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SPEECHES

WHY MANDATORY MINIMUMS MAKE NO SENSE†

JOHN S. MARTIN, JR.*

It is a great pleasure to be here and to participate in this Symposium on what I consider to be a very important topic. It is particularly important today because there is a group of wild-eyed liberals who are attempting to undermine effective law enforcement in the United States by doing away with mandatory minimum sentences. This group includes such well-known radicals as William Rehnquist, Anthony Kennedy, Stephen Breyer, and all of the members of the Judicial Conference of the United States.

The response of the Justice Department to the virtually unanimous view of the federal judiciary that mandatory minimum sentences make no sense is simply that judges resent the fact that sentencing power is taken away from them. I know of no judge who takes joy in exercising sentencing discretion in the limited number of cases where it is now available. Indeed prior to the sentencing guidelines, a number of judges expressed to me a view that sentencing was the most difficult part of their job. Today, the mandatory minimums and sentencing guidelines in many ways make the job of a judge easier. In the vast majority of cases, judges no longer have to take moral responsibility for the

† John S. Martin, Jr. was the first speaker at the Symposium on Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?, hosted by the *Notre Dame Journal of Law, Ethics & Public Policy* on April 1, 2004. See also William B. Mateja, Sentencing Reform, The Federal Criminal Justice System, and Judicial and Prosecutorial Discretion, Speech at the Notre Dame Journal of Law, Ethics & Public Policy Symposium on Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime? (April 1, 2004), in 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 319 (2004); G. Robert Blakey, Mandatory Minimums: Fine in Principle, Inexcusable When Mindless, Speech at the Notre Dame Journal of Law Ethics & Public Policy Symposium on Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime? (April 1, 2004), in 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 329 (2004).

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sentence they impose. They could look a defendant that they have just sentenced thirty years in the eye and say, "Don't blame me—I'm just a scorekeeper." Talk to the Congressmen who voted for this mandatory minimum sentence.

The reason the judges are opposed to mandatory minimums is not that they are power hungry but rather that they see on a day-to-day basis the injustice that results from inflexibility in sentencing, whether it be a result of mandatory minimums or the result of a restriction of judicial discretion under the sentencing guidelines.

In the limited time I have available this evening, let me place before you some of the reasons judges oppose mandatory minimums. First, the vast majority of responsible studies of mandatory minimum sentences suggest they have almost no value in deterring crime and that they result in gross injustice.

In a report issued in April 1990, a special committee appointed by the Chief Justice of the United States at the direction of Congress to make recommendations for improvements on the federal courts, stated "Congress should repeal mandatory minimum sentencing provisions whereupon the United States Sentencing Commissions should reconsider the guidelines applicable to the effected offenses." The Committee stated that mandatory minimums "create penalties so distorted as to hamper federal criminal adjudication."

A study by the Federal Judicial Center of the deterrent impact of mandatory minimum drug laws concluded "the weight of the evidence clearly shows that enactment of mandatory penalties has either no demonstrable effect or short term effects that rapidly waste away."

A study of mandatory minimum sentences for drug offenders conducted by the Rand Corporation found that mandatory minimum sentences were less cost effective than either conventional law enforcement or drug treatment. The study concluded that every million dollars spent on incarcerating drug offenders for longer periods of time would result in the decrease of thirteen kilograms of cocaine distributed. However, if you took that same million dollars and rather than spending it for prisons guards and other correction costs, used it to put more police or drug agents on the streets, it would reduce narcotics distribution by twenty-seven kilograms. Even more revealing, the study found that if you took the same million dollars and spent it treating heavy users in narcotics addiction programs, it would reduce cocaine consumption by over 100 kilograms. Unfortunately, it is easier to run for Congress by saying you voted for harsher

mandatory sentences for drug dealers than by saying you voted to allocate more money for drug addiction programs.

Perhaps the most persuasive arguments against mandatory minimum sentences are contained in the August 1991 Report to Congress of the United States Sentencing Commission. This was the commission that was chaired by the Honorable William W. Wilkins. I had the privilege of serving under Chief Judge Wilkins when he was the Chair of the Criminal Law Committee of the Judicial Conference. He is someone for whom I have great respect, but his liberal credentials are far from impressive. He was appointed by President Reagan as district and circuit judge in South Carolina and served in his early career as a legislative assistant to Strom Thurman of South Carolina.

Because the Sentencing Commission's Report makes the case against mandatory minimums so persuasively, I hope you will excuse me if I read to you some of its principal conclusions:

- There are over sixty criminal statutes that contain mandatory minimum penalties applicable to federal offenses in the federal criminal code today. Only four of these sixty statutes, however, frequently result in convictions; the four relate to drug and weapons offenses.
- Despite the expectation that mandatory minimum sentences would be applied to all cases that meet the statutory criteria of eligibility, the available data suggest that this is not the case. This lack of uniform application creates unwarranted disparity in sentencing, and compromises the potential for the guidelines sentencing system to reduce disparity.
- In thirty-five percent of cases in which available data strongly suggest that the defendant's behavior warrants a sentence under a mandatory minimum statute, defendants plead guilty to offenses carrying non-mandatory minimum or reduced mandatory minimum provisions. Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised.
- The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.
- Whereas the structure of the federal sentencing guidelines differentiates defendants convicted of the same

offense by a variety of aggravating and mitigating facts, the consideration of which is meant to provide just punishment and proportional sentences, the structure of mandatory minimums lacks these distinguishing characteristics. Under the guidelines, offenders classified as similar receive similar sentences; under mandatory minimums, offenders seemingly not similar nonetheless receive similar sentences. It thus appears that an unintended effect of mandatory minimums is *unwarranted* sentencing uniformity.

- Deterrence, a primary goal of the Sentencing Reform Act and the Comprehensive Crime Control Act, is dependent on certainty and appropriate severity. While mandatory minimum sentences may increase severity, the data suggest that uneven application may dramatically reduce certainty. The consequence of this bifurcated pattern is likely to thwart the deterrent value of mandatory minimums.
- Since the power to determine the charge of conviction rests exclusively with the prosecution for the eighty-five percent of the cases that do not proceed to trial, mandatory minimums transfer sentencing power from the court to the prosecution.
- The sentencing guidelines system is essentially a system of finely calibrated sentences. For example, as the quantity of drugs increases, there is a proportional increase in the sentence. In marked contrast, the mandatory minimums are essentially a flat, tariff-like approach to sentencing. Whereas guidelines seek a smooth continuum, mandatory minimums result in "cliffs." The "cliffs" that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.

Let me turn to the impact of mandatory minimum sentences on the administration of justice. The mandatory minimum sentences for drugs and weapon use are themselves extremely harsh. They also impact the overall severity of the sentencing guidelines because the United States Sentencing Commission has determined that in setting the guidelines for these offenses, they should make them consistent with the mandatory minimums. This has the effect of raising all of the drug and weapons offenses to the same level of severity as the mandatory minimums. There is a more subtle impact on the other sentences because once you have such severe sentences for narcotics, there is a tendency to increase the sentences in white collar cases to

avoid the perception that a double standard is being applied. Thus, we can proudly say we now treat white collar defendants almost as unfairly as we treat narcotics defendants.

This combination of harsh mandatory minimums and their impact on the sentencing guidelines has had a dramatic impact on the rate at which we are imprisoning people in the federal system. In 1986, the year before the Federal Sentencing Guidelines became effective, there were 37,542 people in federal prisons. Of the defendants who went to prison that year, 16% received prison sentences of five years or more. Today there are 173,000 people in federal prison and, approximately 70% of them are serving sentences of more than five years, 17% are serving sentences of more than fifteen years and 12% are serving more than twenty years. What makes these numbers particularly striking is that only 3% of those federal prisoners are incarcerated on charges of aggravated assault, homicide, or kidnapping—crimes that we might think can justify such severe sentences.

Does anyone here believe that this vast increase in the number of our citizens serving sentences of five years or more in federal custody has made us safer? Has it decreased drug use? I suggest the answer is no.

While these statistics are frightening, the absurdity of mandatory minimum sentencing is easier to see in the context of particular cases. Let me briefly describe two such cases that I had. About a year ago, I was presiding at a pretrial conference in a criminal case. I asked the Assistant U.S. Attorney to outline the proof against the defendant. He said this defendant, who was an addict, sat on a stoop on a public street and when people would come up and ask where they could get crack, he would tell them of the apartment in which the other defendants were selling crack. Because he did this, from time to time the crack dealers would give him some crack for his own use. I asked what the guideline sentence was. The answer was that because the defendant had prior convictions for street level sales of drugs there was a mandatory minimum sentence of twenty years.

Let me give you another example. One of the early cases I tried involved a single mother of two children who worked at the United States Post Office in downtown Manhattan on the night shift. At approximately 11:30 one night, she had her break and went to a local bar where she joined two other women from the post office waiting to buy some cocaine for their personal use. When the cocaine dealer came in, and they each said that they wanted a twenty dollar bag, he asked one of them to step outside with him to exchange the money for the cocaine, and the defen-

dant volunteered to do this. She was found guilty of distributing cocaine within a thousand feet of a school, which carried a mandatory one-year prison sentence. When I received her presentence report it revealed that the drug dealer who sold her the cocaine received a sentence of probation because he cooperated with the prosecution.

Another example of the irrationality of mandatory minimums is found in a recent order in the case of Weldon Angelos entered by Judge Paul G. Cassell, a District Judge in Utah, a conservative Republican appointed in 2001 by President Bush. Weldon, a 24-year-old dealer in marijuana had a guidelines range of 6.5 years. However, because Angelos carried a gun that was never displayed during two of his marijuana deals and had a shotgun in his apartment he is facing mandatory sentences of fifty-five years that must be consecutive to his six year guideline sentence. Faced with this sixty-one year sentence, Judge Cassell asked the parties to brief a series of questions relating to the constitutionality of the mandated sentence, including whether the mandatory minimum sentences violate the Fourteenth Amendment Equal Protection Clause's prohibition of irrational classifications when compared to the following sentences under the guidelines for far more serious crimes:

- Mr. Angelos will apparently serve a prison term of at least 738 months.
- The kingpin of a major drug trafficking organization in which death or serious bodily injury resulted from the distribution of drugs will serve a prison term of no more than 293 months.
- A terrorist who detonates a bomb in a public place intending to kill a bystander will serve a prison term of no more than 235 months.
- A racist who attacks a minority with the intent to kill and inflicts permanent or life-threatening injuries will serve a prison term of no more than 210 months.
- A spy who gathers top secret information that could be expected to cause exceptionally grave damage to the national security will serve a prison term of no more than 210 months.
- A second degree murderer will serve a prison term of no more than 168 months.
- A marijuana dealer trafficking five kilograms of marijuana shoots an innocent person during a drug transaction will serve a prison term of no more than 153 months.

I suggest that these comparisons clearly demonstrate the absurd results that we get from mandatory minimums. Perhaps this absurdity could be tolerated if mandatory minimums were good law enforcement policy. However, they represent bad law enforcement policy.

Our current sentencing scheme leads to inefficiency in the war against drugs. We have gotten to the draconian sentences which exist today because ever since I was an Assistant United States Attorney in the early 1960s, drug enforcement officials would tell Congress, "We can win the war on drugs if we increase drug sentences." Time after time Congress would respond to that argument by increasing the penalties. However, these harsh penalties are applied without any thought about the level of involvement of the particular defendant in the narcotics distribution scheme. When you fail to distinguish between major and minor violators, you give the law enforcement community the ability to brag about their success in prosecuting narcotics violators. They can testify before Congress and say, "Look, there are 30,000 people who are in federal prison for sentences of over ten years because of their narcotics violations." What is not said is that the incarceration of ninety-five percent of those individuals will have no meaningful impact on the amount of drugs distributed because those individuals are low level members of narcotics distribution organizations who can be immediately replaced upon arrest.

It is very easy for drug enforcement officers to go out on the street and arrest addicts selling drugs. But you end up with somebody doing more than twenty years in jail who was immediately replaced by another addict willing to sell drugs to get some for himself. Drug agents can create impressive statistics by arresting low level drug dealers. It takes a much greater law enforcement effort to prosecute major violators who do not operate openly on the streets. If we simply limited the harsh penalties to major violators, we would be providing the Drug Enforcement Agency with an incentive to concentrate their efforts on major violators and we would have a way of measuring the success of law enforcement in the war on drugs.

Let me conclude by summing up my views on mandatory minimum sentences. They are cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea.

