

April 22, 2005

The Honorable Jim Sensenbrenner, Jr.
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Minority Member
House Judiciary Committee
B-351C Rayburn House Office Building
Washington, D.C. 20515

Re: Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005 (H.R. 1528)

Dear Mr. Chairman and Mr. Conyers:

We, the undersigned former United States Attorneys and Department of Justice officials, write to express our concerns regarding H.R. 1528 (Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005), particularly section 12 of that bill. This legislation contains many new mandatory minimum sentences, restricts the authority of judges to mitigate punishment for low-level offenders, and transforms the Sentencing Guidelines into a system of complex mandatory minimum sentences. Having served as federal prosecutors, we know firsthand that our criminal justice system functions best when it appropriately allocates decision-making authority between the judicial and executive branches. In this respect, H.R. 1528 is dangerously off the mark.

Much has been written about the ways in which mandatory minimum sentences fail to achieve their central purpose of ensuring uniformity in sentencing. By shifting discretion from judges to prosecutors, mandatory minimum sentences result in hidden disparities based on charging decisions that are largely exempt from review. As stated in the Sentencing Commission's fifteen-year report, "Research over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 89 (2004).

Serious criminals deserve substantial punishment, but mandatory minimum sentencing laws too often result in excessively long prison terms for low-level, non-violent criminals. In 1994, Congress sought to ensure that mandatory minimums are reserved for the most culpable defendants by enacting a "safety valve" provision (28 U.S.C. 3553(f)) that permits certain first-time, non-violent drug offenders to be sentenced without regard to the mandatory minimums. Because eligibility for the safety valve is determined according to strict statutory criteria, many minor offenders still receive disproportionately harsh mandatory sentences. Without justification, section 6 of H.R. 1528 would further limit availability of the safety valve, blunting an essential tool for achieving proportionate sentencing.

Finally, we write to express our strong opposition to section 12 of the bill, which would prohibit courts from relying on virtually every ground heretofore recognized for issuing a

sentence below the guidelines range. It puts the federal sentencing scheme once again at risk of the same constitutional infirmity that made the previous guidelines unconstitutional. Re-introducing such constitutional uncertainty leaves every new conviction and sentence subject to challenge and judicial review and is thus very detrimental to the orderly administration of justice.

This provision would overhaul the advisory guidelines system left in place by *Booker & Fanfan* without any evidence that that system is broken. As stated in a March 1, 2005, letter signed by 43 former U.S. Attorneys and Department of Justice official, including many of the undersigned, any changes to the current system of advisory guidelines should be undertaken only after significant deliberation and input from experts and interested persons and groups.

The current functioning of the federal sentencing system belies the need for immediate legislation. According to Sentencing Commission statistics, courts continue to follow the Sentencing Guidelines at a rate comparable to pre-Booker practice. And appellate courts continue to issue decisions that provide additional guidance to sentencing courts, prosecutors and defense lawyers. There is no reason to throw this system into disarray with another dramatic and potentially unconstitutional reworking of federal sentencing law.

In conclusion, we recommend that Congress (1) reject this bill and any other "quick fixes" and permit federal courts to use the advisory guidelines, (2) direct the Sentencing Commission to assemble and analyze post-*Booker* sentencing data and submit a report to Congress within 12 months, and (3) conduct hearings and solicit broad input from sentencing experts and others with knowledge and experience.

Sincerely,

Griffin B. Bell

Attorney General (1977-1979)
Fifth Circuit Court of Appeals (1961-1976)

John S. Martin, Jr.

U.S. Attorney S.D. New York (1980-1983)
U.S. District Judge S.D. New York (1990-2003)

Jo Ann Harris

Assistant Attorney General (1993-1995)

Charles A. "Chuck" Banks

U.S. Attorney E.D. Arkansas (1987-1993)

Rebecca A. Betts

U.S. Attorney S.D. West Virginia (1994-2001)

James Brady

U.S. Attorney W.D. Michigan (1977-1981)

David B. Bukey

U.S. Attorney E.D. Wisconsin (1973-1974)

Robert Bundy

U.S. Attorney Alaska (1994-2001)

A. Bates Butler, III
U.S. Attorney Arizona (1980-1981)

David J. Cannon
U.S. Attorney E.D. Wisconsin (1969-1973)

Zachary W. Carter
U.S. Attorney E.D. New York (1993-99)

Robert J. Cleary
U.S. Attorney New Jersey (1999-2002)

D. Michael Crites
U.S. Attorney S.D. Ohio (1986-1993)

E. Bart Daniel
U.S. Attorney South Carolina
(1989-1992)

Robert J. Del Tufo
U.S. Attorney New Jersey (1977-1980)

W. Thomas Dillard
U.S. Attorney E.D. Tenn. (1981)
U.S. Attorney N.D. Fla. (1983-1986)

Harry "Donnie" Dixon, Jr.
U.S. Attorney S.D. Georgia (1994-2001)

Ronald F. Ederer
U.S. Attorney W.D. Texas (1989-1993)

Jonathan L. Goldstein
U.S. Attorney New Jersey (1974-1977)

Hal Hardin
U.S. Attorney M.D. Tenn. (1977-1981)

Dorothy Yates Kirkley
U.S. Attorney N.D. Georgia (1981)

Scott Lassar
U.S. Attorney N.D. Illinois (1997-2001)

Patrick M. McLaughlin
U.S. Attorney N.D. Ohio (1984-1988)

Irvin B. Nathan
Principal Associate Deputy Attorney
General (1993-1994)
Deputy Assistant Attorney General
(1979-1981)

Katrina Pflaumer
U.S. Attorney W.D. Washington
(1993-2001)

William Robertson
U.S. Attorney New Jersey (1980-1981)

J. Preston Strom Jr.
U.S. Attorney South Carolina
(1993-1996)

Peter Vaira
U.S. Attorney E.D. Pennsylvania
(1978-1983)

Atlee W. Wampler III
U.S. Attorney S.D. Fla. (1980-1982)

William D. Wilmoth
U.S. Attorney N.D. West Virginia
(1993-1999)

Ronald G. Woods
U.S. Attorney S.D. Texas (1990-1993)

Sharon J. Zealey
U.S. Attorney S.D. Ohio (1997-2001)