

Statement of Julie Stewart, President, Families Against Mandatory Minimums

Submitted to the U.S. House Committee on the Judiciary

Regarding H.R. 2278, The Strengthen and Fortify Enhancement Act

June 13, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee, on behalf of the staff, board, and over 25,000 members of Families Against Mandatory Minimums (FAMM), I appreciate the opportunity to submit our views on H.R. 2278, The Strengthen and Fortify Enhancement Act (SAFE Act).

We believe that this proposal is a well-intentioned effort to secure U.S. borders and address illegal immigration. As our name implies, FAMM is concerned, however, with the sentencing aspects of the SAFE Act. We strongly oppose the bill's provisions creating new mandatory minimum prison sentences and expanding existing ones. The proposed mandatory minimum sentences will put an unsustainable and cost-prohibitive burden on our already dangerously overcrowded federal prison system. We also believe that the proposed mandatory minimum sentences will make taxpayers pay an enormous price to incarcerate many people who could instead be deported to their countries of origin in a fair and expeditious manner. Finally, mandatory minimum prison sentences can produce grave injustices because they bar courts from fitting the sentence to the crime and the offender. Even in immigration-related offenses, it is impossible to foresee the unique circumstances of every case and what the appropriate punishment should be for each defendant.

The SAFE Act creates and in some cases expands mandatory minimum sentences for the following offenses:

- Aggravated ID theft (Sec. 312): Expands the coverage of the current 2- and 5-year consecutive mandatory minimums to apply whenever a person uses a means of identification "that is not his or her own" in the course of committing certain felonies, even if the identification does not actually belong to another person (e.g., using a made-up Social Security number);
- Alien smuggling (Sec. 314): Creates new 3-, 5-, 7-, and 10-year mandatory minimum sentences for people who assist others who are entering the U.S. illegally. Which mandatory sentence applies depends on the person's profit motive, whether serious bodily injury or death are likely or result from the violation, and if the alien who is assisted commits other crimes;
- Possession of a gun during an alien smuggling crime (Sec. 314): Creates consecutive 5-, 7-, or 10-year mandatory minimum sentences for possessing, brandishing, or discharging a firearm in the course of an "alien smuggling crime";
- Illegal reentry (Sec. 316): Adds 2-, 4-, and 10-year mandatory minimum sentences for aliens who illegally reenter the U.S. and have prior convictions for various offenses.

Expanding and creating new mandatory minimum sentences for immigration-related offenses would only aggravate the Bureau of Prison's (BOP) and Department of Justice's (DOJ's) significant overcrowding and budget problems. Even before the sequester began, the BOP was under severe budget strain. A January 22, 2013, report from the Congressional Research Service (CRS) provides a useful summary of the extent and causes of the problems.¹ The number of inmates under the BOP's jurisdiction has increased from approximately 25,000 in FY1980 to nearly 219,000 in FY2012.² The BOP is currently overcrowded, operating at 38 percent over its rated capacity.³ The Inspector General for the Department of Justice recently testified that the outlook "is bleak: the BOP projects system-wide crowding to exceed 45 percent over rated capacity through 2018."⁴ Between FY2000 and FY2012, the annual per capita cost of incarceration for all inmates increased from \$21,603 to \$29,027.⁵ Over this same period, appropriations for the BOP increased from \$3.668 billion to \$6.641 billion.⁶

The BOP now consumes a full quarter of the DOJ's crime-fighting budget.⁷ This endangers the public, inmates, and prison staff. The current inmate-to-staff ratio in the BOP is five-to-one,⁸ and BOP Director Charles Samuels recently stated that overcrowding in federal prisons leads to greater risk of harm to inmates and staff alike.⁹ Inspector General Horowitz recently described prison overcrowding as the DOJ's "material weakness"¹⁰ and explained the public safety ramifications of continued prison population and budget growth to the House Crime, Justice, and Science Appropriations Subcommittee:

The federal prison system is consuming an ever-larger portion of the Department's budget, making safe and secure incarceration increasingly difficult to provide, and threatening to force significant budgetary and programmatic cuts to other DOJ components in the near future. ... Whatever approach the

¹ CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 8 (Jan. 22, 2013) [hereinafter CRS Report], *available at* <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

² CRS Report, at 1.

³ Testimony of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies concerning Federal Bureau of Prisons FY 2014 Budget Request 4 (April 17, 2013) [hereinafter Samuels Statement], *available at* <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf> (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).

⁴ Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies, 9 (March 14, 2013) [hereinafter Horowitz Statement], *available at* <http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf>.

⁵ CRS Report, at 15.

⁶ CRS Report, at Summary.

⁷ Horowitz Statement, at 8.

⁸ Horowitz Statement, at 9.

⁹ Samuels Statement, at 4-5 ("[I]ncreases in both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are related to increases in the rate of serious inmate assaults. An increase of one in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates.").

¹⁰ Horowitz Statement, at 8.

Department wishes to take to address the growing cost of the federal prison system, it is clear that something must be done. In an era where the Department's overall budget is likely to remain flat or decline, it is readily apparent from these figures that *the Department cannot solve this challenge by spending more money to operate more federal prisons unless it is prepared to make drastic cuts to other important areas of the Department's operations.*¹¹

Simply put, *the more the DOJ spends on prisons, the less it can spend on fighting crime.*

The CRS report puts the blame for this prison overcrowding and budget crisis squarely on four factors:

- 1) Increased numbers of federal offenses subject to mandatory minimum sentences;
- 2) The growth in mandatory minimums has led to increases in sentence ranges – and, therefore, sentence lengths – under the federal sentencing guidelines;
- 3) More crimes have been made into federal offenses; and
- 4) The elimination of parole.

FAMM has advocated for the elimination of mandatory minimum sentencing laws for more than 20 years. These laws do not allow the type of individualized consideration of facts that every offender expects and deserves. Mandatory minimum sentences also drive the unsustainable growth in federal corrections costs. CRS explains the problem:

Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. ... Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods. For example, the [U.S. Sentencing Commission or] USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more. While only offenders convicted for an offense carrying a mandatory minimum penalty are subject to those penalties, mandatory minimum penalties have, in effect, increased sentences for other offenders. The USSC has incorporated many mandatory minimum penalties into the sentencing guidelines, which means that penalties for other offense categories under the guidelines had to increase in order to keep a sense of proportionality.¹²

This one-size-fits-all approach to justice results in many offenders spending much more time in prison than is necessary to protect public safety. In 2010, fully 75,579 (39%) of the 191,757 offenders in BOP custody as of September 30, 2010, were subject to a mandatory minimum penalty at sentencing. The Sentencing Commission reported that in 2010 the average sentence

¹¹ Horowitz Statement, at 8, 9 (emphasis added).

¹² CRS Report, at 8.

for prisoners serving mandatory minimums was 139 months, while the average for all prisoners was 48 months.¹³

The SAFE Act's proposed mandatory minimums are especially nonsensical. Under current law, non-citizens that are in the United States illegally and convicted of federal crimes are sentenced by a federal judge, serve their sentences in the BOP, and then are transferred to Immigration and Customs Enforcement (ICE) for removal from the country. In these cases, shorter federal prison sentences would save the BOP and DOJ money without jeopardizing public safety because dangerous, non-citizen felons are detained by ICE until they are removed. The mandatory minimum terms established by this bill would simply guarantee that noncitizen offenders spend *even more time* in BOP facilities, thereby stretching limited DOJ resources – money and prison space – even further. Thus, while imposing any new federal mandatory minimums would be a mistake, in our view, *these particular mandatory minimums make the least sense of all.*

Immigration offenders are already the largest category of offenders sentenced in federal courts, comprising 32.2 percent of all cases.¹⁴ In 2012 alone, more than 26,000 people were sentenced for immigration offenses, and their average sentence was 16 months in prison.¹⁵ More than 94 percent of these offenders were non-citizens.¹⁶ It costs approximately \$29,000 to incarcerate one non-citizen offender for one year in federal prison.¹⁷ In 2012 alone, ICE removed a record 409,849 people from the United States, of which 86,405 were repeat immigration law violators and 225,390 were convicted criminal aliens.¹⁸ Giving even a fraction of these people the 2-, 3-, 4-, 5-, 7-, and 10-year mandatory minimum sentences created in the SAFE Act could exacerbate the budget crises that the BOP and DOJ already face and cost taxpayers a fortune.

The Inspector General has offered a bleak forecast for DOJ budget growth, and this Committee should heed it. We cannot build our way out of our current prison overcrowding crisis, nor can we fund the prison explosion that would result from the passage of the SAFE Act with its current mandatory minimum proposals. All taxpayers should dread the increased prison costs and DOJ budget cuts that might result if we opt to give longer prison terms to more immigration law violators each year instead of funding crime-fighting initiatives.

To the best of our knowledge, neither Representative Gowdy nor any of the bill's cosponsors has set forth evidence that the proposed mandatory minimum sentences are necessary to punish these offenders sufficiently, or that the threat of mandatory, longer prison sentences would deter the people most likely to break these laws. We appreciate the constitutional role that Congress plays

¹³ U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 136 (Oct. 2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

¹⁴ U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure A (2012) [hereinafter 2012 SOURCEBOOK], *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureA.pdf.

¹⁵ 2012 SOURCEBOOK, Table 13, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table13.pdf.

¹⁶ 2012 SOURCEBOOK, Table 48, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table48.pdf.

¹⁷ 78 FR 16711 (2012).

¹⁸ Immigration and Customs Enforcement, Removal Statistics, *at* <http://www.ice.gov/removal-statistics/>.

in immigration enforcement, but we think members of Congress have an obligation to engage in careful study before proposing or adopting new mandatory sentencing policies.

With regard to the SAFE Act, we think the public should know the following in relation to the proposed new mandatory minimums:

- Why were these specific prison terms chosen for the offenses? What factors did Representative Gowdy consider and deem relevant in making these choices?
- What is the average sentence currently imposed for these offenses?
- What is the recidivism rate for individuals who commit these offenses?
- What impact will the new and expanded mandatory minimum sentences have on the federal prison population and budget? How will Congress and the DOJ pay for this?
- Is there evidence to suggest that courts are failing to punish these crimes appropriately? If so, what is it?
- How does the cost of removing an immigration law violator compare with the cost of incarcerating one?

Thank you for the opportunity to share our views with the committee.