

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

September 17, 2009

The Honorable Maxine Waters
2244 Rayburn Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Waters:

I write on behalf of the American Bar Association to commend your leadership in introducing H.R. 1466, the Major Drug Trafficking Prosecution Act of 2009, to refocus federal prosecutorial resources to major and serious drug traffickers, provide more discretion to sentencing judges, and eliminate mandatory minimum sentences for drug offenses. The ABA believes that enactment of this much-needed legislation would be a significant step by Congress to address unfairness in the sentencing process and to reduce racial disparities in the federal justice system.

The ABA has devoted significant time and interest to the broad subject of federal sentencing reform and has done so with a sense of urgency in recent years, particularly through the work of its Section of Criminal Justice, its Justice Kennedy Commission and its Commission on Effective Criminal Sanctions. The ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121 A, approved August 9, 2004, urged all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.” The same resolution calls upon Congress to “[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently.”

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 *Standards for Criminal Justice on Sentencing* (3d ed.) state clearly that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that “[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized,” and “[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.”

Mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory, are intended to reduce. This is because prosecutors wind up imposing sentences through charging decisions they make, rather than allowing judges to impose the sentence, taking into account all relevant factors regarding the offender and the charged offense. Mandatory minimum sentencing schemes shift discretion from judges to prosecutors who lack the training, incentive, and often appropriate information to properly consider a defendant’s mitigating

circumstances at the charging stage of a case. H.R. 1466 would repeal mandatory minimum sentences for federal drug offenses and restore authority to judges to consider factors related to each individual crime and offender in making their sentencing decisions.

H.R. 1466 would take much-needed steps to address over-incarceration of low-level drug offenders in the federal system. Since the enactment of federal mandatory minimum sentencing for drug offenses in the mid-1980s, the U.S. prison population has increased twelve-fold and the Federal Bureau of Prisons budget has increased from \$220 million in 1986 to \$5.4 billion in 2008. The United State Sentencing Commission (USSC) has documented in four separate reports to Congress that mandatory minimum sentences for cocaine offenses triggered solely by the weight of crack or powder cocaine have resulted in lengthy federal prison sentences for a majority of offenders who have a “low-level” role in drug distribution. Its May 2007 report to Congress found that as a result of mandatory minimum sentencing policy, federal drug enforcement resources are not being properly focused, as only 12.8 percent of powder cocaine prosecutions and 8.4 percent of crack cocaine prosecutions were brought against high-level offenders.

Mandatory minimum sentences for drug offenses have consistently been shown to have a disproportionate impact on African Americans. The USSC, in a 15-year overview of the Federal sentencing system, concluded that “mandatory penalty statutes are used inconsistently” and disproportionately affected African American defendants. As a result, African American defendants are 20 percent more likely to be sentenced to prison than white drug defendants. Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62 percent, compared with a 17 percent increase among white drug defendants.

Much of this disparity is attributable to the severe penalties for crack cocaine offenses. According to the 2007 report by the USSC, African Americans constituted 82% of those sentenced under federal crack cocaine laws. This is despite the fact that 66% of those who use crack cocaine are Caucasian or Hispanic. This prosecutorial disparity between crack and powder cocaine results in African Americans spending substantially more time in federal prisons for drug offenses than Caucasian offenders. Indeed, the Commission reported that revising the crack cocaine threshold would do more to reduce the sentencing gap between African Americans and Caucasians “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system.” H.R. 1466 would eliminate the crack-versus- powder sentencing threshold disparity as part of its broader reform of federal drug sentencing.

The ABA believes that enactment of H.R. 1466 would restore balance and fairness to federal sentencing policy regarding drug offenses by refocusing federal policy toward major drug traffickers and providing judges needed sentencing discretion. We look forward to working with you toward passage of H.R. 1466.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman