The Justice Safety Valve Act of 2013
S. 619

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Senators Leahy and Paul, and the entire Senate Judiciary Committee, thank you for the kind invitation to present my views about the Justice Safety Valve Act of 2013.

I am writing to express support for the Bill, which I believe is a necessary step towards strengthening our communities, ingraining a sense of fairness into federal sentencing, and returning sentencing discretion back to where it rightfully belongs: the federal judiciary.

My perspective on the issue of mandatory minimum sentencing is unique. Unlike most witnesses who come before you, I am a product of the federal criminal justice system. I received a sentence of over 12 years for my role in five bank robberies that I committed at the age of 22 when I was a reckless and immature young man. That sentence included a mandatory minimum five years of imprisonment for carrying a firearm during one of the robberies. I am now a committed husband, father, community volunteer, and a law-school student in my third year at the University of Washington School of Law.

My sentence was just. But I saw many that weren't. In fact, it is fair to say that what I saw in federal prison would shock and shame most Americans. What I saw was a colossal waste of humanity and resources wrapped into a system of mass incarceration. And at the heart of that waste is our mandatory minimum sentencing regime.

The Randomness of Mandatory Minimum Sentencing

Before I explain why this Bill is needed, I'd like to explain why mandatory minimum sentences result mostly from sheer random bad luck when they are actually imposed on criminal defendants. This random bad luck is largely determined not by the defendant's criminal conduct or lack of remorse but by the prosecutor assigned to the defendant's case.

Adam Clausen's case was not much different from my own. While in his early twenties, Adam committed nine robberies in Philadelphia, crimes for which he undoubtedly deserved some imprisonment.[2]

The federal prosecutor assigned to Adam's case made several plea bargains with Adam's co-defendants, but the same prosecutor was unwilling to offer Adam a reasonable deal. So, Adam went to trial and a jury convicted him of robbery and firearms charges.

Although our crimes were similar, a federal judge sentenced Adam to 213 years of imprisonment and his release date is December 1, 2185.

Adam now spends his days teaching and mentoring other prisoners. Unless there is a miraculous presidential commutation of his sentence, Adam Clausen will die in prison. Assuming that he lives until the age of 75, taxpayers can expect to hemorrhage a sum of over 1.2 million dollars to incarcerate him.

How did Adam receive 213 years when I received 12 years for comparable crimes? In the 1980s and 1990s, Congress passed several get-tough-on-crime mandatory minimum sentencing laws. One of those laws requires a judge to impose an additional 25-year sentence for anyone convicted of a second or subsequent firearm charge, even if that subsequent offense is part of a single and continuous crime spree with no intervening arrest.[3] Because of these laws, Adam faced 205 years of mandatory minimums just for the firearm offenses.

Without these laws, Adam may have received the same 12-year sentence I did. Instead, mandatory minimums sentencing provisions allowed the prosecutor to transform a crime that averages a 10-year sentence into lifelong imprisonment.

Congress passed mandatory minimum sentencing laws, in part, because it believed that similar crimes deserved similar punishments. But what it did not consider is the role federal prosecutors play in charging the accused. Possessing an arsenal of over 4,500 federal criminal statutes, a federal prosecutor can manipulate prison sentences by picking and choosing which crimes to charge. These charging decisions ultimately dictate the prison sentence a judge must impose under federal law.

In my case, a federal prosecutor brought charges that allowed me a second chance in life despite the prosecutor's unchecked discretion. Adam was not so lucky.

When the law leads to such arbitrary results, we normally take it as a sign that the law needs to be rethought. On a fundamental level, a criminal defendant's sentence should result from even application of sentencing laws and by a judge carefully weighing the aggravating and mitigating factors, not by the subjective charging decisions made by prosecutors at the outset of a case. Giving federal prosecutors the discretion to trigger harsh mandatory minimum sentences has created much greater randomness in federal sentencing, not less.

Give the Discretion Back to the Federal Judiciary

The Justice Safety Valve Act raises a fundamental question as to which body should possess discretionary sentencing authority to impose mandatory minimum sentences. I would vote for Article III judges.

Why are federal judges better equipped than federal prosecutors to decide which criminal defendants should receive mandatory minimum sentences? To begin with, federal sentencing judges enjoy the constitutional protection of life tenure and

salary protection, which shelter them from the popular hysteria that often accompanies crime and punishment in this country. This allows federal judges to make sentencing decisions with "clear heads … and honest hearts deemed essential to good judges."[4]

Judges are also the best-equipped group to make the weighty decision of whether a mandatory minimum sentence should be imposed on a particular defendant. Most judges, unlike many prosecutors, are not seeking career advancement. Indeed, most are life-long public servants. And just like when Congress rightly thinks it can do a better job at legislating than, say, an administrative agency, most judges believe the judiciary is the best-positioned group to weigh the competing goals of sentencing and then determine what sentence should be imposed. They are, after all, judges.

The Judiciary has more information at its disposal than prosecutors when deciding whether to impose a mandatory minimum sentence. Through the adversarial process, judges receive both the prosecution and defense views on what the proper sentence should be. Additionally, judges can tap into the wisdom of federal probation officers. These officers ordinarily interview defendants and family members, and obtain school, employment, medical, and mental health records, before drafting a presentence investigation report explaining the aggravating and mitigating factors relevant to an individual defendant's sentence. And criminal defendants sometimes send their sentencing judge a letter before sentencing, placing their actions into context or explaining their remorse for those actions—all factors essential to determining a fair and just sentence. Sentencing judges thus possess a broader array of information than prosecutors to use in fashioning an appropriate sentence.

Federal judges often spend a great deal of time thinking about federal sentencing, contemplating whether a particular sentence is correct both as a matter of policy and as a matter of individual justice. I saw this in action last summer while working for Senior Judge John C. Coughenour of the United States District

Court for the Western District of Washington. What few people outside his chambers will ever understand is just how much time and thought Judge Coughenour expends on federal sentencing. When difficult cases arose, he would convene a group together in the early morning hours before the courthouse doors opened. Clerks and interns role played as prosecutors and defense attorneys, peppering Judge Coughenour with hypothetical arguments the real lawyers might present in the upcoming sentencing hearing that day.[5] While I have never witnessed a federal prosecutor prepare a case, I doubt that a busy prosecutor, faced with an overwhelming caseload, is thinking about sentencing with the same depth and effort of a Judge Coughenour.[6] And it almost goes without saying that when it comes to imposing a mandatory minimum sentence of a decade or two in prison on another human being, thoughtfulness and thoroughness count for a great deal.

As the Supreme Court recently noted, we have a "tradition of judicial sentencing," and sentencing should "not be left to employees of the same Department of Justice that conducts the prosecution."[7] This Bill correctly places the discretion to impose a statutory minimum sentence with the judiciary where it belongs.

Legislation Is Necessary: A Change in DOJ Policy Will Not Work

Attorney General Eric Holder released a memo on August 12, 2013, directing prosecutors to decline to charge the quantity of drugs necessary to trigger mandatory minimum sentences, if the defendant meets several criteria. There are a number of reasons why this Bill is superior to the new policy change directed by the Attorney General.

First, any policy change created by the Executive is a temporary fix. The Attorney General's new policy is susceptible to change with the next administration. The changes made by this Bill are of such monumental importance to the effort of criminal justice reform that they should be enshrined into law and made impervious to Executive modification.

Second, the Attorney General's memo does not go far enough with respect to drug cases. The memo applies to defendants only if: 1) the defendant's "relevant conduct," which includes the conduct of others and not just the defendant herself, does not involve possession of firearms or violence; 2) the defendant is not a leader, organizer, or manager of a drug conspiracy; 3) the defendant does not have ties to a large drug operation or gang; and 4) the defendant does not have a significant criminal history, defined as at least three criminal history points. From my experience, almost all federal drug offenses can be said to be tied to a large drug operation or gang, if only remotely, and, unless the offender is particularly young, most federal drug offenders have three or more criminal history points—usually associated with small sales of drugs, simple possession, or even traffic violations. Based on the criteria set forth by the Attorney General's memo, I question how many of the 25,000 federal defendants sentenced each year for involvement with drugs will be affected by the changes, and I understand that the Federal Public Defenders have analyzed the data and found that fewer than 1,000 defendants per year would be affected.

Third, the Attorney General's memo does not apply to mandatory minimums applicable to firearms, which have created some of the most absurd and abhorrent results. Consider again the example of Adam Clausen who committed nine robberies in one crime spree before his arrest. Because of the provision for a second or subsequent use of a firearm,[8] he received consecutive mandatory minimum sentences of 5, 25, 25, 25, 25, 25, 25, 25, and 25 years, for nine charges. Or, to put it somewhat differently, Adam received a higher sentence than terrorists,[9] persons convicted of child rape,[10] and some murderers.[11]

Adam is not the only one. During my time in federal prison, I met several prisoners who had received mandatory minimum sentences of 15 years under the Armed Career Criminal Act.[12] One received a sentence because he had committed a prior felony and police found a few bullets in his car. Another felon received 15 years because he possessed a rifle on his farm that he used to scare away the deer

in his wife's garden. Both of these defendants had wives and children, and the cost of incarcerating them totaled over $700,000. While these two were wrong to possess firearms after previously having been convicted of a felony, stiff sentences like these would be better reserved for far more serious crimes. The Attorney General's memo fails to address these cases.

The Human Toll

Adam Clausen is not the same 22-year-old that committed some robberies. In prison he has become a life coach to others, takes college classes for self-improvement, and teaches physical-fitness classes for other prisoners. He has a wife and family, and they simply don't understand why Adam received the sentence he did. To be sure, Adam made a serious mistake, but it was not the kind of mistake that required a sentence of 213 years.

Adam's story easily could have been my story. Had a different prosecutor been assigned to my case, I could have received four additional firearm charges. Had I received those additional firearm charges, the judge would have sentenced me to 85 years in mandatory minimums and the taxpayers would be footing the bill to incarcerate me over a lifetime for a crime that rarely carries a sentence of more than 20 years of imprisonment.

I truly believe that my story of rehabilitation is one that could be easily repeated, if some prisoners are given the chance. Many of the mandatory minimum sentencing provisions remove that second chance from the sentencing equation. And sentences such as Adam's serve little purpose other than to perpetuate the human suffering and waste of taxpayer dollars, when judges are forced to impose harsh mandatory sentences, even where the facts and circumstances suggest that a mandatory minimum sentence is not appropriate.

Conclusion

The Justice Safety Valve Act of 2013 is an important step forward in meaningfully addressing some of the harshest and most unfair aspects of the federal system of criminal justice. Federal mandatory minimums are often imposed simply because of the prosecutor assigned to the case, and this Bill will prevent injustices from occurring by handing over the discretion of mandatory minimum sentencing to the actor best equipped to decide whether to impose such sentences: federal sentencing judges. This Bill is also needed because the Attorney General's memo is a temporary and inadequate fix and fails to address some of the most pressing injustices in current mandatory minimum sentencing. Most importantly, this Bill will alleviate the human toll that mandatory minimum sentencing provisions have inflicted on those like Adam Clausen, whose criminal culpability did not match the punishment imposed.

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[1] I am a Gates Public Service Law Scholar at the University of Washington School of Law and the
[2] *See United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003).
[3] 18 U.S.C. § 924(c)(1)(C)(i).
[4] *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (*citing* 1 Works of James Wilson 363 (J. Andrews ed. 1896)).
[5] I asked Judge Coughenour if I could share this story and he graciously agreed. However, he expresses no opinion on the substance of my testimony.
[6] In fact, it's not a prosecutor's role to do so. They are one side in the adversary system, not a judge.
[7] *Setser v. United States*, 132 S. Ct. 1463, 1471-72 (2012).
[8] 18 U.S.C. § 924(c)(1)(C)(i); *see also* 18 U.S.C. §§ 922(g) & (h).
[9] http://www.justice.gov/opa/pr/2006/June/06_crm_389.html
[10] http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199503_Federal_Rape_Cases.PDF
[11] http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_2_A-C.pdf
[12] 18 U.S.C. § 924(e).