

# JOIN THE CONVERSATION ABOUT MANDATORY MINIMUM SENTENCING

The new film *Snitch*, starring Dwayne Johnson, explores how mandatory minimum sentencing laws can impose harsh punishments on drug defendants without fully considering the individual's case, shifting power away from the judge and fully into the prosecution's hands. Is this an unfortunate consequence of our nation's ongoing war against international drug cartels? Or is it an avoidable miscarriage of justice?

Review the facts. Debate the issues. Take action. For more information, visit [takepart.com/snitch](http://takepart.com/snitch).

## WHAT IS MANDATORY MINIMUM SENTENCING?

- A mandatory minimum sentencing provision is a criminal statute requiring the imposition of a specified minimum term of imprisonment for a particular crime.<sup>1</sup> Once triggered, mandatory minimums severely limit judicial discretion to impose a prison term below a certain statutorily prescribed floor.<sup>2</sup> This means that a mandatory sentence cannot be lowered by a judge at sentencing due to mitigating circumstances like the defendant's role, motivation, or likelihood of repeating the crime.<sup>3</sup> As a result, prosecutors have enormous power within the judicial system because the offense with which a prosecutor chooses to charge a defendant effectively determines his penalty.<sup>4</sup>
- The most frequently applied federal mandatory minimums were enacted by Congress in the Anti-Drug Abuse Acts of 1986 and 1988 as part of the "War on Drugs."<sup>5</sup> In 2011, 77.4% of convictions carrying a mandatory minimum penalty were for drug trafficking offenses.<sup>6</sup> Almost half of all drug offenders were convicted of an offense carrying a ten-year mandatory minimum penalty, which is the most frequently reported drug mandatory minimum penalty.<sup>7</sup>
- Mandatory minimum penalties are very effective in soliciting cooperation from defendants.<sup>8</sup>

## HOW WE GOT HERE

- Mandatory minimum sentencing has been used in various contexts since Congress created the first comprehensive series of federal offenses in 1790, but the most recent mandatory minimum sentencing schemes were passed in the 1980s as part of the "War on Drugs."<sup>9</sup> One of the purposes of these laws was to target the "kingpins" or high-level leaders of drug cartels.<sup>10</sup> Drug quantity was supposed to serve as a proxy for identifying the type of trafficker.<sup>11</sup>

- Prior to the 1980s, trial judges followed an "indeterminate" sentencing scheme that gave them broad discretion and authority to impose a wide range of sentences.<sup>12</sup> However, indeterminate sentencing was increasingly criticized for creating unwarranted disparities in sentences while failing to curb recidivism rates.<sup>13</sup> These criticisms culminated in the passage of the Sentencing Reform Act of 1984, which created the U.S. Sentencing Commission to develop guidelines for federal sentencing that would limit judges' discretion in determining prison terms,<sup>14</sup> and additional legislation that instituted predetermined sentences for certain crimes—mandatory minimums—that could trump those sentencing guidelines.<sup>15</sup>
- Since 1971, when President Nixon first declared the "war," the U.S. has spent \$1 trillion on anti-drug efforts.<sup>16</sup> In 2010 alone, the U.S. spent \$15 billion dollars.<sup>17</sup>

## CONSEQUENCES AND CRITICISMS OF MANDATORY MINIMUM SENTENCING

- Mandatory minimum sentencing has contributed to the vast increase in the U.S.'s prison population. In the 25 years since the advent of the mandatory minimum sentences for drug offenses and the adoption of Sentencing Guidelines, the average federal sentence has roughly tripled in length.<sup>18</sup> Despite the fact the U.S. represents only 4.6% of the world's population, it houses 25% of the world's inmates.<sup>19</sup> In 2010, 40% of U.S. federal inmates were serving mandatory minimum sentences.<sup>20</sup>
- Mandatory minimum sentencing allows prosecutors to coerce defendants into pleading guilty by threatening them with charges that will

carry significantly longer sentences if they refuse to "plead out" and waive their right to a jury trial.<sup>21</sup> On average, federal defendants who refuse to waive their right to a jury trial receive a sentence three times longer than those who plead.<sup>22</sup>

- In the context of drug offenses, there are only two situations in which a judge can grant a downward departure from a mandatory minimum sentence:
  - On the prosecutor's motion, based on the defendant's "substantial assistance" in the investigation or prosecution of another person.<sup>23</sup> The discretion to make such a motion rests solely with the prosecutor.<sup>24</sup>
  - If the defendant meets all the elements of the "safety valve" provision: they have minimal criminal history; they were not violent, armed, or high-level participants in the crime; and they provided the government with truthful information regarding the offense.<sup>25</sup>
- Most recipients of drug mandatory minimums are couriers, mules, and street-level dealers, not kingpins or leaders of drug cartels.<sup>26</sup> Some critics say this is because low-level offenders are not likely to have the kind of information they need to be able to provide to a prosecutor in order to obtain a "substantial assistance" departure.<sup>27</sup>
- One federal judge has proposed that it may be possible to stop mandatory minimum sentencing from being applied in unfair ways, even without new legislation, if a policy is instituted directing prosecutors to charge defendants with mandatory minimum crimes only if they intend to prove that the individual was in fact in a managerial or leadership role within the drug enterprise.<sup>28</sup>

<sup>1</sup> United States Sentencing Commission, "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System" 4 (2011).  
<sup>2</sup> Erik Luna, Cato Institute, "Mandatory Minimum Sentencing Provisions Under Federal Law," Congressional Testimony, May 27, 2010.  
<sup>3</sup> See FAIMM, "What Are Mandatory Minimums?", available at <http://faimm.org/aboutsentencing/WhatAreMandatoryMinimums.aspx>.  
<sup>4</sup> Caulkins, J., et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* (Santa Monica, CA: RAND Corp., 1997), 24.  
<sup>5</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986); Pub. L. No. 100-690, 102 Stat. 4181 (1988); see FAIMM, "Understanding Federal Sentencing Laws," <http://www.faimm.org/federal/UnderstandingFederalSentencingLaws.aspx>.  
<sup>6</sup> *Supra* note 1 at xviii.  
<sup>7</sup> *Id.* at 153.  
<sup>8</sup> Lanny A. Breuer, The Attorney General's Sentencing and Corrections Working Group: A Progress Report, *Federal Sentencing Reporter*, Vol. 23, No. 2 (December 2010), pp 110-114.  
<sup>9</sup> *Supra* note 1 at 1, 23.  
<sup>10</sup> C. Mascharka, "Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences," *Florida State University Law Review*, Vol 28:935 (2001) at 941.  
<sup>11</sup> See *supra* note 1 at 24, quoting 132 Cong. Rec. 27,193-94 (Sept. 30, 1986); H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).  
<sup>12</sup> Congressional Research Service, "Federal Sentencing Guidelines: Background, Legal Analysis and Policy Options" (June 2007).

<sup>13</sup> See, e.g., Report of the Twentieth Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill Book Company, 1978); Andrew Von Hirsch, *Doing Justice, The Choice of Punishments* (New York: Hill and Wang, 1976), and others, as quoted in CRS, *supra* note 12.  
<sup>14</sup> Sentencing Reform Act of 1984, P.L. No. 98-473, 98 Stat. 1987.  
<sup>15</sup> These included the Anti-Drug Abuse Acts of 1986 and 1988, see *supra* at note 5.  
<sup>16</sup> Franklin, Neil, "Former Cops Agree: Legalization is the Path to Controlling Drugs," *U.S. News & World Report*, July 9, 2012.  
<sup>17</sup> Drug Sense Nonprofit, "Drug War Clock," available at <http://www.drugsense.org/crs/warlock>.  
<sup>18</sup> The Third Branch, "Sentencing Commission Takes New Look at Mandatory Minimums," June 2010.  
<sup>19</sup> Adam Lipitz, "Inmate count in U.S. dwarfs other nations," *New York Times*, April 23, 2008.  
<sup>20</sup> *Supra* note 1, chapter 4.  
<sup>21</sup> See, e.g., Rachel E. Barkow, "The Problem With Mandatory Minimum Sentences," *New York Times*, August 19, 2012; Judge John Gleeson, Statement of Reasons in *United States v. Dossie*, 11-Ch-237 (E.D.N.Y. Mar. 30, 2012).  
<sup>22</sup> Quoted in Barkow, "The Problem With Mandatory Minimum Sentences," *supra* note 21.  
<sup>23</sup> 18 U.S.C. § 3553(e).  
<sup>24</sup> *Id.*  
<sup>25</sup> 18 U.S.C. § 3553(i).  
<sup>26</sup> See, e.g., United States Sentencing Commission, "Special Report to the Congress: Cocaine and Federal Sentencing Policy," 20-21, 85 (2007).  
<sup>27</sup> See, e.g., Interview with Eric E. Sterling, ProCon, PBS Frontline, available at [www.pbs.org/wgbh/pages/frontline/shows/snitch/proconsterling.html](http://www.pbs.org/wgbh/pages/frontline/shows/snitch/proconsterling.html)  
<sup>28</sup> See Gleeson, Statement of Reasons, *supra* note 21.



# SNITCH IN THEATERS 2.22.13

