

**Testimony of Marc Levin, Esq.
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at the Texas Public Policy Foundation
Before the Senate Judiciary Committee, September 18, 2013**

Introduction

- 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.
- More broadly, I am very pleased this Committee and distinguished Senators of both parties have come together to identify ways we can improve the federal criminal justice system and offer some very worthwhile proposals dealing with not only reining in mandatory minimums, but also 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 to taxpayers, and much more importantly their crime rate.
- 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 1970’s, Americans and particularly conservatives were correct to react against the attitudes and policies that stemmed from the 1960’s, 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 recent years have yielded new research and techniques 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 re-offending 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.

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 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 9 percent and, most importantly, a drop in its crime rate by more than 12 percent, reaching its lowest level since 1968.² 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. There are more than 4,500 federal statutory crimes with perhaps hundreds of thousands of regulatory offenses created by agencies themselves, which is exacerbated by the erosion of *mens rea* requirements.³
- 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 possession 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 the proposal before Congress by Chairman Pat Leahy and Senator Rand Paul.
- 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

- As former Attorney General Meese indicated, it has long been time to reexamine many mandatory minimums. We have the following concerns with mandatory minimums, particularly as they apply to nonviolent offenses:
 - 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
 - Illustrating the injustice that mandatory minimums can lead to, 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 ten 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 guns 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 sixty 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.⁷
- They do not allow for input from the victim. 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.⁸
- They have not met the goal of achieving uniformity in sentencing. For example, a defendant in the Northern District of Iowa “who is eligible for a § 851 enhancement is 2,532% 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% 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).
- 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 rolled back for certain offenses, judges in each circuit could be asked to annually review data comparing their sentencing patterns in similar cases with those of their colleagues.
- 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 a greater share of the Department of Justice Budget, the same budget that funds federal prosecutors.

Other Federal Corrections Reforms

- In the recent groundswell of state policy innovations in this area, reforms in some states like Texas have not dealt with mandatory minimums because Texas only had minimum prison terms for repeated seriously violent offenses and instead has long provided meaningful sentence ranges for most 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.
- You have been given a copy of our paper “The Verdict on Federal Prison Reform” that focuses mostly on such other changes that would complement reform of mandatory minimums and that are backed by empirical research and proven success in the states.⁹ 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 unnecessary criminal laws, adopting a rule of construction that applies a strong *mens rea* protection where the underlying statute is unclear, and reining in the authority of agencies to create regulatory offenses.

Conclusion

- The success in many states in reducing both crime and costs through reforms anchored in research and conservative principles provides a blueprint for reform at the federal level. Several pending proposals by members of this Committee are targeted to addressing the challenges I have highlighted and are supported by the recent positive experiences in many states. It has been a privilege to be with you today. We are encouraged by the remarkable vision and leadership of the distinguished members of this Committee and look forward to being of assistance in any way we can.

¹ “Program Evaluation Results,” Hawaii State Judiciary’s HOPE Probation Program, <http://www.hopeprobation.org/about/program-evaluation-results>.

² Marc Levin, “The Texas Model: Adult Corrections Reform, Lower Crime, Lower Costs,” Texas Public Policy Foundation, Sept. 2011, <http://www.texaspolicy.com/sites/default/files/documents/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf>.

³ Paul Larkin, "The Need for a Mistake of Law Defense as a Response to Overcriminalization," Heritage Foundation, April 2013, <http://www.heritage.org/research/reports/2013/04/the-need-for-a-mistake-of-law-defense-as-a-response-to-overcriminalization>.

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, <http://www.bop.gov/news/quick.jsp>.

⁶ U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Tbls. 37, 39, 40, 44, (2012), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm.

⁷ 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 pp., ISBN: 0-8330-2453-1

⁸ "The 1997 Iowa Adult Crime Victimization Survey," Center For Social and Behavioral Research University of Northern Iowa, April 1998, http://www.csbs.uni.edu/dept/csbr/pdf/CRI_Crime_Victimization_Survey-1998.pdf. "Empowering and Restoring Crime Victims," Texas Public Policy Foundation, <http://www.texaspolicy.com/sites/default/files/documents/Empowering%20and%20Restoring%20Crime%20Victims.pdf>.

⁹ Marc Levin & Vikrant Reddy, "The Verdict on Federal Prison Reform," Texas Public Policy Foundation, July 2013, <http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf>