



November 13, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

I am the Robert J. Watkins/Procter & Gamble Professor of Law at the Moritz College of Law at The Ohio State University. My primary teaching and scholarship activities focus on American criminal law and policy, with federal sentencing decision-making as my particular area of special expertise. I have authored over 50 articles on a variety of sentencing topics, I am a co-author of the leading sentencing casebook used in American law schools, and I am the creator and author of the widely-cited web log, *Sentencing Law and Policy*. I also serve as co-managing editor of two academic law journals, the *Federal Sentencing Reporter* and the *Ohio State Journal of Criminal Law*. My articles and other writings have been cited by the U.S. Supreme Court and numerous other federal and state courts.

To begin, I wish to express my strong support for the important and difficult work you and your colleagues are doing to try to enact meaningful and needed reforms to federal sentencing statutes. I have long been concerned about the unfairness and inefficacy of extremely long federal prison terms, especially when they are applied through mandatory minimum sentencing provisions to lower-level, non-violent and/or first-time offenders. I very much share the perspective recently expressed by your colleague F. James Sensenbrenner when he called modern mass incarceration “both irresponsible and unsustainable,” and lamented that in “our sentencing policy, we’re spending more, getting less, and destroying communities in the process.”¹ And I have been moved to write this letter to express formally my support for the bill you have recently introduced, the “Sentencing Reform Act of 2015” (H.R. 3713), which includes statutory reform provisions that seem to have the greatest potential to secure passage and get to the desk of the President before the end of the year.

Though I surmise that some reform advocates may criticize certain provisions of H.R. 3713 as not going far enough, and that some reform opponents may criticize certain provisions of H.R. 3713 as going too far, I personally believe that key provisions of the bill would lead to a

¹ *Written Testimony of Rep. F. James Sensenbrenner, Jr.* delivered during Criminal Justice Reform Hearing before the House Oversight and Government Reform Committee (July 14, 2105).

substantial net reduction, both short-term and long-term, in federal incarceration levels. Moreover, and perhaps just as importantly, passage of H.R. 3713 would deliver and reinforce, through concrete statutory reforms, the important message that Congress recognizes and is especially eager to ensure that the most severe federal prison terms are carefully and narrowly targeted to apply only to the most culpable federal offenders.

The fundamental basis for my views on this matter come primarily from the detailed data promulgated by the U.S. Sentencing Commission (USSC) based on its detailed analysis of key provisions of S. 2123, which are in various ways comparable to key provisions H.R. 3713. Most tangibly and obviously, according to USSC's analysis, Section 7 of H.R. 3713, by providing finally for full retroactive application of the statutory sentence reductions of the Fair Sentencing Act of 2010, would "allow 5,826 offenders currently in prison to receive an approximate 20 percent reduction in sentence." I continue to believe it was problematic for Congress to choose not to provide expressly for full retroactivity of the FSA for the lowest-level crack offenders back in 2010, and I sincerely hope Congress can and will provide relief for these offenders still serving, five years after the passage of the FSA, unfairly long crack sentences based on the old disparate 100-1 crack/powder statutory sentencing scheme.

In addition, working section by section and relying on USSC statistical analysis:

--- **Section 6 of H.R. 3713**, by altering the mandatory minimum penalty under the Armed Career Criminal Act, "would reduce the sentence of 277 offenders each year by approximately 21.6 percent" and "could result in a sentence reduction for 2,317 offender currently in federal prison."

--- **Section 5 of H.R. 3713**, by reducing the severity and applicability of the most extreme mandatory minimum sentencing enhancement for using a firearm in the commission of a violent crime or drug offense, would reduce sentences in dozens of cases a year and applied retroactivity would fix the "stacking" problem that led to the extreme 55-year mandatory minimum sentence term for Weldon Angelos for low-level marijuana dealing.

--- **Section 4 and 3 of H.R. 3713**, by permitting certain offenders who are currently subject to the 10-year mandatory minimum penalty to be subject to the 5-year mandatory minimum instead, would "reduce the sentence of 550 offenders annually by approximately 19.3 percent," and by broaden the safety valve "would reduce the sentence of 3,314 offenders annually by nearly 20 percent and save 1,593 federal prison beds within 5 years of enactment."

--- **Section 2 of H.R. 3713**, by reducing certain mandatory minimum penalties for certain recidivist offenders, would subject near one hundred offenders each year to lower mandatory minimum penalties and could lead to "2,265 offenders currently incarcerated" receiving a sentence reduced by over twenty percent.

I realize that, in addition to this significant and consequential array of reduced sentencing provisions, H.R. 3713 includes a few provisions that modestly expand in a few sections the types of prior offenses that could possibly trigger mandatory minimum prison terms for certain repeat offenders. My understanding is that these provisions expanding the reach of a few mandatory minimums would, statistically speaking, impact far few cases in the future than the much larger

number of cases impacted by all the reduced and narrowed mandatory minimum provisions detailed above. Moreover – and arguably even more importantly as we envision how passage of H.R. 3713 would actually impact the work of U.S. Sentencing Commission, prosecutors, probation officers and judges who must interpret and apply faithfully federal sentencing statutes – even this modest expansion of the potential applicability of a few mandatory minimums to certain serious repeat offenders ultimately serves to deliver and reinforce the fundamental and fundamentally important modern message that Congress only wants the most severe federal prisons terms to be carefully and narrowly targeted to apply only to the most culpable federal offenders.

I will close this letter in support of H.R. 3713 by seeking to stress again my view **(1)** that Congress should enact, and should enact as quickly as possible, meaningful and needed reforms to federal sentencing statutes, and **(2)** that the symbolism and spirit of passing a significant reform bill like H.R. 3713 may be nearly as important and as consequential as some of its sentencing substance. I strongly believe that overcrowded federal prisons and the national problems connected to modern mass incarceration have been the consequence not only of a distinctively severe set of federal sentencing laws, but also the symbolic message suggested by these laws that Congress generally wants federal prosecutors always to pursue, and federal judges always to impose, longer and longer prison sentences on nearly any and every federal offender. By enacting a bipartisan bill with provisions like H.R. 3717, especially after having previously enacted the bipartisan Fair Sentencing Act in 2010, Congress could and would deliver a much sounder message to all those who work in the federal sentencing system – namely that the most severe federal prisons terms need to be carefully and narrowly targeted to apply only to the most culpable federal offenders.

Respectfully submitted,

A handwritten signature in black ink that reads "Douglas A. Berman". The signature is written in a cursive, flowing style with a long horizontal line extending to the right.

Professor Douglas A. Berman
Robert J. Watkins/Procter & Gamble Professor of Law
The Ohio State University Moritz College of Law