Testimony

"Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences"

Testimony before the Senate Judiciary Committee

September 18, 2013

Brett Tolman
Shareholder
Ray Quinney & Nebeker

Chairman Leahy, Ranking Member Grassley, and members of the committee:

Thank you for the opportunity to testify today.

My name is Brett Tolman, and I am currently a shareholder at the law firm of Ray Quinney & Nebeker, PC based in Salt Lake City, Utah. I am the former United States Attorney for the District of Utah – a position I held for nearly 4 years from 2006 to 2009. As U.S. Attorney I made it a priority to protect children, to aggressively prosecute mortgage fraud, to preserve American Indian heritage, and to stem the abuse of illicit and prescription drugs. Prior to serving as US Attorney, I was Chief Counsel for Crime and Terrorism for the United States Senate Judiciary Committee under Chairman Specter and before him Chairman Hatch.

Prior to my service in the United States Senate, I was an Assistant United States Attorney for the District of Utah. As a line prosecutor in the federal system I personally prosecuted hundreds of felonies. While I prosecuted mostly violent crime felonies, I also participated in the prosecution of white-collar criminals, drug traffickers, child predators, violent illegal immigrants, and others. Indeed, in my nearly a decade with the Department of Justice I was responsible for the prosecution of individuals who are currently serving long prison sentences – some longer than 30 years in federal prison.

I am here today because my experience, while at times rewarding, revealed the need for federal criminal justice reforms that are not only meaningful, but the result of thoughtful analysis of deficiencies in the administration of justice in the federal system. I am not alone in this position. Several of my former colleagues have joined me in signing a "Policy Statement of Former Federal Prosecutors and

Other Government Officials," which I have brought with me and ask that it be submitted into the record of this hearing.

The signers of this statement are a diverse group of former federal prosecutors, judges, Department of Justice and other government officials who deeply believe in notions of fairness in the administration of justice. Many of us are noted conservatives who were some of the most aggressive appointees when it came to pursuing crime. While our experiences vary, we can agree that a shift in investigative and prosecutorial direction has occurred in the federal criminal justice system over the past few decades.

Rather than focusing valuable resources on the highest levels of criminal conduct, the reality is that today's federal system is all too often mired in the pursuit of low-level offenders who are too often over-punished by the federal government and who, a growing number believe, should otherwise be prosecuted by the states. More and more individuals, on both sides of the political aisle, are recognizing that many of these low-level offenders are being given extremely long sentences in federal prisons – sentences that too often do not match the gravity of the crimes committed.

The result, ironically, is a burgeoning prison population that, with its rising costs, is becoming a real and immediate threat to public safety. Department heads and congressional leaders have become painfully aware that the growing prison budget is consuming an ever-increasing percentage of the Department of Justice's budget. Over the last 15 years, the enacted BOP budget has increased from 15% to more than 25% of the Department of Justice budget, and I have seen projections it will exceed 30% by the end of this decade.

During my tenure as U.S. Attorney, which included roughly a year as a member of the Attorney General's Advisory Committee, I became aware of growing budgetary issues as many US Attorneys' offices were informed that they could no longer hire additional prosecutors – in many instances unable to fill existing vacancies, let alone secure much needed additional FTEs. And as I informed this committee last year, I observed the budget become the absolute center of focus of the Department of Justice and its U.S. Attorneys. More significantly, in individual U.S. Attorney's offices across the country, lack of funding is increasingly the reason behind failed or abandoned law enforcement obligations and partnerships. U.S. Attorneys are increasingly turning to volunteer Special Assistant U.S. Attorneys, investigative agency attorneys, and state and local prosecutors to help fill the widening gaps.

It is with these concerns in mind that I appear before this Committee. It is my hope and intention to highlight areas of concern and to engage at all levels necessary to assist in achieving meaningful and thoughtful reforms. Specifically, this Committee should focus its attention on several unfortunate consequences of our current front-end policies and practices, including the use and abuse of certain mandatory minimum statutes.

Under current laws, federal prosecutors 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.

Unfortunately, the federal system has neither been thoughtful nor conscientious in its punishment of those it convicts. In the drug arena, DOJ is expected to use the hammer of mandatory minimum sentences to dismantle drug trafficking – but the reality is that most prosecutions, despite resulting in significant prison sentences, are only netting insignificant "mules" or small-time traffickers. The threat of long mandatory minimum sentences has *not* resulted in the identification of high-level leaders of drug organizations by low-level targets, primarily because "kingpins" are smarter than that – they insulate themselves so the "mules" and street-corner dealers either do not know who they are or do not have enough information to lead to their discovery let alone prosecution. As a result, the long federal sentences routinely go to the lower-level targets while the "kingpins" and their drug trafficking operations continue to thrive.

Accordingly, it has long been my view that punishment in the federal system should not be based upon the quantity of drugs but on other factors such as the role or position in the trafficking or distribution operation. Unfortunately, the substantial majority of federal drug prosecutions are utilizing mandatory minimum statutes based solely upon quantity of drugs found. Adding to the problem is the use of section 851, which is effectively a way in which drug sentences are doubled if the target has a prior drug felony. Consequently, the already long mandatory minimum sentences in drug prosecutions are doubled if a prior exists – a fact which is all too common among low level drug couriers and users.

Over-punishment is certainly not confined to the drug arena. As I have previously informed this committee, in the white collar world for example, long sentences are too easily the product of manipulating the "dollar-loss figure" – resulting in baffling and unfortunate prosecutions such as Sholom Rubashkin, a 52-year old

Jewish rabbi with no criminal history who is serving 27 years for financial fraud despite there being no actual victim of fraud.

It is of particular concern that mandatory minimum sentences have become the sought-after result by which many in the criminal justice system measure success. The practical implications are such that the federal criminal justice system has become overly-reliant on the use of mandatory minimum statutes in making its charging decisions. All too often, prosecutors and investigators associate the success of their investigations and prosecutions with the amount of time a particular defendant receives in sentencing. Felonies are more significant than misdemeanors, multiple felonies mean longer prison sentences, and mandatory minimum cases are viewed as more important cases with undoubtedly more significant offenders. However, prosecuting the "more significant offenders" is not the reality in the application of many mandatory minimum prosecutions in the federal system. The institutional pressures to prosecute with an eye toward identifying and using mandatory minimum statutes to achieve the longest potential sentence in a given case are severe. This fact became all too vivid for me in one of my earliest prosecutions as a young federal prosecutor.

My first assignment as a new federal prosecutor was to prosecute violent crime. One of my first cases was the prosecution of Marco Rivas. Mr. Rivas was a young man with very little criminal history who made unfortunate decisions over a two-day period of time that resulted in his potential incarceration for over 57 years, or effectively the remainder of his life. Based upon this range of sentence, it would be natural to assume that Mr. Rivas killed someone or otherwise committed such a capital offense as to effectively demand the equivalent of a mandatory minimum life sentence. To the contrary, Mr. Rivas, while trying to evade a pursuing police officer stole three vehicles from three different individuals. I was asked to take the case and to determine whether a federal prosecution for carjacking could be brought for each vehicle theft, and, because Mr. Rivas had a gun on him, whether the mandatory minimum gun enhancements could apply. After concluding that I could bring multiple carjackings and multiple mandatory minimum enhancements, I was shocked to learn that the minimum sentence Mr. Rivas was looking at was over 55 years in prison. I did not believe this was a fair result and had to expend significant time and energy to secure DOJ permission to offer Mr. Rivas a plea deal for only two of the offenses charged. Mr. Rivas was faced with having to plead guilty to a near 30-year sentence simply to avoid the effective lifelong incarceration. Significantly, Mr. Rivas' sentence was still roughly 10 times the amount of prison time he would have otherwise received had he been prosecuted in the state system – where this type of crime is traditionally prosecuted.

Furthermore, my experience has been that federal agents are all too often incentivized to allow the commission of multiple offenses in order to enable federal prosecutors to stack gun charges and get the longest possible mandatory minimum sentences under section 924(c) of Title 18 of the U.S. Code. Rather than making arrests as soon as they have evidence of an offense, it is not uncommon for agents to watch these offenders commit one or more further crimes, which unnecessarily increases the potential for further crime victims, but invokes additional mandatory minimums and thus facilitates longer sentences.

As a particularly egregious example of this problem, look at the case of Weldon Angelos, who was convicted of selling marijuana to a police informant several times while having a firearm strapped to his body. Mr. Angelos had very little if any criminal history, and he never used or even brandished the firearm during the undercover buys. The law enforcement officials in the case allowed Mr. Angelos to commit multiple offenses, knowing that the 924(c) mandatory minimum sentences could be stacked on top of each other by the prosecutor. As a result, Mr. Angelos received a mandatory minimum sentence of 55 years in prison – a sentence that far outweighs the minimum sentence for hijacking, kidnapping, or rape. The federal judge who was forced to impose this sentence, Paul Cassell – now a former federal judge who has joined me in signing the attached Policy Statement – described it as "unjust, disproportionate to his offense, demeaning to victims of actual criminal violence… [and] one of those rare cases where the system has malfunctioned."

These examples highlight why many, regardless of political affiliation, have argued as of late that the federal criminal justice system needs to be reformed in two meaningful ways: first, on the front end, through a thoughtful editing and redrafting of current federal criminal laws and sentencing policies, and second, on the back end, through a thoughtful implementing of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system. It is not enough to focus on sentencing reforms – we must also address the issues associated with risk and recidivism reduction in order to offset the out-of-control incarceration costs plaguing the federal system. So I hope you will consider another hearing to look into the federal prison system, as well.

Along with my fellow signers of the Policy Statement, I am here to serve as a resource in this process, so we can all – current and former servants of the law – do our part to ensure that justice shall be done.

In this direction, I have already been working with members of the House Judiciary Committee to help them shape H.R. 2656, the Public Safety Enhancement Act of 2013. And I look forward to working with members of this committee to finalize a Senate version of this bipartisan legislation, which will implement evidence-based federal prison reform strategies that are finding success in states like Texas, Ohio, Vermont, Rhode Island, South Carolina and many others.

Further, my fellow signers and I hope to work with the Committee to identify the front-end policies and practices that have created imbalance, and then develop thoughtful reforms that will allow us to achieve a more appropriate balance in the federal criminal justice system.

Without meaningful front-end and back-end reforms, the oft quoted ideal articulated by Justice George Sutherland in Berger v. United States, 295 U.S. 88 (1935), will remain a thing of the past, incapable of being achieved. He wrote:

> *The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.*
>
> *As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so.*
>
> *But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

As you move forward to finalize and debate specific reforms, I respectfully urge the Committee to take a thoughtful approach that avoids the political divide, and focuses instead on our common duty and interest to strike hard blows but refrain from striking foul blows.

Thank you, Chairman Leahy, Ranking Member Grassley, and members of the Committee.