September 14, 2011

The Honorable Patrick Leahy
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: S. 1151, Personal Data Privacy and Security Act

Dear Chairman Leahy:

We understand that the Judiciary Committee will soon consider legislation to address the government’s ability to prevent attacks on our nation’s critical computer-based infrastructure. The ABA recognizes the need to protect this infrastructure and to deter crimes against it. We believe, however, that those who willfully damage critical infrastructure computers deserve to be punished to a degree commensurate with the severity of their crime, as well as their personal culpability. Because mandatory minimums often frustrate the ability of courts to impose proportionate and individualized sentences, we are pleased that you did not include new mandatory sentencing provisions in your bill, S. 1151. We urge the Committee to reject any amendment calling for new mandatory minimum sentences when it marks up the bill.

Mandatory minimum sentencing laws are blunt, inefficient tools for addressing criminal conduct. Indeed, existing evidence does not support any significant public safety benefit resulting from increasing the severity of sentences by imposing longer prison terms. Additionally, the broad expansion of the use of mandatory minimums in federal sentencing in the past three decades has coincided with enormous growth in the cost of maintaining a constantly growing federal corrections system. In a time of belt-tightening in other areas of federal spending, the ABA has called for similar scrutiny in federal sentencing policies. We believe it is time to take significant steps to reduce the size of the federal prison population and to adopt sentencing policies that have demonstrated greater efficacy in reducing crime, while also being the most cost-effective.

One of the purported benefits of mandatory sentencing laws is their ability to minimize sentencing disparities among similarly situated defendants. The reality, however, is that mandatory minimums are more likely to distort the process of
assessing an individual’s culpability by placing too much emphasis on a single factor, such as weight in drug cases or loss in fraud cases. Similarity is reduced to how many pills were in a bottle or how much money might have been lost. In too many cases, sentencing uniformity is attained at the cost of ignoring more important factors that might dictate disparity.

While producing few if any benefits, mandatory minimums cause very real social and economic harms. First, they have helped to propel the five-fold increase in the federal prison population since the mid-1980s. Federal prisons are operating at 137 percent of rated capacity, putting guards, prison personnel, and prisoners at real and imminent risk. Second, mandatory minimums have contributed greatly to the racial disparities that plague federal sentencing and corrections. For example, the decision whether to charge criminal conduct under a statute that carries a mandatory minimum is in the hands of the government, and prosecutors also control which cooperating defendants to recommend for a waiver of the mandatory minimum for “substantial assistance.” African Americans have historically received a lower rate of such substantial assistance motions from the government. Finally, mandatory minimum sentences tend to over-punish and over-incarcerate. We are aware of too many first-time, nonviolent offenders who have received prison terms in excess of 20 years. Our long-held belief that lengthy incarceration is neither effective in reducing crime nor humane has been reinforced after a generation of research has revealed that there are better ways to deter offenders and maintain public safety.

For all of these reasons, opposition to mandatory minimum sentencing laws is growing, including in some unexpected quarters. Most recently, former House Speaker Newt Gingrich, former Attorney General Ed Meese, Family Research Council President Tony Perkins, former Florida governor Jeb Bush, former drug czar Bill Bennett and others have joined forces to form Right on Crime, a group dedicated to achieving a cost-effective criminal justice system that “protects citizens, restores victims, and reforms wrongdoers.” Included in the group’s proposals for reform is a call to consider “eliminating many mandatory minimum sentencing laws for nonviolent offenses. These laws remove all discretion from judges who are the most intimately familiar with the facts of a case and who are well-positioned to know which defendants need to be in prison because they threaten public safety and which defendants would in fact not benefit from prison time.”

The ABA has long opposed mandatory minimum sentencing and supports elimination of their use in federal sentencing. We therefore urge you to reject any amendments to S. 1151 that call for new mandatory minimum sentences. Thank you for your consideration of our views, and please feel free to contact us should you have any questions regarding this letter.

Sincerely,

Thomas M. Susman