservatives were correct to react against the attitudes and policies that stemmed from the 1960s, which included an "if it feels good, do it" mentality and a tendency to emphasize purported societal causes of crime while disregarding the fundamental individual responsibility for crime. In the ensuing couple of decades, a six-fold increase in incarceration occurred, some of which was necessary to ensure violent and dangerous offenders were kept off the streets.

However, the pendulum shift, while necessary, went a bit too far, sweeping too many nonviolent, low-risk offenders into prison for long terms while at the same time new research and techniques have emerged on everything from drug courts to actuarial risk assessments to electronic monitoring to pharmacological interventions to treat heroin addiction. One of the most recent and promising models is the Hawaii HOPE Court launched by former federal prosecutor Steve Alm that utilizes swift, sure, and commensurate sanctions, which has reduced substance abuse and reoffending by two-thirds.[1] With all of these advancements, just as we recognize that locking up violent offenders and international drug kingpins continues to make us safer, we must also follow the examples of many states that demonstrate utilizing more alternatives for low-level, low-risk offenders can lead to better public safety outcomes at a lower cost to taxpayers.

The astronomical growth in the breadth of federal criminal law is in tension with the primary constitutional role of state and local governments in the area of criminal justice. With more than 4,500 federal statutory offenses on the books, and hundreds of thousands of regulations carrying criminal penalties, it is time to right-size the federal criminal law as part of a broader effort to revive federalism and the Tenth Amendment. We recommend that all necessary federal criminal laws be consolidated into one federal criminal code with clear *mens rea* requirements, which will make it simple for the average citizen to determine what is prohibited, and that agency regulations be precluded from carrying criminal penalties unless expressly authorized by Congress. In the 1970s, Dick Thornburgh, serving as the Assistant Attorney General for the Justice Department's Criminal Division under President Ford, urged Congress to create a unified criminal code.[2] It was a good idea then, and it is only more urgently needed now as the volume, scope, and complexity of federal criminal laws continues to grow.

About the Texas Public Policy Foundation & Right on Crime

Since 1989, the Texas Public Policy Foundation has served as the state's free-market think tank and in 2005 I launched our Center for Effective Justice. Our work in Texas which included research, data analysis, and legislative testimony helped shape Texas' historic shift in criminal justice policy in 2007 away from building more prisons to instead

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strengthening alternatives for holding nonviolent offenders accountable in the community, such as drug courts. Since making this shift, Texas has achieved a drop in its incarceration rate by more than 12 percent and, most importantly, a drop in its crime rate by more than 22 percent, reaching its lowest level since 1968.[3] Taxpayers have avoided spending more than $2 billion on new prisons.

Building on the Texas success, we launched Right on Crime in 2010. Our Statement of Principles signed by conservative leaders such as Jeb Bush, Newt Gingrich, Bill Bennett, Grover Norquist, and J.C. Watts, as well as leading experts in the field such as John DiLulio and George Kelling, explains how conservative principles such as personal responsibility, limited government, and accountability should apply to criminal justice policy. Our focus areas include: 1) maximizing the public safety return on the dollars spent on criminal justice, 2) giving victims a greater role in the system through restorative justice approaches and improving the collection of restitution, and 3) combating overcriminalization by limiting the growth of non-traditional criminal laws. Right on Crime does not endorse or oppose legislation, but continues to highlight how these principles can be applied at all levels of government.

Over the past few years, we have worked with our counterpart free-market think tanks and conservative Governors and legislators across the country to advance tough and smart criminal justice reforms, which in most cases have passed unanimously or with just a few votes against. Examples include Georgia, South Carolina, Ohio, and Pennsylvania. These legislative packages have shared many similarities, such as strengthening and expanding alternatives such as drug and other problem-solving courts, reducing penalties for low-level drug offenses while still holding these offenders accountable and requiring treatment, reinvesting a share of prison savings into proven community corrections and law enforcement strategies, imposing swift, certain, and commensurate sanctions for non-compliance with community supervision terms, implementing earned time policies that incentivize offenders to succeed, and instituting rigorous, outcome-oriented performance measurements to hold the system accountable for lowering recidivism. Also, in Georgia, the mandatory minimum safety valve for drug cases in the successful legislative package spearheaded by Governor (and former prosecutor) Nathan Deal is very similar to pending federal legislation.

While in the last two years, state incarceration rates have been declining, the federal prison system continues to grow. Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.[4] Some 46.8 percent of federal inmates are drug offenders.[5]

Mandatory Minimums for Nonviolent Offenders

In 1999, Ed Meese told the *New York Times*, "I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it." More than two decades later and three years after Ed Meese became one of the signatories to our Right on Crime Statement of Principle, today we have that opportunity to do that. As you consider recalibrating mandatory minimums that apply to nonviolent offenses, we think the following factors should be taken into account:

- Judges and juries have much more information as to the specific facts of the case, yet mandatory minimums prevent the judge and jury from considering the defendant's background and especially his risk level. Research shows that actuarial risk assessments can accurately determine that two offenders who committed the same offense pose very different levels of risk to the community.

- Some mandatory minimums result in excessive prison terms, particularly following the abolishment of parole in the federal system. For example under 21 U.S.C. § 851(a), if a federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions for a "felony drug offense," the mandatory minimum is 20 years with a maximum of life in prison. If there were two prior "felony drug offenses" that the prosecutor files notice of, life in federal prison is mandatory. Notably, a prior "felony drug offense" can be satisfied by a state misdemeanor in states where a misdemeanor is punishable by one or more years behind bars and even a diversionary disposition in state court. Furthermore, there is no limit on how old the prior offense can be and in some cases it has been decades old. Also, the current safety valve for federal drug cases is too narrow, as it applies to only 24 percent of cases even though only 7 percent of those charged were considered leaders, supervisors, or managers.[6]

- Most federal drug offenders are not violent. Of the 22,300 federal drug offenders sentenced in FY 2013, half had little or no prior criminal record and 84 percent had no weapon involved in the crime—and most of the 16 percent who did merely possessed the weapon.[7] Despite these facts, 97 percent of all federal drug

offenders went to prison in FY 2013, and 60 percent received mandatory minimum sentences of 5, 10, 20 years or life without parole.[8] Yet, of drug offenders sentenced in FY 2012, just 28 defendants (.1%) received a seven-year increase under 18 U.S.C. § 924(c) for brandishing a firearm, and just 44 (.2%) received a 10-year increase, either for discharging a weapon or possessing a more dangerous type of weapon. Only 89 (.37%) of the 23,758 defendants sentenced under USSG §2D1.1 in FY 2012 received the 2-level increase under (b)(2) for having "used violence, made a credible threat to use violence, or directed the use of violence." Just 6.6 percent received any increase for playing an aggravating role in the offense, and only .4 percent received a super-aggravating adjustment under §2D1.1(b)(14).

- There are many cases where federal judges have lamented in the record that the sentence they are forced to give by the applicable mandatory minimums is unjust and far beyond what is needed to sufficiently punish and ensure public safety. Among those are the case of college student Michael Wahl just this year in Florida who received 10 years for growing marijuana in his apartment due to a § 851 enhancement for drug possession case two decades earlier. An Iowa 40 year-old man named Robert Riley was sentenced to mandatory life in federal prison for selling 10 grams of drugs, including the weight of the blotter paper they were attached to, due to the prosecutor filing § 851 enhancements based on prior drug convictions involving small amounts. The judge said the sentence he was forced into was "unfair" and wrote a letter supporting presidential clemency which has proven futile so far. In addition to the drug cases, there are also many problematic cases involving guns otherwise legally owned by persons previously convicted of any crime punishable by more than a year behind bars. Some such defendants have received mandatory terms of 10 to 40 years even when the prior offense was nonviolent and decades ago and the gun they currently possessed was otherwise legal and not being used for any illicit purpose. In one such case where the gun was a 60 year-old hunting rifle used to hunt turkey in rural Tennessee, the judge described the 15 year mandatory term he was forced to impose as "too harsh."

- A Rand Institute study found mandatory minimums for nearly all drug offenders are not cost-effective, although long sentences for major international drug kingpins trafficking enormous quantities were found to be cost-effective.[9]

- Mandatory minimums do not allow for input from the victim in cases where there is one. Research has shown that in some cases victims do not want the maximum prison term and that restitution is much more likely to be obtained if an alternative sentence is imposed.[10]

- Mandatory minimums have not met the goal of achieving uniformity in sentencing. Mandatory minimum sentences can actually create geographical sentencing disparity, because whether to charge someone with an offense carrying a mandatory minimum is entirely up to prosecutors—and the 94 US Attorney offices around the country have different charging policies and practices. For example, a defendant in the Northern District of Iowa "who is eligible for a § 851 enhancement is 2,532 percent more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska," a defendant in the Eastern District of Tennessee is "3,994 percent more likely to receive" the enhancement than in the Western District. *United States v. Young*, __ F. Supp. 2d __, 2013 WL 4399232 (N.D. Iowa 2013). The USSC's 2011 report found that the charging and application of the 18 USC 924c penalties, for example, depended greatly on where the crime was committed—nearly half of all cases came from just three districts in 2010, despite no difference in the prevalence of that offense conduct among all districts. (p. 276).

- Mandatory minimums were implemented in large part due to concerns with excessive use of judicial discretion, but judicial adherence to drug sentencing guidelines is relatively high overall. An overreliance of mandatory minimums effectively results in a massive transfer of discretion from judges to prosecutors, since the sentence is dictated by what charges and notices are filed. Indeed, it is prosecutors, not judges, who are responsible for the largest proportion of deviations from the guidelines in drug cases. In FY 2013, only 17.8 percent of below-guidelines sentences for drug offenders were initiated by the court for *Booker* reasons.[11] More than 38 percent of below-guidelines sentences for drug offenders in FY 2013 came at the urging of prosecutors for reasons Congress has sanctioned (Table 45 of USSC 2013 Sourcebook).

- Mandatory minimums are not necessary to encourage defendants to plea. Some 96.9 percent of federal cases are resolved by plea, with only 3.1 percent going to trial.[12] These figures are very high for every category of cases, even those to which mandatory minimums do not apply. For example, 99.4 percent of immigra-

tion cases result in pleas, as do 93.4 percent of fraud cases. In fact, the U.S. Sentencing Commission found that those convicted of an offense carrying a mandatory minimum penalty pled guilty at a slightly lower rate (94.1%) than offenders who were not convicted of an offense carrying a mandatory minimum penalty (97.5%).[13] Furthermore, offenders facing longer mandatory minimum penalties were less likely to plead guilty.

We do recognize the value of appropriate sentencing ranges to guide the discretion exercised by judges and juries as well as judges being aware of the sentencing patterns of their colleagues. If mandatory minimums were revised for certain nonviolent offenses and/or if the safety valve was expanded, judges in each circuit could be asked to annually review data comparing their sentencing patterns in similar cases with those of their colleagues. In short, policymakers should not be forced to choose between the false dichotomy of a sentencing regime that is entirely rigid and one with no limits and monitoring to constrain discretion.

It is important to remember that, even if mandatory minimums did not apply to certain drug cases, these offenders would be going to federal prison. Recent experience illustrates that federal judges would generally impose tough sentences even if Congress dialed back mandatory minimums in such cases. For example, even after the crack/power disparity was narrowed in 2010, those convicted in subsequent crack cases received an average prison term of 97 months.

We appreciate the outstanding work that prosecutors typically do at all levels of government. We have heard the concern that prosecutors in some jurisdictions have excessive caseloads and mandatory minimums provide the leverage needed to quickly extract plea bargains that are satisfactory to them, but the better way to address this concern is to ensure there are sufficient prosecutors to properly examine the facts of each case and, when necessary, fully prosecute those cases that merit a trial. The growth in the Bureau of Prisons, however, is consuming an ever greater share of the Department of Justice budget, the same budget that funds federal prosecutors.

It is useful to note that Texas generally does not have mandatory minimums, except for repeat seriously violent offences, but still has long provided for meaningful [and appropriately stringent] sentencing ranges and penalties for criminal offenses. In the recent groundswell of state policy innovations in this area, a number of states have addressed

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their mandatory minimums. For example, in 2010, South Carolina eliminated mandatory minimums for the manufacture, distribution, dispensing, delivery or purchase of drugs below certain weight thresholds for first and second offenses. Delaware reduced its mandatory minimum sentences for many drug trafficking offenses in 2003. In 2013, Georgia provided judges with a "safety valve" for departing below mandatory minimums for trafficking and manufacturing, if certain findings were made. Reductions in state mandatory minimums does not appear to have had an adverse impact on crime, as the crime rates have continued to decline in these states. Since the reforms in South Carolina 2010, the crime rate has decreased by 14 percent.

Beyond Mandatory Sentencing: Other Federal Criminal Justice Reforms

The criminal justice reforms in some states like Texas have not dealt with mandatory minimums because Texas only had minimum prison terms for repeated seriously violent offenses. However, at the federal level, since mandatory minimums affect many cases, including many nonviolent cases, comprehensive reform approaches should address both mandatory minimums and other changes that do not involve sentencing laws such as earned time and strengthening reentry.

Our recent paper "The Verdict on Federal Prison Reform" focuses on policy changes that are backed by empirical research and proven success in the states.[14] These include: utilizing validated risk and needs assessments, earned time policies, strengthening alternatives to incarceration such as problem-solving courts and electronic monitoring, reducing collateral consequences of convictions that make it harder for rehabilitated ex-offenders to find employment, and strengthening reentry. With regard to both alternatives to incarceration and reentry, we suggest considering subcontracting in some instances with state, local, and non-profit agencies, as this can be more efficient than the federal government reinventing the wheel, particularly in areas where there are not that many federal offenders on probation or on supervised release.

Congress must also act to rein in overcriminalization by reducing the number of superfluous criminal laws, consolidating all necessary criminal laws into one unified criminal code, adopting a rule of construction that applies a strong *mens rea* protection where the underlying statute is unclear, codifying the rule of lenity,* and removing the authority of agencies to apply criminal penalties to regulations unless expressly authorized by Congress.

When it comes to conduct that is properly criminalized, limited federal criminal justice resources should be refocused on areas where the federal government is uniquely situated to supplement the role of states and localities, such as matters involving homeland security and international drug and human trafficking. The garden variety drug, property, or even violent offense that occurs on one street corner can and should be addressed by prosecution at the local and state levels. Congress and the administration should look at how to develop mechanisms, such as guidelines and performance measures, to ensure federal prosecutorial resources are being appropriately prioritized.

In addition to considering the statutory penalties for various crimes, we urge the Task Force to examine collateral consequences. One example is the federal law that requires states to suspend the driver's licenses of all individuals convicted of any drug offense, even a misdemeanor. While those who are driving while inebriated with any substance should be taken off the road, this issue should be dealt with at the state and local levels. States should not be subject to losing federal transportation funds based on their policy in this area, as the threat of withholding unrelated funds involves coercion that undermines the framework of federalism embodied in the Tenth Amendment.

Conclusion

The successes of many states in reducing both crime and costs through reforms anchored in research and conservative principles provide a blueprint for reform at the federal level. By learning from what is working in the states and taking steps to ensure the federal role in criminal justice does not intrude on the constitutional purview of state and local governments, Congress can focus federal resources on those areas where it can most uniquely contribute to advancing public safety and the rule of law. We are encouraged by the remarkable vision and leadership of the distinguished members of this Task Force and look forward to being of assistance in any way we can. ★

* This canon of statutory interpretation provides that, if there are two objectively reasonable meanings of a statute, the court should adopt the one that is favorable to the defendant. The rule of lenity has a long pedigree in Western law (*See United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself") and has been applied on occasion by the U.S. Supreme Court and federal appellate courts in recent years. It is tied to the core principle that citizens should have fair notice as to what is a crime, since a statute capable of an objectively reasonable interpretation whereby the conduct at issue would not be prohibited would, thereby, fail to provide such notice. By codifying the rule of lenity, Congress can ensure it is uniformly applied.

[1] "Program Evaluation Results," Hawaii State Judiciary's HOPE Probation Program.

[2] Dick Thonburgh, "Codification and the Rule of Law.""

[3] Marc Levin, "The Texas Model: Adult Corrections Reform, Lower Crime, Lower Costs," Texas Public Policy Foundation (Sept. 2011).

[4] The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted. *See also* "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.

[5] *Federal Bureau of Prisons Quick Facts*.

[6] U.S. Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics* at Tbls. 37, 39, 40, 44, (2012).

[7] All data come from U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[8] U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*.

[9] Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa , "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?," Rand Institute, MR-827-DPRC (1997) 217 ISBN: 0-8330-2453-1.

[10] "The 1997 Iowa Adult Crime Victimization Survey," Center For Social and Behavioral Research University of Northern Iowa (Apr. 1998). "Empowering and Restoring Crime Victims," Texas Public Policy Foundation.

[11] U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 168-69 (2011). .

[12] U.S. Sentencing Commission.

[13] U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 168-69 (2011).

[14] Marc Levin & Vikrant Reddy, "The Verdict on Federal Prison Reform," Texas Public Policy Foundation (July 2013).

About the Author

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About the Texas Public Policy Foundation

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