The Controlled Substances Act at 50 Years
February 20-22, 2020
Phoenix, Arizona
Panel 2A: Marijuana Reform

**Presenter:** Oliver Kim • Adjunct Professor, School of Law - University of Pittsburgh

**Reviewer:** Daniel Rodriguez • Harold Washington Professor, Pritzker School of Law - Northwestern University

**Presenter:** Paul Larkin, Jr. • Rumpel Senior Legal Research Fellow - The Heritage Foundation

**Reviewer:** Patricia J. Zettler • Assistant Professor, Moritz College of Law - The Ohio State University

**Presenter:** Melanie Reid • Associate Dean of Faculty, Duncan School of Law - Lincoln Memorial University

**Reviewer:** Alex Kreit • Professor of Law - Thomas Jefferson School of Law

Additional Reviewer: David Kramer • Senior Associate Attorney - Vincente Sederberg LLP
Panel 2B: Drug Policy Empirical Research and Sentencing Reform

Presenter: Stephanie Holmes Didwania • Assistant Professor, Beasley School of Law - Temple University

Reviewer: Jelani Jefferson Exum • Professor of Law - University of Detroit Mercy

Presenter: Erica Zunkel • Associate Director, Federal Criminal Justice Clinic - University of Chicago

Reviewer: Jonathan Wroblewski • Director, Office of Policy and Legislation, Criminal Division - U.S. DOJ

#CSAat50

The Controlled Substances Act at 50 Years
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Outline

Mandatory Minimums in the Act

Mandatory Minimum Entrenchment

Case Study: Eric Holder Memo

Next Steps
Outline

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Controlled Substances Act

In the Act, mandatory minimums are primarily based on \textit{drug type} and \textit{drug quantity}.

MMs added as part of the Anti-Drug Abuse Act of 1986.

- MMs range from five years to life.
- Crack-powder disparity (originally 100:1)
Controlled Substances Act

Example: First time offender distributing heroin and no death or serious bodily injury. If quantity is:

1 kg or more → 10 year MM
[100g to 1 kg) → 5 year MM
Less than 100 g → no MM
“Mandatory” Minimums: Exceptions

Two ways to get a sentence < MM in a federal drug case:

1. Safety Valve: for certain low-level drug offenders (32% of all drug offenders, FY16)
2. Substantial Assistance: available for all defendants (24% of drug offenders, FY16)
Critiques

(1) Impose unduly harsh sentences for many defendants;

(2) Perpetuate race disparity; and

(3) Imbalance dynamics in plea bargaining.
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Mandatory Minimum Entrenchment

Three ways that mandatory minimums are entrenched:

(1) Tied to the Sentencing Guidelines
(2) Judges anchored
(3) Co-defendants and similarly-situated defendants
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Holding: Any fact that increases the mandatory minimum of a crime is an “element” of the crime that must be submitted to the jury (or pled to).
We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation. Moreover, rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs. These reductions in public safety spending require us to make our public safety expenditures smarter and more productive.

1 These factors are set out more fully in my memorandum of May 19, 2010 ("Department Policy on Charging and Sentencing") and Title 9 of the U.S. Attorneys’ Manual, Chapter 27.
Justice Dept. Seeks to Curtail Stiff Drug Sentences

Eric Holder seeks to cut mandatory minimum drug sentences

Holder Tossing Mandatory Minimum Sentences Out the Window

Tough punishments ‘breed disrespect for the system,’ attorney general will say.
Prosecutors must be candid with the court, probation, and the public as to the full extent of the defendant’s culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant’s role in the offense, even if the charging document lacks such specificity. Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines....
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Proposals

Amend/reduce mandatory minimums:
• Many valid critiques: unduly harsh for many defendants and racially disparate
• Mostly (but not entirely) unique to drug offenders.

Untether Guidelines from MMs:
• Within Sentencing Commission’s statutory mandate
• Unlikely to generate massive disparity