

Barry C. Scheck

Mandatory Madness

When the new Congress convenes next month, it might face a revolutionary change in the criminal justice system. There are signs that the Supreme Court will invalidate, in some fashion, the federal sentencing guidelines. The pending cases are *United States v. Booker* and *United States v. Fanfan*, and it is likely that the court will hold the guidelines unconstitutional because they permit judges, instead of juries, to embellish sentences.

If the court forces Congress to construct a new federal sentencing scheme, it will present the legislature with an opportunity to rectify an unfair and senseless disgrace that it should have confronted years ago: mandatory minimum sentences. These are the harsh, often draconian sentences that federal judges must impose for certain crimes—guidelines or no guidelines. Mandatory minimums are exactly that: fixed terms of 5, 10, 25 years or more, imposed without parole, and without regard to the defendant's background or to mitigating facts in the case.

This inflexible system results in sentences in which the punishment often does not fit the crime. Harsh penalties are meted out disproportionately against minorities and the poor—though not always.

Take the case of Weldon Angelos—a middle-class 25-year-old from Salt Lake City—convicted for the first time and sentenced for selling small amounts of marijuana on three occasions. The judge gave him just one day in prison for the marijuana, but added a mandated 55 years to the sentence because on the three occasions, Angelos allegedly carried a pistol while he made the sales.

Judge Paul G. Cassell—a recent Bush appointee, former prosecutor and victims' advocate—was so distraught that he wrote a 67-page memorandum decrying the sentence Congress forced him to impose. "To sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational," Cassell complained. Mandatory minimums for victimless offenses demean crime victims, he added, because the sentences are often

longer than the penalties Congress prescribed for violent crimes. Hours earlier, the judge noted, he had imposed a 22-year sentence on a man convicted of murder for beating an elderly woman to death with a log.

Twenty-nine former federal judges, attorneys general and U.S. attorneys filed a friend-of-the-court brief on behalf of Angelos, arguing that his sentence violated the Eighth Amendment's ban on cruel and unusual punishment. "A terrorist who detonates a bomb in a public place intending to kill a bystander will serve a prison sentence of no more than 235 months A second-degree murderer will serve a prison sentence of no more than 168 months A rapist will serve a prison term of no more than 87 months." They argued that Angelos's 660-month sentence is unconstitutional "because (a) it is grossly disproportionate to the offenses that Angelos committed and (b) it is contrary to the evolving standards of decency which are the hallmark of our civilized society."

Earlier this year, the American

Bar Association's Justice Kennedy Commission, a distinguished panel of legal scholars and jurists, recommended repealing mandatory minimum sentences and restoring guided discretion for judges in sentencing, allowing them to consider the unique characteristics of offenses and offenders that warrant increased or decreased prison time. The panel also called for the establishment of drug courts for minor offenders.

Harsh sentences are appropriate for violent criminals and drug kingpins, but Angelos and others like him are filling prisons at considerable expense to taxpayers. According to the Bureau of Prisons, more than half of the 180,000-plus people in federal institutions are there for drug law violations. Most are low-level, small-time and nonviolent offenders. These defendants and we taxpayers would be better served by placing many low-level offenders under community supervision and treatment. Federal incarceration costs taxpayers \$26,696 per inmate each year, or \$4 billion annually.

There is a developing consensus among judges, prosecutors and the defense bar that something must be done to restore sanity to federal sentencing. Let's hope it infiltrates the Capitol. Congress and the Sentencing Commission should create a blue-ribbon panel to study constitutional and human issues raised in the sentencing cases now before the Supreme Court. The panel should look at the good and the bad of what developed from the last effort at sentencing reform, 20 years ago. We can make the system better.

In my lifetime I have seen hundreds of wrongfully convicted persons freed from prisons and death rows. I hope to see the unjustly imprisoned allowed back into society. At a minimum, we can stop the madness of mandatory minimum sentencing.

The writer is president of the National Association of Criminal Defense Lawyers and a professor at Yeshiva University's Benjamin Cardozo School of Law in New York.