

**REPORT ON LEGISLATION
BY THE FEDERAL COURTS COMMITTEE**

S. 1917

Sen. Grassley

AN ACT to reform sentencing laws and correctional institutions.

THE SENTENCING REFORM AND CORRECTIONS ACT OF 2017 (S. 1917)

THIS BILL IS APPROVED

I. INTRODUCTION

The New York City Bar Association (“the City Bar”) has determined to support this legislation—which the Senate Judiciary Committee approved with bipartisan support on February 15, 2018—and commends the many congressional leaders who are leading this bipartisan effort for criminal justice reform and urges prompt action on this bill.

The City Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The City Bar includes among its membership lawyers in virtually every area of law practice, including many present or former federal prosecutors as well as many lawyers who represent defendants in criminal cases. The City Bar’s Federal Courts Committee is charged with responsibility for studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts.

The City Bar’s 2015 report, “Mass Incarceration: Seizing the Moment for Reform,” called on Congress and the state legislatures to prioritize reduction of mass incarceration. The proposed reforms included repealing or reducing mandatory minimum sentences, expanding sentencing alternatives to incarceration and the availability of rehabilitative services during and following incarceration to reduce recidivism and better enable individuals to successfully reenter society, and providing opportunities for individuals with misdemeanor and non-violent felony convictions to seal those records.¹

The City Bar recognizes that the proposed Sentencing Reform and Corrections Act, if enacted, would make significant progress towards the goals of reducing the current high

¹Available at
https://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf

levels of incarceration and promoting fairness and justice. The City Bar strongly supports the provisions of the Act aimed at reducing reliance on mandatory minimums, which have been a primary driver of mass incarceration.² Federal statutes requiring the imposition of a mandatory minimum sentence take away from federal district judges the discretion to impose an appropriate sentence, consistent with the federal sentencing policies set out in 18 U.S.C. § 3553(a), taking into account the unique facts of each case and defendant. Statutes imposing mandatory minimum sentences instead substitute a “one-size-fits-all” approach that can often result in unduly harsh and unjust sentences and contribute to sentencing disparities among similarly situated defendants. The problem created by mandatory minimum sentences is particularly acute with respect to the mandatory minimums currently imposed for non-violent drug offenses, which often result in excessively severe penalties relative to the gravity of the offense, are in large part responsible for the enormous growth of the federal prison population, and have greatly exacerbated racial disparities in the treatment of federal offenders.

There is growing bipartisan recognition that our current levels of incarceration are both enormously expensive and unjustified. The Sentencing Reform and Corrections Act would reduce overcrowding in federal prisons. As the Sentencing Commission, among others, has observed, mandatory sentencing laws have caused the prison populations to soar. Approximately 2.4 million people – fully 1% of the U.S. adult population – are now behind bars, including nearly 200,000 in federal prisons. The Act would reduce prison overcrowding and significantly reduce the nearly \$7 billion annual cost of the federal prison system, making funds available for programs that aid victims and other purposes; such programs are likely to be more effective than lengthy prison terms in protecting the public and reducing recidivism. The Act also would reduce, at least to some extent, the disgraceful racial disparities in sentencing that continue to plague our criminal justice system.

The most significant provisions of the proposed Act do the following:

- (i) substantially reduce mandatory minimum sentence enhancements for drug offenders with prior felony convictions, and authorize that this provision be applied retroactively;
- (ii) effectively focus the 10-year mandatory minimum sentence for drug offenses on those who have higher-level roles or pose a greater risk to public safety, and reduce mandatory minimum sentences for low-level non-violent offenders;
- (iii) expand the applicability of the “safety valve” provided by 18 U.S.C. § 3553(f), by substantially broadening the conditions governing which drug offenders may qualify for a sentence below the mandatory minimum, and giving sentencing judges discretion to waive certain qualifying limitations;
- (iv) permit current federal prisoners to seek relief retroactively under the Fair Sentencing Act of 2010;
- (v) mandate recidivism-reduction programs, and authorize pre-release custody

² The City Bar has previously expressed strong support for the bills that would enact the proposed Smarter Sentencing Act (S. 502; H.R. 920), by letter dated June 4, 2015, and the Sentencing Reform and Corrections Act of 2015 (S. 2123; H.R. 3713), by letter dated December 8, 2015.

- for lower-risk prisoners who complete those programs; and
- (vi) provide for the sealing and expungement of juvenile delinquency records.

As discussed below, the City Bar strongly supports each of these provisions, with only minor exceptions or reservations. In particular, the City Bar recommends that: (i) Section 103 be amended to apply retroactively, to permit prisoners who were sentenced to a 10-year mandatory term, but would now be eligible for a 5-year sentence, to seek relief; (ii) Section 105, modifying the application of convictions for the use of a firearm in a crime of violence or drug crime, be amended to reduce the mandatory minimum for such offenses from 25 years to 15 years and to reduce the mandatory minimum for armed career criminal convictions from 15 years to 10 years; (iii) Sections 106 and 107, imposing new mandatory minimum sentences, be deleted; (iv) the portions of Section 109, mandating a 5-year minimum enhancement for offenses involving fentanyl or fentanyl-mixed heroin, be deleted; and (v) Section 210 be amended to expand sealing and expungement relief for juveniles who were tried as adults for an offense other than a serious violent crime, and for adults who have misdemeanor and non-violent felony convictions and who have demonstrated successful rehabilitation.

Finally, as this Report was going to press, on March 19, 2018, President Trump gave a public address in Manchester, New Hampshire, in which he announced White House proposals to combat the nation's opioid epidemic. As widely reported, the President "urged Congress to lower the threshold to use mandatory minimum sentences on opioid dealers, and said he will look for tougher criminal sentences on traffickers of certain drugs, such as fentanyl."³ While the administration apparently has not yet specified the details of its proposals, the City Bar is generally opposed to expansions of mandatory minimums for the reasons set forth in this Report. Indeed, as noted above and herein, there is bipartisan opposition to mandatory minimums and, if anything, such penalties – as proposed in the Sentencing Reform Act – should be *reduced*, not increased.

II. BACKGROUND ON MANDATORY MINIMUM LAWS FOR DRUG OFFENSES

The Anti-Drug Abuse Act of 1986 established the framework of mandatory minimum sentences for federal drug offenses. The minimums were based on drug quantity, which was viewed as a proxy for identifying major drug traffickers without allowing for consideration of an offender's actual role in the drug distribution organization. The quantities triggering a mandatory minimum sentence differed by drug or form of drug. In particular, the 1986 Act treated quantities of crack cocaine vastly differently from quantities of powder cocaine, using a "100-to-1" ratio and thereby causing, as has been well documented, significant racial disparities in sentencing. The mandatory minimum sentencing provisions of the 1986 Act were expanded in 1988, including by imposing a 5-year mandatory minimum for possession of more than 5 grams of crack cocaine and extending the scope of mandatory minimums for drug trafficking offenses to defendants convicted of conspiring to commit

³ See Maggie Haberman, Abby Goodnough and Katharine Q. Seelye, "Trump Offers Tough Talk but Few Details in Unveiling Plan to Combat Opioids," N.Y. Times, March 19, 2018, <https://www.nytimes.com/2018/03/19/us/politics/trump-new-hampshire-opioid-plan.html> (last visited March 20, 2018).

substantive drug offenses. These laws made non-violent, low-level street dealers and private users susceptible to disproportionately lengthy prison terms relative to their conduct.

In 2010, Congress passed the Fair Sentencing Act, effectively reducing the ratio between crack and powder cocaine to 18-to-1 and eliminating the mandatory minimum sentence for possession of crack cocaine. The 2010 Act provided no relief to federal prisoners already serving lengthy prison sentences under the earlier mandatory minimum laws.⁴

III. THE SENTENCING REFORM ACT

a. Reduction of Certain Mandatory Minimums for Drug Offenses

Section 101 of the Sentencing Reform Act would amend the Controlled Substances Act, 21 U.S.C. § 841(b)(1), and the Controlled Substances Import and Export Act, 21 U.S.C. § 960(b)(1), to reduce the enhanced mandatory minimum sentences for a drug offender who has a prior qualifying conviction from 20 years to 15 years, and for a drug offender who has two or more prior convictions from life imprisonment to 25 years. Further, the Act would limit the application of the enhanced mandatory minimums to a prior “serious drug felony” or “serious violent felony” for which the person actually served a term of imprisonment of more than 12 months. A serious drug felony would include drug offenses under federal or state law for which a maximum term of imprisonment of ten years or more is prescribed by law. A serious violent felony would include federal or state offenses of murder, voluntary manslaughter, assault with intent to commit murder or rape, aggravated sexual abuse and sexual abuse, kidnapping, aircraft piracy, robbery, carjacking, extortion, arson, firearms offenses, or any other offense that has as an element the use (or risk) of physical force and that is punishable by a maximum term of ten years or more. The Act would expressly state that this provision may be applied retroactively to reduce a defendant’s sentence upon consideration of various sentencing factors, subject to 18 U.S.C. § 3771, the Crime Victims’ Rights Act, which requires the government to “conduct a particularized inquiry of the facts and circumstances of the original sentencing of the defendant in order to assess whether a reduction in sentence would be consistent with” the act.

Section 103 of the Sentencing Reform Act would effectively reduce the mandatory minimum sentence for higher-quantity drug offenses under the Controlled Substances Act and the Controlled Substances Import and Export Act from 10 years to 5 years for eligible non-violent offenders. A person is eligible for the reduced mandatory minimum if he or she: (1) did not have a prior conviction for a serious drug felony or serious violent felony; (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense, and the offense did not cause death or serious bodily injury to any person; (3) was not an organizer, leader, manager, or supervisor of other participants in the offense; (4) did not act as an importer, exporter, high-level distributor or supplier (excluding couriers), wholesaler, or manufacturer of the controlled substance or engage in a continuing criminal enterprise; (5) did not distribute a controlled substance to a minor; and (6) provided the government a proffer of information and evidence regarding the

⁴ The Supreme Court has held that the more lenient penalties of the Fair Sentencing Act apply to offenders who committed crimes before the 2010 Act, but were sentenced after its passage. *Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321 (2012).

offense. This provision would apply only to a conviction entered on or after the date of enactment of the Act and would not be retroactive. This section also adds that information obtained during a proffer with the government cannot be used to enhance the defendant's sentence unless the information relates to a violent offense.

The City Bar believes that a substantial reduction of mandatory minimum sentences for non-violent drug offenses is necessary and restores proportionality in sentencing for these offenses. We believe that Congress's focus on reducing mandatory minimums for drug offenses is appropriate, given that drug offenses represent a significant majority of all convictions carrying a mandatory minimum.⁵ Mandatory minimums should not be set by reference to the sentence appropriate to the *most* culpable violators, because the result is that the same sentence has to be imposed on many less culpable offenders. Instead, mandatory minimums should be set by reference to the sentence appropriate to the least culpable violator who can be convicted under the statute, because a sentencing judge can always sentence the more culpable violator to a sentence above the mandatory minimum.

The City Bar recognizes that the Act would make substantial reductions in mandatory minimum sentences for many drug offenders and would take an important step forward – including through the expansion of the safety valve, as discussed below – to restoring fairness in sentencing and reducing the critical problem of mass incarceration. The City Bar supports the effort to limit application of the 10-year mandatory minimum to those offenders who have greater culpability or pose a higher risk to public safety, and to reduce the mandatory minimum to 5 years for less culpable offenders.

However, for these same reasons, and in the interest of parity, we urge Congress to amend the Act to make this provision retroactive so that those prisoners who were sentenced to the mandatory 10 years, but would now be eligible for a 5-year sentence under the Act, may seek relief under this provision.

b. Safety Valve Expansion

Existing law contains a “safety valve” exception for federal drug offenses, 18 U.S.C. 3553(f), which permits some defendants convicted of a drug offense to avoid a mandatory minimum sentence even if the drug quantity relevant to their offense would otherwise require imposition of the mandatory minimum. The “safety valve” currently allows drug offenders who have no more than one criminal history point under the Sentencing Guidelines to qualify for a sentence below the mandatory minimum if they meet certain other criteria. Section 102 of the Sentencing Reform Act would expand the safety valve so that drug offenders who have no more than four criminal history points would qualify, as long as they do not have a prior “3 point” felony conviction or prior “2 point” violent or drug trafficking offense. Importantly, this section would also authorize a sentencing judge to waive the prior disqualifying convictions if the judge specifies in writing the reasons why the defendant's criminal history “substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.” This provision would

⁵ See U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 122 (Oct. 2011) (explaining that over 77% of all convictions requiring a mandatory minimum in 2010 were drug offenses).

apply only to a conviction entered on or after the date of enactment of the Act and would not be retroactive.

The City Bar strongly supports the proposed expansion of the safety valve, and has previously advocated for the waiver approach reflected in this provision, which is consistent with Sentencing Guidelines Section 4A1.3(b). Under current law, an offender with prior convictions for one or more minor offenses in the distant past might well be ineligible for safety valve consideration. The Sentencing Reform Act would enable such offenders to qualify for a sentence below the mandatory minimum if they otherwise qualify for the safety valve. This provision would be particularly significant to drug offenders who are subject to a 5-year mandatory minimum sentence for lower-quantity offenses, which the Act does not otherwise reduce or limit. More generally, this provision of the Act would significantly enhance judicial discretion to impose an appropriate sentence.

c. Retroactive Relief under the Fair Sentencing Act of 2010

As noted above, the Fair Sentencing Act of 2010 amended the trigger amounts for mandatory minimum sentences applicable to drug offenses by reducing the ratio between crack and powder cocaine quantities from 100:1 to 18:1. The main purpose of that change was to make sentences for cocaine-base, or “crack,” offenses more reasonably reflect the harm resulting from use of that drug, and to reduce the gross racial disparity in sentencing for these offenses.

Section 105 of the Sentencing Reform Act provides the possibility of relief to offenders sentenced prior to August 3, 2010, the date of enactment of the 2010 Act. While it would not automatically reduce existing sentences, the Sentencing Reform Act would allow a defendant (or the government) to make a motion for a reduced sentence, and would confer discretion on a sentencing judge to impose a reduced sentence as if the provisions of the 2010 Act had been in effect at the time the offense was committed.

The City Bar strongly supports this provision, because it would provide potential relief, based on the individualized facts of each case, to nearly 6,000 federal prisoners who were sentenced to lengthy prison terms under laws that Congress has acknowledged were gravely flawed and have had an unjust and racially disparate impact.⁶ The implementation of this provision will also have the salutary impact of significantly reducing the prison population and saving taxpayers a great deal of money.

d. Other Mandatory Minimum Provisions

In cases where offenders are convicted of using a firearm during a crime of violence or drug crime, Section 104 of the Sentencing Reform Act would not allow second or

⁶ Press Release, U.S. Sentencing Commission, Statement on Bipartisan Sentencing Reform Legislation (Nov. 18, 2015), available at <http://www.ussc.gov/news/press-releases-and-news-advisories/november-18-2015> (estimating that the retroactive application of the Fair Sentencing Act “would allow approximately 5,826 offenders currently in federal prison to seek an approximate 20 percent reduction in their sentence”).

successive convictions to occur within the same prosecution – eliminating the authority to “stack” sentences based upon the same conduct.⁷ The City Bar supports the prohibition on stacking offenses, but would further support a reduction in the mandatory minimum sentence for such offenses from 25 years to 15 years, as was previously proposed in the Sentencing Reform and Corrections Act of 2015 (the “2015 Bill”), which did not pass.⁸

Section 105 of the 2015 Bill would have reduced the enhanced mandatory minimum for armed career criminals from 15 to 10 years. The City Bar supported this provision, but it was removed from S. 1917. While we believe that Congress’s current focus on reducing mandatory minimum sentences for non-violent drug offenses is appropriate, the City Bar supports the reduction of mandatory minimums generally and giving sentencing judges the discretion to impose appropriate sentences for all other crimes. Thus, the City Bar proposes that S. 1917 be amended to reduce the enhanced mandatory minimum for armed career criminals from 15 years to 10 years.

Sections 106 and 107 of the bill would establish a new mandatory minimum sentence of 10 years for interstate domestic violence offenses and a new mandatory minimum of 5 years for providing “controlled goods or services” to terrorists or proliferators of weapons of mass destruction.⁹ For the reasons stated herein, the City Bar generally does not support creating new mandatory minimums, and thus the City Bar does not support these provisions. We urge the Senate to amend the bill to delete these provisions. However, even if these provisions are included in the final legislation, we believe on balance that the benefits of the provisions the City Bar supports substantially outweigh the concerns we have with adding these new mandatory minimums.

Section 109 would mandate an additional 5 years of imprisonment for a conviction under the Controlled Substances Act and the Controlled Substances Import and Export Act if the controlled substance involved in the offense included heroin mixed with fentanyl or if a fentanyl substance was represented to be or sold as heroin. The City Bar urges the Senate to delete this provision. Although we share the concern about the added public safety risks of fentanyl-mixed heroin, we do not believe that requiring sentencing judges to impose an additional five-year term in every case, regardless of the particular facts – thereby frequently mandating an increase in the offender’s sentence by 50-100% – is necessary, appropriate or just. Some drug offenders subject to this provision may not even know that the controlled substance involved contained fentanyl. Whether the presence of fentanyl increases the offender’s culpability – and thus, should increase his or her prison sentence – is precisely the kind of assessment that a sentencing judge should make after considering all of the facts and circumstances of the case.

e. Inventory of Federal Criminal Offenses

⁷ See 18 U.S.C. 924(c)(1)(C).

⁸ See 2015 Bill, Section 104.

⁹ “Controlled goods or services” refers to articles, items, data, services or technologies designated as defense- or space-related by regulation or other high technology commerce items that generally require an export license.

Section 108 of the bill directs the Attorney General to provide and make publicly available a list of all criminal statutory and regulatory offenses, including their elements, their mens rea requirement, and penalties. The Act also requires a report on the number of prosecutions and convictions of each offense brought in the last 15 years, as well as the average length of sentence. The City Bar supports the empirical study of our nation's criminal laws and believes that such a study will assist Congress in determining whether the increased federalization of crimes over the last several decades is necessary and appropriate, and in considering further reforms in sentencing policy.

f. The Corrections Act Provisions

Title II of the bill, Sections 202-204, includes provisions aimed at reducing recidivism and increasing opportunities for pre-release custody.¹⁰ It would direct the Bureau of Prisons ("BOP") to establish statistically-validated recidivism-reduction programs for eligible prisoners within 6 years, and to regularly assess the recidivism risk level of each prisoner. Offenders who have fewer than 13 criminal history points would be eligible to participate in the program, and would receive time credit of at least 5 days for each 30 days of programming they complete.¹¹ Prisoners assessed as low risk or moderate risk (if the risk has declined from a higher level) may apply the time credits earned for pre-release custody in a residential reentry center, home detention or community supervision.¹² Section 207 also directs the Attorney General to evaluate best reentry practices, to create Reentry Demonstration Projects, to facilitate reentry assistance to veterans, and to review and study project outcomes and the impact of reentry on communities in which a disproportionate number of individuals reside upon release from prison.

The City Bar strongly supports these provisions, and the goals of preparing people for reentry and reducing recidivism. As we wrote in our Report on Mass Incarceration, "we should not lose sight of one of the four traditional goals of the criminal justice system: rehabilitation. It is in the interest of society, as well as of those convicted, that we remain closely focused on building programs that will preserve and extend this important purpose of punishment."

g. Juvenile Sealing and Expungement

Section 210 of the Act would allow a person who was tried as a juvenile to file a petition to seal his record after completing his sentence, and would require automatic sealing 3 years after the date of adjudication, if the person has maintained a clean record and has no

¹⁰ We note that Representative Bobby Scott also introduced similar legislation addressing these subjects as part of the proposed Safe, Accountable, Fair, and Effective (SAFE) Justice Act (H.R. 4261).

¹¹ "Low risk" prisoners would receive double time credit.

¹² Title II of the bill also includes parole provisions, which the City Bar supports. In response to the Supreme Court's rulings in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S., 132 S. Ct. 2455 (2012), that juveniles convicted as adults and sentenced to life terms must be eligible for parole, Section 209 (entitled "Parole for Juveniles") would allow such juvenile offenders to seek a reduced term of imprisonment after serving 20 years of their sentence. Section 209 would allow for compassionate release from prison for prisoners who are older than 60 who have no record of violence, as well as those who are terminally ill or have been determined to be in need for care at a nursing home or similar facility, and who have served a large portion of their sentence.

pending criminal court or juvenile delinquency proceedings. Records would be unsealed, however, if the person is thereafter convicted of a crime or adjudicated a delinquent. This section would also direct the Attorney General to move for, or a district court to order, expungement of juvenile delinquency records in the following circumstances: (i) a person adjudicated delinquent for a non-violent juvenile offense committed before the age of 15, who completes his sentence before the age of 18; (ii) a juvenile arrested for a non-violent juvenile offense for which no delinquency or criminal proceeding was instituted; and (iii) a juvenile whose delinquency case is dismissed or who is adjudicated not to be delinquent.

In addition, the Act would allow a person adjudicated delinquent on or after the age of 15 to petition the court for expungement of the juvenile record if the person has maintained a clean record, has no pending criminal court or juvenile delinquency proceedings, and has no more than one delinquency adjudication previously expunged. The sentencing judge would be required to consider various factors in determining whether to grant a sealing or expungement petition, including the nature of the offense, the petitioner's participation in rehabilitative programs, and the length of time the petitioner has been without contact with any court or law enforcement agency. A sealed or expunged record would be unavailable for public examination; access to and disclosure of sealed records generally would be limited to law enforcement or armed forces background checks and for subsequent "investigatory or prosecutorial purposes."

The City Bar supports providing opportunities to individuals with misdemeanor and non-violent felony convictions to seal or expunge those records in appropriate cases.¹³ In its Report on Mass Incarceration, the City Bar detailed the devastating collateral consequences of criminal convictions and incarceration, particularly on African-American and Latino populations: "The long term effects on each adult who has been incarcerated are often devastating, from the immediate, such as loss of housing, to the long term, such as the loss of educational and employment opportunities, federal and state social welfare benefits and a voice at the ballot box."

Although the City Bar supports the sealing and expungement provisions of the Act and recognizes that they provide significant relief to minors and adults who have juvenile delinquency records, we believe that these provisions do not go far enough. The City Bar urges Congress to consider expanding sealing and expungement relief for juveniles who were tried as adults for an offense other than a serious violent crime, as well as to provide similar opportunities for adults who have misdemeanor and non-violent felony convictions and who have demonstrated successful rehabilitation. Currently, the broad availability of criminal record information disables adults who have turned their lives around from finding employment and becoming productive members of our communities years – sometimes, decades – after their criminal conviction. More than 20 states have expanded their record-clearing laws in recent years and Congress should consider doing the same.

h. Establishment of National Criminal Justice Commission

¹³ We note that Senators Cory Booker and Rand Paul have reintroduced the Record Expungement Designed to Enhance Employment (REDEEM) Act (S. 827), a comprehensive bill that provides for sealing and expungement of juvenile records and offers adults an opportunity to seal non-violent criminal records.

Title II of the Act would establish a National Criminal Justice Commission to: “(1) undertake a comprehensive review of the criminal justice system; (2) make recommendations for Federal criminal justice reform to the President and Congress; and (3) disseminate findings and supplemental guidance” to federal, State and local governments. The City Bar supports the creation of such a Commission.

IV. CONCLUSION

The City Bar strongly supports the Sentencing Reform Act because there is an urgent need for the reforms it would enact. We are proud to join the growing bipartisan chorus of members of Congress and concerned organizations that have expressed their support for the bill.¹⁴ While the City Bar submits that additional measures are warranted, as discussed above, the Act is an important step in the right direction. We urge Congress to pass this important bill.

Federal Courts Committee
Laura G. Birger, Chair

March 2018

¹⁴ To date, the bill has 19 co-sponsors. There is also broad support for the bill among disparate constituencies and organizations, including law enforcement organizations, taxpayer advocacy organizations, civil rights organizations, and religious organizations.