

Thomas M. Susman
Director
Governmental Affairs Office

AMERICAN BAR ASSOCIATION
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762
SusmanT@staff.abanet.org

October 1, 2009

The Honorable Carl Levin
Chairman, Senate Armed Services Committee
United States Senate
Washington, DC 20510

The Honorable Ike Skelton
Chairman, House Armed Services Committee
United States House of Representatives
Washington, DC 20515

RE: Conferees Considering the Hate Crimes Mandatory Minimum Provision in the FY-2010 National Defense Authorization Act

Dear Chairman Levin and Chairman Skelton:

As you consider the National Defense Authorization Act for Fiscal Year 2010, (S. 1390), I urge you on behalf of the American Bar Association to remove the mandatory minimum sentencing provision contained in Division E, the Matthew Shepard Hate Crimes Prevention Act. Sec. 4712 would provide a six-month mandatory minimum sentence in the case of assault against members of the Armed Forces on account of their status as a service member and resulting in bodily injury.

We urge that this mandatory minimum sentence be removed from the provision. The federal statute criminalizing assault by striking, beating, or wounding is currently punishable by a fine or imprisonment for not more than six months or both. *See* 18 U.S.C. § 113 (4). Assault resulting in serious bodily injury is punishable by a fine or imprisonment for not more than ten years or both. *See* 18 U.S.C. § 113 (6). The Federal Sentencing Guidelines provide a sentence of between 24 and 30 months for assault that results in bodily injury, 30 to 37 months for serious bodily injury and between 37 to 46 months if the injury is permanent or life-threatening. *See* U.S.S.G § 2A2.2. According to the U.S. Sentencing Commission, in 2008, the median sentence for all assaults was more than two years. *See* U.S.S.G., 2008 Sourcebook of Federal Sentencing Statistics, Table 13.

A total of 387 people were sentenced in 2008 for aggravated assault (which includes assault with bodily injury) to an average sentence of more than two years. Of those, 326 were sentenced above or within the guidelines or sentenced below them pursuant to a government motion. *See* 2008 Sourcebook, Table 28. The guidelines and our courts clearly take aggravated assault very seriously and reduce sentences only when necessary to assist in the administration of justice or to recognize that the guideline overstates the actual culpability of the defendant.

We urge you to reject this mandatory minimum because it is unnecessary and because it undermines the American system of justice. Mandatory minimums limit the ability of courts to properly do their jobs and needlessly tie the hands of judges by stripping them of their discretion to weigh the facts and evidence on a case-by-case basis. Just as courts should not determine what the government should charge a defendant in a given case, prosecutors should not determine what a court sentences in a given case. Mandatory minimums, however, virtually put sentencing in the hands of prosecutors, whose choice of charges and plea bargains can be more important in the ultimate outcome than any other factor. Further, mandatory minimum sentences have greatly contributed to our country's massive and unsustainable over-incarceration. Far from writing new mandatory minimum sentences into federal law, Congress should be taking steps to reduce or eliminate their use.

Once again, as you continue working on final conference language for the National Defense Authorization Act and the hate crimes provision contained within it, we urge you to remove the mandatory minimum sentence language contained in Sec. 1389(a)(3).

Sincerely,



Thomas M. Susman

Cc: The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee

The Honorable John Conyers
Chairman, House Judiciary Committee

The Honorable Lamar Smith
Ranking Member, House Judiciary Committee

The Honorable John McCain
Ranking Member, Senate Armed Services Committee

The Honorable Howard "Buck" McKeon
Ranking Member, House Armed Services Committee