March 13, 2012

The Honorable Rand Paul
United States Senate
208 Russell Office Building
Washington, DC 20510

Dear Senator Paul:

I write on behalf of the America Bar Association and its almost 400,000 members to express our appreciation and to commend you for your stand against enactment of new mandatory minimum sentences proposed by S. 409, the Combating Dangerous Synthetic Stimulants Act of 2011; S. 605, the Dangerous Synthetic Drug Control Act of 2011; S. 839; and the Combating Dangerous Drugs Act of 2011. We understand that your opposition to these bills is based on your strong concerns about the federalization of crimes easily handled by the states and their imposition of mandatory minimum sentences. We share both your concerns about these bills, just as we do with many other bills to add new federal crimes, and we urge other Senators to stand with you against such legislation.

The ABA has been concerned for some time about the federalization of crime. In the last 40 years, Congress has enacted new federal criminal laws at an unprecedented rate, both in sheer numbers of subjects addressed and in the scope of new legislated federal jurisdiction. Beyond the increase in the number of federal laws, the last few decades have seen a massive growth in the size of the overall federal criminal justice system, with attendant costs. Caution about inappropriate federalization must also include caution about the addition of federal investigative and prosecution personnel beyond what is needed for offenses of a truly federal nature.

Congress's decision to create a federal crime confers jurisdiction upon other federal entities and results in the involvement of others in different federal government branches - prosecutors, investigators, administrative agencies, courts, and prison authorities- as well as federal public defenders. Federal executive departments (including, but not limited to, the Department of Justice) assume broad supervisory responsibility over newly created crimes. This activates powerful federal investigatory agencies (such as the FBI, Treasury Department agencies, or Postal Inspectors) to investigate citizen activity for possible federal criminal violations. The scope of federal prosecutors’ interests widens,
resulting in power to act in a broad range of citizen conduct and intervene in more local conduct. The priorities of the Department of Justice may be changed or diluted, requiring consideration of a different set of goals and programs beyond those entailed in concentrating on traditional federal crimes.

Another important effect of federal criminal legislation is felt by the federal courts, which become forums for new classes of cases, many of which would otherwise be tried only in state courts. Convictions lead to federal imprisonment, burdening the federal prison system with all the attendant consequences of such expansion.

With 40 states already regulating many or most of the drugs addressed in these bills, it is not clear to us why federal intervention is needed. We are also deeply concerned about and strongly opposed to authorizing a large number of new federal mandatory minimum penalties to be added to existing federal law. We oppose the legislative proposals pending in the Senate because they would expand the application of existing Schedule I penalties and mandatory minimum sentences to include synthetic substances. Schedule I of the Controlled Substances Act authorizes federal prosecutors to seek up to 20 years imprisonment for individuals convicted of distribution, possession with intent to distribute, importation or manufacturing of any quantity of a synthetic substance, and it requires a mandatory minimum sentence of 20 years to life imprisonment for individuals engaged in this activity and charged with aggravating circumstances. This approach not only inappropriately applies a one-size-fits-all approach, but it eliminates the ability of judges to exercise discretion to impose an appropriate sentence taking into account individual circumstances.

Federal mandatory minimum sentences also distort and exacerbate the growing federalization of crime. When Congress approves legislation that creates automatic, lengthy federal prison sentences for common local and low-level drug crimes, it provides irresistible incentives to shift those otherwise state matters into the federal system. The results are clear enough: after nearly three decades of federalizing such crimes, the Federal Bureau of Prisons now administers a prison population that has grown eight-fold over that period, operates at 140% of capacity and is an immense and growing cost.

Today, while states are enacting significant sentencing and corrections reforms to reduce unnecessary and excessive incarceration of low-level offenders, Congress is considering proceeding with the business-as-usual, "big-government" approach to federal criminal justice that is characterized by ever swelling rolls of federal crimes with expanded federal jurisdiction and additional mandatory minimum sentences. The ABA commends you for your principled opposition to these bills and urges you to stand firm.

Sincerely,

Wm. T. (Bill) Robinson III