Senate Judiciary Committee Hearing
"Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"
Answers to Questions for the Record Submitted by Senator Al Franken for Brett Tolman

Question 1: I think that mandatory minimum sentences raise serious constitutional issues. The Eighth Amendment prohibits cruel and unusual punishments. In *Solem v. Helm*, the Supreme Court said that this is a ban not only on barbaric punishments, but also on "sentences that are disproportionate to the crime committed."

And the Fifth and Fourteenth Amendments guarantee due process before one may be deprived of liberty. I am troubled by the notion that a person receives due process in a criminal case when the judge is forbidden from taking into account the unique circumstances of his case.

I take it from your written testimony that there also might be a separation-of-powers issue here. Could you elaborate on that?

Answer 1: I agree that there are constitutional concerns surrounding some mandatory minimum sentences. Regarding separation-of-powers, mandatory minimum sentences have placed enormous power in the hands of federal prosecutors, such that they exercise virtually complete control over the entire criminal justice process. Federal prosecutors decide who to charge, what to charge, how many counts to charge, the terms of any plea agreement, and all too often what the range of sentence will be. Many have argued that with the sentencing guidelines now being discretionary, some balance has been returned. In my view, this is neither accurate nor the reality in federal prosecutions. The executive branch still exercises too much power given the ease with which the sentence or sentencing range can be manipulated based solely upon charging decisions. Prosecutors can elevate the sentence through the use of strategic decisions at the time of charging – either through the use of mandatory minimums, the manipulation of dollar/loss figures, or the manipulation of drug quantity factors.

For most of America's history as a constitutional republic, the vast majority of sentencing decisions were left in the hands of judges. This system has two major advantages: first, appointed judges are independent from the winds of political pressures to impose disproportionate sentences in criminal cases. Second, and most importantly, judges become intimately familiar with the facts of the case and the circumstances of the particular defendant, enabling them to make decisions based on the full spectrum of relevant factors.

In the past two or three decades, we have seen dramatic changes in the way these sentencing decisions are made. While it is within Congress's constitutional powers to narrow or limit the discretion of federal judges in many circumstances, both the number of current mandatory minimum sentences and the severity of many of these sentences raise serious concerns that the power of federal judges is being unduly restrained.

In short, Congress has effectively removed discretion historically belonging to the judiciary – an institution prized for its independence and impartiality – and placed it in the hands of federal prosecutors. The prosecutors I worked with as a U.S. Attorney impressed me with their professionalism and commitment to justice, but our constitutional system was designed to

prevent *any* one person from wielding as much power as these men and women have been given by Congress. And as is made clear by our "Policy Statement of Former Federal Prosecutors and Other Government Officials," many of these prosecutors – including some of the most conservative in the country – believe that the level of discretion they were given has resulted in an imbalance in the scales of justice.

I therefore believe that as both a constitutional matter and a policy matter, Congress should engage in a thoughtful debate about the best way to edit and redraft current federal criminal laws and sentencing policies, which should inform us how to most effectively scale back the number and severity of mandatory minimum sentences.

Question 2: Many federal judges have spoken out against mandatory minimum sentences. For example, in a 2001 opinion, Judge Paul Magnuson, a Reagan appointee to the federal bench in Minnesota, raised serious questions about the application of a mandatory minimum sentence in the case before him. The defendant in the case – a mother who was addicted to drugs – pled guilty to manufacturing methamphetamine. Judge Magnuson thought that a sentence of 70 months – almost six years – was appropriate. But a mandatory minimum sentencing statute required a ten-year sentence, in part because the defendant previously had written two bad checks – one for $45 and the other for $38 – which disqualified her from safety valve relief.

Judge Magnuson was so outraged by sentencing law that he recused himself from the case. He wrote this:

> I continue to believe that a sentence of 10 years' imprisonment under the circumstances of this case is unconscionable and patently unjust. Upon re-sentencing, [the defendant] will be sacrificed on the altar of Congress' obsession with punishing crimes involving narcotics. This obsession is, in part, understandable, for narcotics pose a serious threat to the welfare of this country and its citizens. However, at the same time, mandatory minimum sentences-almost by definition-prevent the Court from passing judgment in a manner properly tailored to a defendant's particular circumstances. This is one case in which a mandatory minimum sentence clearly does not further the ends of justice.

It seems to me that federal judges are most familiar with the way these laws operate in the criminal justice system. Of what significance is it that so many federal judges have been outspoken in their opposition to mandatory minimum sentences?

Answer 2: It is absolutely correct that more and more federal judges are speaking out against the overuse of mandatory minimum sentences. As I discussed in my written testimony, Judge Paul Cassell spoke out on this issue in the case of Weldon Angelos, who was convicted of selling marijuana to a police informant several times while having a firearm and was sentenced to a term of 55 years in prison. Judge Cassell described this sentence as "unjust, disproportionate to his offense, demeaning to victims of actual criminal violence… [and] one of those rare cases where

the system has malfunctioned." Judge Cassell also signed onto our "Policy Statement of Former Federal Prosecutors and Other Government Officials."

This policy statement underlines the point: those officials with the most intimate experiences with the criminal justice system are now acknowledging, in greater and greater numbers, that mandatory minimum sentences are failing our system in many instances.

It is important for Congress to listen to these informed voices. Prior to my experience as a U.S. Attorney, I worked in Congress as Chief Counsel for Crime and Terrorism for the United States Senate Judiciary Committee under Chairman Specter and before him Chairman Hatch. This experience gave me important insights into how Congress enacted many of these mandatory minimum sentences in the first place. Too often, the process was not as thoughtful as it should have been. Instead, Congress set policies that did not properly take into account the practical experiences of prosecutors, judges, and other officials in the criminal justice system.

Congress now has the opportunity to correct these mistakes by involving these officials, listening closely to their viewpoints, and shaping thoughtful and meaningful policy reforms that strike a more appropriate balance between the relevant competing interests at stake.

Again, my former colleagues and I stand ready to serve as resources in this process.