

United States Senate  
WASHINGTON, DC 20510

May 12, 2014

Dear Colleague:

The nation is in the midst of an historic heroin epidemic that is wreaking havoc in cities and towns from New England to the Pacific Northwest. According to the Drug Enforcement Administration (DEA), the amount of heroin seized at the southwest border has increased nearly 300% from 2008 to 2013, while heroin-overdose deaths have increased by 45%.<sup>1</sup> At the same time, approximately 4.3 million people abuse or are dependent on marijuana.<sup>2</sup> In 2012, almost 32 million people ages 12 and older reported using marijuana within the past year and, in 2013, one out of every 15 high school seniors reported being a near daily user.<sup>3</sup> According to the 2013 National Survey Results on Drug Use, 50% of high school seniors reported having used illegal drugs at some point in their lives.<sup>4</sup>

It is against this grim backdrop that we write to express our concerns with S. 1410, the “Smarter Sentencing Act of 2014,” which would benefit some of the most serious and dangerous offenders in the federal system by cutting in half (or more) mandatory minimum sentences for high-level drug trafficking offenses. The proponents of S. 1410 claim that it will reduce sentences for so-called “low-level, non-violent” drug offenders. These terms, as well as the bill’s claimed effect, are highly misleading. In fact, nothing in this bill will affect the lowest level federal drug offenders at all.

First, the criminals who would benefit from this bill are not “low-level” offenders. Quite the opposite. It applies to offenders convicted of trafficking in heroin, methamphetamine, crack, cocaine, PCP, LSD, marijuana, and other dangerous drugs. In the federal criminal justice system, mandatory minimums are used almost exclusively for high-level drug traffickers who have trafficked in large quantities of hard drugs. For example, in order to trigger a 10-year

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<sup>1</sup> Testimony of Michele M. Leonhart, Administrator, Drug Enforcement Administration, Oversight of the Drug Enforcement Administration, Committee on the Judiciary, U.S. Senate, 113<sup>th</sup> Cong., 2<sup>nd</sup> Session (April 30, 2014).

<sup>2</sup> *Id.* (citing Substance Abuse and Mental Health Services Administration, Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings, Department of Health and Human Services [September 2013]. Available at:

<http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/NationalFindings/NSDUHresults2012.htm#fig7.2>).

<sup>3</sup> *Id.* (citing Substance Abuse and Mental Health Services Administration, Results from the 2012 National Survey on Drug Use and Health: Detailed Tables. Department of Health and Human Services [September 2013]. Available at: <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDetTables/DetTabs/NSDUH-DetTabsSect6peTabs1to54-2012.htm#Tab6.1A> ; “American teens are more cautious about synthetic drugs,” University of Michigan Press Release, December 18, 2013, p. 3. Available at: [www.umich.edu/news](http://www.umich.edu/news)).

<sup>4</sup> Johnston, L.D., O’Malley, P.M., Miech, R.A., Bachman, J.G., & Schulenberg, J.E. (2014). *Monitoring the Future national results on drug use: 1975-2013: Overview, Key Findings on Adolescent Drug Use*. Ann Arbor, Institute for Social Research, The University of Michigan at p. 51.

mandatory minimum, a person must possess at least 1 kilogram of heroin, which can sell for *an average of \$69,117*, or 5 kilograms of cocaine, which can sell for *an average of \$143,680*.<sup>5</sup> It would take at least *220 pounds* of marijuana to trigger a 5-year mandatory minimum and *2,204 pounds—more than a ton—*of marijuana to trigger a 10-year mandatory minimum.<sup>6</sup>

Second, those who would benefit from these reduced sentences are not “non-violent”—they would include repeat drug traffickers and criminals with a history of violence. As noted by DEA Administrator Michele Leonhart in her April 30, 2014 testimony before the Senate Judiciary Committee, “drug trafficking poses a serious threat to society because of the violence and the hazards that accompany it and the terrorist organizations that are often funded by it.” The notion that drug traffickers are non-violent is simply incorrect. Among other factors, disputes over drug money cannot be settled with a lawsuit. Violence and threats are the norm.

Not only is there a misconception about the offenders whom this bill would benefit, there is also a misconception about the problem the bill purports to address. As noted, mandatory minimums largely apply to those who traffic in significant quantities of illegal drugs. Additionally, there already exists a “safety valve,” which provides a way for traffickers who meet certain mitigating criteria (*i.e.*, was not an organizer or leader, did not use violence, cooperated with the government, etc.) to avoid a mandatory minimum. Also, defendants often receive lesser sentences as the result of a plea bargain or for providing the government with substantial assistance in the investigation or prosecution of other defendants. According to the U.S. Sentencing Commission, in FY2012, nearly 60% of heroin traffickers,<sup>7</sup> more than 65% of marijuana traffickers,<sup>8</sup> and nearly two-thirds of methamphetamine traffickers<sup>9</sup> convicted of a drug offense carrying a mandatory minimum were not subjected to a mandatory minimum sentence because they were eligible for the safety valve or provided substantial assistance to the government. Clearly, federal judges have no difficulty in identifying defendants who are deserving of a sentencing reduction.<sup>10</sup>

Before considering the drastic changes in S. 1410, we would do well to recall the benefits of such sentences and why Congress enacted them on a bipartisan basis. According to the Bureau of Justice Statistics, there are more than 4 million fewer serious crimes per year in the

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<sup>5</sup> National Drug Price Ranges 2013. Drug Enforcement Administration, unpublished statistics.

<sup>6</sup> See 21 U.S.C. §841(b)(1)(B)(vii), 21 U.S.C. §841(b)(1)(A)(vii).

<sup>7</sup> “Quick Facts: Heroin Trafficking Offenses,” U.S. Sentencing Commission, Aug. 2013, available at: [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Heroin\\_Trafficking.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Heroin_Trafficking.pdf).

<sup>8</sup> “Quick Facts: Marijuana Trafficking Offenses,” U.S. Sentencing Commission, Sept. 2013, available at: [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Marijuana\\_Trafficking.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Marijuana_Trafficking.pdf).

<sup>9</sup> “Quick Facts: Methamphetamine Trafficking Offenses,” U.S. Sentencing Commission, Sept. 2013, available at: [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Methamphetamine.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Methamphetamine.pdf).

<sup>10</sup> In fact, according to the U.S. Sentencing Commission’s Federal Sentencing Statistics for 2013, for the first time ever, a majority of sentences are not within the guidelines ranges, and nearly all of those departures are below the guidelines ranges. U.S. Sentencing Commission, Preliminary Quarterly Data Report, 1<sup>st</sup> Quarter Release, available at: <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-1st.pdf>.

United States today than there were before mandatory minimums were in place.<sup>11</sup> To reduce sentences for drug traffickers would not only put more dangerous criminals back on the streets sooner, but it would send the message that the United States government lacks the will or is not serious about combatting drug crimes in the midst of a deadly epidemic. As Professor Matt DeLisi of Iowa State University testified before the Senate Judiciary Committee, criminal justice research shows that “releasing 1 percent of the current [federal prison] population would result in approximately 32,850 additional murders, rapes, robberies, aggravated assaults, burglaries, thefts, auto thefts, and incidents of arson.”<sup>12</sup> The empirical data are clear: lower mandatory minimum sentences mean increased crime and more victims.

This is why law enforcement organizations oppose this bill. The National Narcotic Officers’ Associations’ Coalition has written:

As the men and women in law enforcement who confront considerable risk daily to stand between poison sellers and their victims, we cannot find a single good reason to weaken federal consequences for the worst offenders who are directly responsible for an egregious amount of personal despair, community decay, family destruction, and the expenditure of vast amounts of taxpayer dollars to clean up the messes they create.<sup>13</sup>

The Federal Law Enforcement Officers Association (FLEOA) has written:

It is with great concern that FLEOA views any action or attempt . . . that would alter or eliminate the current federal sentencing policy regarding mandatory minimum sentencing. The mandatory minimum sentencing standard currently in place is essential to public safety and that of our membership. Any change in the mandatory minimum sentencing standard does a disservice to the brave men and women who are asked to put their lives on the line to protect us from terrorists and criminals. Currently, the system in place allows federal law enforcement agents to infiltrate and dismantle large-scale drug trafficking organizations and to take violent armed career criminals off the street. In turn, this allows progression up the scale of criminal organizations from low-level subject[s] to higher ranking members.<sup>14</sup>

Notably, the National Association of Assistant United States Attorneys has courageously publicly disagreed with their employer, the Department of Justice and Attorney General Holder. Assistant U.S. Attorneys are career prosecutors—non-political appointees hired in administrations of both parties. They have spoken out against this bill because they know that it will drastically handicap their efforts to break down and prosecute the bigger and more violent drug conspiracies that are handled by the federal government. They have written in opposition to

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<sup>11</sup> Bureau of Justice Statistics, Uniform Crime Reporting Statistics for the years 1990 and 2012.

<sup>12</sup> Testimony of Prof. Matt DeLisi, Ph.D., Dep’t of Sociology, Iowa State Univ., Oversight of the Bureau of Prisons and Cost-Effective Strategies for Reducing Recidivism, Committee on the Judiciary, U.S. Senate, 113<sup>th</sup> Cong., 1<sup>st</sup> Session (Nov. 6, 2013).

<sup>13</sup> Letter from Bob Bushman, President, Nat’l Narcotic Officers’ Associations’ Coalition, to the Hon. Harry Reid, Majority Leader, and the Hon. Mitch McConnell, Minority Leader, U.S. Senate (Mar. 26, 2014).

<sup>14</sup> Letter from Frank Terreri, Nat’l Vice President for Legislative Affairs, Federal Law Enforcement Officers Ass’n, to the Hon. Patrick Leahy, Chairman, and the Hon. Charles Grassley, Ranking Member, Committee on the Judiciary, U.S. Senate (Mar. 10, 2014).

the bill: “Mandatory minimums deter crime and help gain the cooperation of defendants in lower-level roles in criminal organizations to pursue higher-level targets. They have been demonstrably helpful in reducing crime.”<sup>15</sup> DEA Administrator Leonhart echoed these sentiments when she testified before the Senate Judiciary Committee: “Having been in law enforcement as an agent for 33 years, a Baltimore city police officer before that, I can tell you that for me and for the agents that work for DEA, mandatory minimums have been very important to our investigations.”<sup>16</sup>

In the last few years, the Congress, the Department of Justice, and the United States Sentencing Commission have lessened the punishment for, or altogether stopped the enforcement of, laws proscribing illegal drugs:

- In 2010, Congress reduced the 100-to-1 sentencing disparity between crack and powder cocaine to 18-to-1, and eliminated the 5-year mandatory minimum for first-time simple possession of crack cocaine.<sup>17</sup>
- Last August, Attorney General Holder ordered federal prosecutors to refrain from charging certain drug defendants with offenses carrying a mandatory minimum, regardless of the quantity of drugs involved.<sup>18</sup>
- The administration has declined to enforce federal drug laws regarding marijuana in Colorado and Washington.<sup>19</sup>
- Prosecutions for drug trafficking under 21 U.S.C. §841 have declined over 16% since 2009, and prosecutions under 21 U.S.C. §960 (the “Import-Export Act”) have declined by 30% over that same period.<sup>20</sup>
- In March, while amendments to the federal Sentencing Guidelines were still in the public comment period, Attorney General Holder ordered federal prosecutors to act as if these amendments were already in place and refrain from objecting to defendants’ requests for shorter sentences.<sup>21</sup> Less than a month later, the Sentencing Commission voted to reduce sentences for an estimated 70% of federal drug trafficking offenders, including those who possessed a firearm, committed a violent crime, or had a prior conviction, decreasing their

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<sup>15</sup> Letter from Robert Ray Guthrie, President, Nat’l Ass’n of Assistant United States Attorneys, to the Hon. Patrick Leahy, Chairman, and the Hon. Charles Grassley, Ranking Member, Committee on the Judiciary, U.S. Senate (Jan. 31, 2014).

<sup>16</sup> Testimony of Michele M. Leonhart, Administrator, Drug Enforcement Administration, Oversight of the Drug Enforcement Administration, Committee on the Judiciary, U.S. Senate, 113<sup>th</sup> Cong., 2<sup>nd</sup> Session (April 30, 2014).

<sup>17</sup> Fair Sentencing Act, Pub. L. No. 111-220 (2010).

<sup>18</sup> Memorandum to U.S. Attorneys and the Assistant Attorney General for the Criminal Division from Attorney General Eric Holder, “Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases,” Aug. 12, 2013.

<sup>19</sup> Memorandum to U.S. Attorneys from James M. Cole, Deputy Attorney General, “Guidance Regarding Marijuana Enforcement,” Aug. 29, 2013.

<sup>20</sup> Criminal Defendants Filed Under 21 U.S.C. §841 During the 12-Month Periods Ending December 30 (2009-2013), Criminal Defendants Filed Under 21 U.S.C. §960 During the 12-Month Periods Ending December 30 (2009-2012), Administrative Office of the U.S. Courts, unpublished statistics.


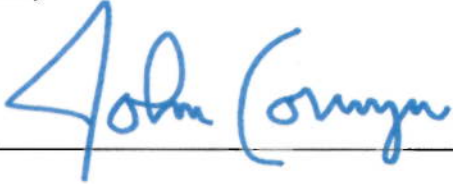
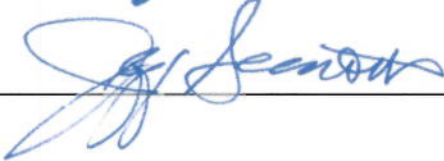
<sup>21</sup> Testimony of Eric Holder, Attorney General, U.S. Dep’t of Justice, U.S. Sentencing Commission, Mar. 13, 2014, available at: <http://www.justice.gov/opa/pr/2014/March/14-ag-263.html>.

sentences an average of 11 months.<sup>22</sup> If Congress does not act to disapprove some or all of these amendments, they will go in to effect on November 1, 2014.

- Recently, the President announced that he would grant clemency to perhaps thousands of convicted federal drug offenders, including those with even limited ties to gangs and cartels.<sup>23</sup>

These are major changes to the substance and application of federal sentencing for serious drug offenses. At a minimum, we should carefully examine the impact of all of these changes before rushing to consider the even more drastic changes that would result from S. 1410. As DEA Administrator Leonhart testified, “the fight against drug abuse is a generations-long struggle and it will not be won overnight. . . . Now is not the time to sound the retreat. But rather, we should be redoubling our efforts.”<sup>24</sup>

Very truly yours,

  
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<sup>22</sup> News Release, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences, April 10, 2014, available at: [http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410\\_Press\\_Release.pdf](http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf).

<sup>23</sup> News Release, Attorney General Holder: Justice Dep’t Set to Expand Clemency Criteria, Will Prepare for Wave of Applications from Drug Offenders in Federal Prison, April 21, 2014, available at: <http://www.justice.gov/opa/pr/2014/April/14-ag-409.html>.

<sup>24</sup> Testimony of Michele M. Leonhart, Administrator, Drug Enforcement Administration, Oversight of the Drug Enforcement Administration, Committee on the Judiciary, U.S. Senate, 113<sup>th</sup> Cong., 2<sup>nd</sup> Session (April 30, 2014).