AGENCY PERSPECTIVES

HEARING

BEFORE THE

OVER-CRIMINALIZATION TASK FORCE OF 2014

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JULY 11, 2014

Serial No. 113–101

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

88–643 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONTENTS

JULY 11, 2014

AGENCY PERSPECTIVES

FRIDAY, JULY 11, 2014

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2014

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Task Force met, pursuant to call, at 9:06 a.m., in room 2237, Rayburn Office Building, the Honorable Spencer Bachus presiding.

Present: Representatives Bachus, Goodlatte, Conyers, Scott, and Jeffries.

Staff Present: (Majority) Robert Parmiter, Counsel; Alicia Church, Clerk; (Minority) Ron LeGrand, Counsel; and Vanessa Chen, Counsel.

Mr. BACHUS. Good morning. The Over-Criminalization Task Force hearing will come to order.

Without objection, the Chair is authorized to declare recess of the Task Force at any time.

We welcome our witnesses here today. And at this time, I will turn to the Chair of the full Committee, Mr. Goodlatte, to introduce our first witness, Mr. Heaphy.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding this hearing, and thank you for allowing me the honor of introducing my United States Attorney, who has represented us well in the Western District of Virginia for the past several years. He is someone who is very interested in not only the enforcement of the law, but in criminal law and public policy. So I am delighted to have him here today to testify.

Tim, welcome.

Mr. BACHUS. Thank you. Our other witnesses, we have the Honorable Irene M. Keeley from West Virginia. She is from Clarksburg, West Virginia, a U.S. District Judge. She received her undergraduate degree from the College of Notre Dame of Maryland in Baltimore, and her master's degree from West Virginia University, who will be playing the University of Alabama in its first game.

Before attending law school, she was employed as a secondary education teacher. She received her juris doctorate from West Virginia University College of Law.

We welcome you, Judge.

From 1980 to 1992, she practiced law with the firm Steptoe & Johnson.

Was that here in Washington?

Judge KEELEY. It was in the original office in West Virginia.

Mr. BACHUS. Okay, so they originally are a West Virginia firm. Okay, thank you.

She was appointed a Judge in the United States District Court for the Northern District of West Virginia by President George H.W. Bush in 1992. She served as Chief Judge of the Northern District from March 2001 to March 2008.

Currently, she serves as chair of the Criminal Law Committee at the Judicial Conference of the United States.

We welcome you.

Our next witness is the Honorable Patti Saris, who is no stranger to this Committee.

We welcome you back.

She has served as the chair of the United States Sentencing Commission since December 2010. Judge Saris has served as United States District Judge for the District of Massachusetts since 1994, having been nominated to the Federal bench by President Clinton.

Prior to her appointment to the District Court, Judge Saris served as an Associate Judge for the Massachusetts Superior Court. Previously, Judge Saris served as a Federal Magistrate Judge for the United States District Court for the District of Massachusetts.

Judge Saris served as staff counsel to the United States Senate Committee on the Judiciary. She also served as a law clerk to the late Justice Robert Braucher of the Massachusetts Supreme Judicial Court. She then became an attorney in the Civil Division of the Justice Department and held the position of Chief of the Civil Division in the Office of United States Attorney from Massachusetts.

Judge Saris received her B.A. from Radcliffe College and her J.D. from Harvard Law School. She is the sister-in-law of Jim Segal, who many of you know, whose office was right down the hall for several years and served as Chief of Staff for Chairman Frank.

Mr. GOODLATTE. Mr. Chairman, if I might?

Mr. BACHUS. The Chairman is recognized.

Mr. GOODLATTE. I just want to say that I shortchanged my United States Attorney, and I never want to do that, by leaving out his credentials.

He is a graduate of the University of Virginia and the University of Virginia School of Law. And upon graduation from law school, he served as a law clerk to the Honorable John A. Terry in the District of Columbia Court of Appeals. He subsequently spent 2 years as a litigation associate at Morrison Foerster in San Francisco.

In addition to practicing law, he has taught several classes as a lecturer at the University of Virginia School of Law, and he has also lectured frequently at the U.S. Department of Justice's National Advocacy Center in Columbia, South Carolina.

Prior to becoming a United States Attorney, he served 12 years as an Assistant United States Attorney, both in the West District of Virginia and the District of Columbia, and he has prosecuted a broad spectrum of criminal matters.

Thank you, Mr. Chairman.

Mr. BACHUS. Thank you, Mr. Chairman.

Well, we have at least two Virginia grads. Our last witness is Mr. David Patton. He has been executive director and attorney in chief of the Federal Defenders of New York since July 2011. Mr. Patton, from 2002 to 2008, worked at the Federal Defenders as a trial attorney in the Manhattan office. During that time, he also served as adjunct professor at New York University School of Law.

In 2008, Mr. Patton taught as an assistant professor at the University of Alabama. And from 2010 to 2011, he was a visiting associate professor of law at Stanford Law School.

He currently teaches professional responsibility in criminal law and is an adjunct professor of law at NYU.

Mr. Patton clerked for the Honorable Claude Hilton of the United States District Court for the Eastern District of Virginia. He is a graduate of University of Virginia School of Law.

We welcome you to the Committee.

We are expecting our first and only votes of the day at 10:15, so without objection, Members' opening statements will be made a part of the record.

[The information referred to follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Thank you Chairman Bachus. I am very pleased to be here today to hear from representatives of our major Federal criminal justice agencies. Today's panel will offer their perspectives on the various topics covered in the Task Force's yearlong series of hearings on issues related to over-criminalization.

While past hearings have examined over-criminalization from more of an academic point of view, today's hearing is designed to fill in the blanks by eliciting the practical, working knowledge of the agencies at the heart of the nation's Federal criminal justice system. The Justice Department, the Judicial Conference of the U.S. Courts, the U.S. Sentencing Commission, and the Federal Public Defenders are uniquely situated to provide valuable insight into the over-criminalization concerns examined by this Task Force. I look forward to hearing their perspective on all the issues faced by this Task Force in the past year, including criminal intent, regulatory crime, the need for criminal code reform, over-federalization, and many others.

Concerns with fundamental fairness abound in the area of over-criminalization. During its existence, this bi-partisan Task Force has endeavored to closely examine the problems posed by over-criminalization and over-federalization, and to identify potential solutions in order to prevent the regrettable circumstances that inevitably arise from the tangled web of Federal criminal provisions. Examples of individuals convicted of offenses despite no proof of any level of criminal intent, have been detailed in prior hearings and are far too commonplace.

Additionally, Iam very supportive of taking responsible legislative action to ensure that offenders who have served their debt to society are given the opportunity to become productive citizens and avoid returning to a life of crime. This result serves multiple purposes, including enhancing public safety, alleviating overcrowding in Federal prisons, and saving taxpayer dollars.

It is my hope that the members of today's panel can share their thoughts on these issues as well others the Task Force has considered. I believe that with their input, it may be possible to begin resolving many of the problems we have examined during the previous eight hearings on the over-criminalization issue.

Again, I thank our distinguished witnesses for appearing today and look forward to their testimony. I would also like to reiterate my continued appreciation for the work of my colleagues on the issues before this Task Force, and I yield back the balance of my time.

Mr. BACHUS. Mr. Heaphy, you are recognized for your opening statement.

Does that suit everybody? No objections?

TESTIMONY OF THE HONORABLE TIMOTHY J. HEAPHY, UNITED STATES ATTORNEY, WESTERN DISTRICT OF VIRGINIA, UNITED STATES DEPARTMENT OF JUSTICE

Mr. HEAPHY. Thank you very much for inviting the Department of Justice today, and thank you, Congressman Goodlatte, for that very nice introduction. We very much appreciate the opportunity to appear at today's hearing.

Last August, in remarks at the annual meeting of the American Bar Association's House of Delegates, my boss, the Attorney General of the United States, spoke of his desire to forge a more just society and to reform and strengthen America's criminal justice system. He said it is our duty to identify those areas we can improve in order to better advance the cause of justice for all Americans.

On behalf of the Attorney General, I want to thank the Members of this Task Force for your pursuit of the goal of reform. Your work has contributed and will continue to contribute significantly to the discussion of potential improvements to make our system more fair and efficient.

The department has an interest in all of the issues that this Task Force has explored. In our written testimony, we address issues regarding so-called regulatory crimes, the possible uniform mens rea standard for Federal crimes, and criminal code reform, issues which have been a major focus of the Task Force.

I look forward to answering questions on those issues and other topics today. But in this opening statement, we would like to use my very limited time to focus on the crucial and urgent need to improve Federal sentencing and correctional policies.

As the Task Force has recognized, our crime reduction strategies have included, over the last 20 years, a greatly expanded use of the criminal sanction. Incarceration rates in this country have skyrocketed. Our Nation now has the greatest number of prisoners of any country in the world, nearly one in every 100 adults in America is in prison or jail, a rate that is five to 10 times higher than rates in Western Europe and other democracies.

Such extensive use of prison is expensive and unsustainable. Currently, our State and Federal Governments spend about $74 billion a year on incarceration. At the Department of Justice, spending on prisons in detention now amounts to almost a third of our overall operating budget, compared to only about a quarter in 2000.

As a result, prison spending has increasingly displaced other crucial justice and public safety investments, including resources for investigation, prosecution, prevention, intervention and assistance to State and local law enforcement agencies.

In response to the increasing percentage of our resources devoted to incarceration, the Attorney General has launched a Smart on Crime initiative that began in August of last year.

Smart on Crime requires all Federal prosecutors, the men and women with whom I work every day, to ensure that we are devoting our enforcement resources to the most deserving of the Federal criminal charge.

Smart on Crime also augments our support for State and local law enforcement as well as our funding and other support of prevention and reentry programs.

The goal is to maintain our ability to fulfill our core enforcement function while also pursuing other priorities in a comprehensive approach to community safety.

One important component of Smart on Crime is the department's support for reform of sentencing practices for low-level drug offenders. Of the 217,000 people in BOP custody today, nearly half are serving time for drug-related offenses.

The department is committed to modifying charging and sentencing policies for these offenses, both to help control Federal prison spending and to ensure that people convicted of certain low-level, nonviolent Federal drug crimes will face sentences appropriate to their individual conduct.

To most effectively address that issue, however, congressional action is necessary. We strongly urge this Task Force and the full Committee to take up sentencing reform legislation this year.

The department strongly supports the legislation introduced by Congressman Scott and Labrador, the Smarter Sentencing Act. By modestly reducing statutory penalties for certain nonviolent drug offenders, the bill could allow billions of dollars to be reallocated to other critical public safety priorities while enhancing the effectiveness of our Federal sentencing system.

The kinds of reforms the department supports have already proven successful at the State level. State leaders, Republicans and Democrats, have begun to transform sentencing and corrections policy across the country. Changes in State laws and justice priorities have demonstrated that it is possible to spend less money on incarceration without sacrificing public safety.

In fact, many of these States have seen a drop in recidivism since they enacted sentencing reform legislation.

So by controlling prison spending, shifting away from an overreliance on incarceration, we can focus our limited resources on the most important law enforcement priorities, such as violence prevention and protection of vulnerable populations.

The department has committed to an approach that is not only more efficient and more effective at deterring crime and reducing recidivism, but also more consistent with our Nation's commitment to treating all Americans as equal under the law.

We cannot achieve these critical goals without the support of Congress. We urge you to seize this opportunity to make our criminal justice system fair and keep the American people safe.

Thank you.

[The prepared statement of Mr. Heaphy follows:]

Department of Justice

STATEMENT OF

TIMOTHY J. HEAPHY

UNITED STATES ATTORNEY, WESTERN DISTRICT OF VIRGINIA

DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY

OVER-CRIMINALIZATION TASK FORCE

UNITED STATES HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED

"AGENCY PERSPECTIVES"

JULY 11, 2014

Statement of
Timothy J. Heaphy
United States Attorney, Western District of Virginia
Department of Justice

Before the
Committee on the Judiciary
Over-Criminalization Task Force
United States House of Representatives

At a Hearing Entitled
"Agency Perspectives"

July 11, 2014

Chairman Sensenbrenner, Ranking Member Scott and Members of the Task Force – Thank you for providing the Department of Justice the opportunity to appear at today's hearing.

Last August, in remarks at the Annual Meeting of the American Bar Association's House of Delegates, the Attorney General spoke of his desire to forge a "more just society," and "to reform and strengthen America's criminal justice system." He said it was "our duty" to "identify those areas we can improve in order to better advance the cause of justice for all Americans." You have been leaders in precisely that endeavor – leading an important conversation about our justice system.

This Task Force has examined many critical issues and raised many important questions, for example: Has Congress enacted too many Federal crimes? What are the proper roles of the criminal and civil justice systems in protecting our health, safety and environment? Do particular criminal laws contain sufficient *mens rea* requirements to ensure that defendants are held responsible for their offenses?

. However, we urge the Task Force to be carefulas it considers changes to criminal statutes. Each statute must be examined in light of its specific purpose; its specific and general deterrence goals; the particular conduct it seeks to penalize; and the harm it is meant to prevent.

In addition, the Task Force held several hearings critical of so-called "regulatory crimes." Again, we strongly encourage the Task Force to proceed cautiously. The "regulatory" laws the Government enforces are critical to protect the health and safety of our citizens. In enacting the Clean Air Act, the Clean Water Act, the Federal Food, Drug, and Cosmetics Act, the Mine Safety and Health Act, and the Occupational Safety and Health Act – to name just a few – Congress rightly determined that it is in our national interest to ensure our families, our neighbors and our communities can breathe clean air and drink clean water, our children consume safe food and medicine, and workers are safe at their plants, mines, factories and offices.

The Task Force has also raised concerns about laws that impose strict liability for certain crimes. Although the vast majority of criminal statutes require the government to prove some level of *mens rea*, or criminal intent, strict liability statutes, such as those aimed at preventing drunk driving, have long been a part of our criminal justice system. They play an important role in protecting the public welfare, including protecting consumers from unsafe food and medicine. In such situations, the law places the burden of compliance on those who are in the best position to ensure that their products and activities are safe, rather than on the people who cannot protect themselves from the harms that those products and activities can cause.

Some witnesses before the Task Force have criticized the enforcement of some health, safety, and environmental laws. They have tended to focus on a handful of cases that have raised

concerns – some legitimate, some not. But, we also urge the Committee to consider the enormous difference these laws have made in the lives of the American people.

The Department of Justice has prosecuted some of the most egregious violators of our Nation's regulatory laws. Those cases have involved illegal pesticide applications that resulted in the deaths of innocent children, hazardous materials violations that caused explosions that killed workers, failure to comply with worker safety rules that caused employees to die from exposures to deadly gases, and Clean Air Act violations that caused explosions killing and injuring company employees. These laws also make it possible to determine responsibility for major disasters, like the BP oil spill and the Upper Big Branch Mine Disaster, and to hold accountable those who endanger the public and the environment through their illegal conduct.

Criminal violations of these laws and regulations that are designed to protect people and our environment can and do have serious consequences.

Congress should think very carefully before weakening these laws.

The Department has an interest in these issues that the Task Force has explored, and we look forward to working with you and to answering your questions about them. For today's purposes, however, we want to focus on a number of initiatives the Department has undertaken to improve Federal sentencing and corrections policies and to urge Congress to enact legislative reforms.

Over the last 20 years, the combined work of Congress, Federal law enforcement, prosecutors, judges, and our State and local partners has been part of a dramatic and unprecedented reductions in violent crime rates across the country to their current, generational lows. As a result of these efforts, communities from coast to coast are safer and more

prosperous. This is a phenomenal achievement of government, and as we look to make further improvements in public safety and justice, we should recognize these achievements.

It is important to also recognize, though, that our crime reduction strategies have included a greatly expanded use of the criminal sanction. As a result, incarceration rates in the country have skyrocketed. Our nation now has the greatest number of prisoners of any country in the world: with just five percent of the world's population, the United States holds nearly a quarter of the world's inmate population.[1] About 1 in 100 U.S. adult residents is currently incarcerated in a state or federal prison, a local jail, or a privately operated correctional facility.[2] While the number of persons in state prison decreased by almost 55,000 prisoners between 2009 and 2012 (almost 4%), the federal prison population continued to increase.[3] The Federal prison population alone has more than doubled since 1994.[4]

The large proportion of our citizens behind bars has had serious budget implications that, unless addressed, will negatively affect public safety. The fact is such extensive use of prison is expensive and unsustainable. Currently, State and Federal governments spend about $74 billion a year on incarceration. At the Department of Justice, spending on prisons and detention now amounts to almost a third of our budget, compared to 27% in 2000.[5] As a result, prison spending

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[1] INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISONER POPULATION LIST (2010), *available at* http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf.

[2] LAREN E. GLAZE AND ERINN J. HEBERMAN, CORRECTIONAL POPULATIONS IN THE UNITED STATES , 2012, Bureau of Justice Statistics (2013), p. 2, *available at* http://www.bjs.gov/content/pub/pdf/cpus12.pdf.

[3] E. ANN CARSON AND DANIELA GOLINELLI, PRISONERS IN 2012 - ADVANCE COUNTS, BUREAU OF JUSTICE STATISTICS (2013; NCJ 242467): Table 1, *available at* http://www.bjs.gov/content/pub/pdf/p12ac.pdf.

[4] HEATHER C. WEST, ET AL., PRISONERS IN 2009, BUREAU OF JUSTICE STATISTICS (2010), Fg. 3, p. 3, *available at* http://www.bjs.gov/content/pub/pdf/p09.pdf; *see also* STATISTICS, FEDERAL BUREAU OF PRISONS (updated weekly) *available at* http://www.bop.gov/about/statistics/population_statistics.jsp.

[5] Statement of Michael E. Horowitz, Inspector General, U.S. Dept. of Justice, before the U.S. House of Representatives, Comm. on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, concerning oversight of the Dept. of Justice (Mar. 14, 2013), *available at*

has increasingly displaced other crucial justice and public safety investments, including resources for investigation, prosecution, prevention, intervention, assistance to State and local law enforcement agencies, and victims' support.[6]

At the same time that spending on prisons and detention has drastically increased, the Budget Control Act of 2011 sent an unmistakable message that the steady growth in the budgets of the Department of Justice, other Federal enforcement agencies, and the Federal courts that we experienced over the previous 15 years has come to an end. Sequestration imposed further spending cuts, making it even more evident that a rebalancing of Federal criminal justice spending is needed to effectively ensure public safety and protect our families and communities.

As the budgetary threats to criminal justice operations have increased dramatically at all levels, the choices we all face – Congress, the Judiciary, the Executive Branch – are clearer and more stark: control Federal prison spending or see significant reductions in the resources available for all non-prison public safety initiatives. If we fail to reduce our prison population and related prison spending, there will continue to be fewer agents to investigate Federal crimes; fewer prosecutors to bring charges; less support to State and local law enforcement, criminal justice partners and crime victims; less support for treatment, prevention and intervention programs; and cuts in other public safety priorities.

In addition to being expensive, our excessive reliance on incarceration and insufficient investment in prisoner reentry has undermined our ability to effectively address recidivism,

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http://www.cepr.net/documents/publications/incarceration-2010-06.pdf.
http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf, at 8 (DOJ requests $6.9 billion for Bureau of Prisons in FY2013, approximately 26 percent of DOJ's total budget request for the year).

[6] In Fiscal Year 2000, prisons and detention comprised 27% of the total DOJ budget, 19% for the FBI, 26% for grants, and 28% for all other Department functions, including U.S. Attorneys. In Fiscal Year 2013, prisons and detention comprised 31% of the budget, compared to 30% for the FBI, 31% for other Department functions, and just 8% for grants.

which is a significant part of our crime problem. Prison overcrowding has contributed significantly to the diminished inability of correctional facilities to accomplish two of their primary goals: deterrence and rehabilitation. .[7] In an April 2014 publication, the Bureau of Justice Statistics reports that "Overall, 67.8% of the 404,638 state prisoners released in 2005 in 30 states were arrested within 3 years of release, and 76.6% were arrested within 5 years of release." Although recidivism rates are lower in the Federal system, they are still unacceptably high. Unreasonably high recidivism rates may cause many Americans to lose confidence in the criminal justice system. The NAACP suggests that the cycle of poverty, criminality, and incarceration has deprived already marginalized individuals of the opportunity to escape poverty.[8] Such failures of our current approach to criminal justice highlight a need for considerable changes.

Ultimately, our remarkable public safety achievements of the last 20 years would be threatened unless reforms are instituted to make our public safety expenditures smarter and more productive. The Department of Justice already has begun to prioritize and implement key improvements. At the direction of the Attorney General, we have extensively studied all phases of the criminal justice system – including charging, sentencing, incarceration and reentry – to identify which practices are most successful at preventing crime and deterring, incapacitating, treating, and rehabilitating criminals. Our findings indicate a need for significant changes in our approach to enforcing the Nation's laws, and through the Attorney General's Smart on Crime

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[7] ALEXIA D. COOPER, ET AL., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, BUREAU OF JUSTICE STATISTICS (2014), 1, *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986.
[8] *See NAACP Supports Passage of Comprehensive Ex-Offender Reentry Legislation*, NAT'L ASSOC. FOR THE ADVANCEMENT OF COLORED PEOPLE, http://www.naacp.org/action-alerts/entry/naacp-supports-passage-of-comprehensive-ex-offender-reentry-legislation.

Initiative, we are making those changes. While the aggressive enforcement of Federal criminal statutes remains essential – and we U.S. Attorneys take a back seat to no one in our vigorous enforcement of these laws – many of our current practices, including most notably long incarceration sentences, are financially unsustainable. The Department has identified a set of initial reforms that we hope this Task Force will embrace and help to bring about, including – changing statutory drug penalties; improving reentry programming; reforming prison credits and other incentives to promote more efficient use of prison resources while simultaneously reducing reoffending; investing in evidence-based diversion programs – for example, drug treatment initiatives and veterans courts – that can serve as alternatives to incarceration in some cases; and reducing unnecessary collateral consequences for formerly incarcerated individuals seeking to rejoin their communities.

In August 2013, the Attorney General announced the Department's commitment to addressing these priority policy areas when he announced the Smart on Crime Initiative, which, in part, prioritizes reforming sentencing practices for low-level drug offenders. Of the 217,000 individuals in the Bureau of Prisons' custody, nearly half are serving time for drug-related offenses.[9] The Justice Department is committed to modifying charging and sentencing policies for these offenses both to help control Federal prison spending and to ensure that people convicted of certain low-level, nonviolent Federal drug crimes will face sentences appropriate to their individual conduct. While we continue to support mandatory minimum sentencing statutes, we believe they should be applied only to the most serious criminals. By reserving the harshest

[9] FEDERAL BUREAU OF PRISONS, INMATE STATISTICS, OFFENSES, *available at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp. *See also* Press Release, Department of Justice, Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers (Mar. 13, 2014) *available* at http://www.justice.gov/opa/pr/2014/March/14-ag-263.html.

penalties for dangerous and violent offenders, we can better promote public safety, deterrence, and rehabilitation by saving billions of taxpayer dollars and reinvesting the savings to strengthen communities. .

The Smart on Crime Initiative is already allowing the Justice Department to make critical improvements; to hold offenders accountable; to conserve precious public safety resources; to improve outcomes; and to disrupt the destructive cycle of poverty, incarceration, and crime that traps too many Americans and weakens entire neighborhoods. However, to most effectively address the issue, congressional action is necessary. The fact that several members of this task force – Congressmen Scott, Labrador, and Bachus – plus Congressmen Chaffetz as well as Senators Durbin, Lee, Leahy and Paul have introduced sentencing reform bills – shows an emerging bipartisan consensus that reform is urgently needed. We strongly urge this Task Force and the House Judiciary Committee to take up this issue this year. Advancing commonsense reforms to make the Federal criminal justice system more effective, more efficient and more just will help us to enhance justice and battle crime more effectively.

The Department strongly supports the legislation introduced by Congressmen Scott and Labrador: the Smarter Sentencing Act. By modestly reducing statutory penalties for certain non-violent drug offenders, the bill could allow billions of dollars to be reallocated to other critical public safety priorities while enhancing the effectiveness of our Federal sentencing system. Enactment of the Smarter Sentencing Act will ensure that law enforcement continues to have the tools needed to protect national security, combat violent crime and drugs, fight financial fraud, and safeguard the most vulnerable members of our society. Enactment of the Smarter Sentencing Act also would address a basic issue of fair treatment for similar offenders: drug

offenders with mandatory minimum sentences imposed before the Fair Sentencing Act would receive the same benefit as those convicted afterwards.

In addition to front-end reforms to the Federal sentencing system, the Department believes that we need "back-end" reforms to enhance the prospects that Federal prisoners will successfully return to their communities. Although enhanced reentry programs alone will not be sufficient to address the Department's budgetary challenges, they can make an important contribution. Although the Department has some technical concerns, we share the overall goals of legislation introduced by Congressmen Chaffetz and Scott: to improve Federal prisoner reentry, better control the Federal prison population, and reward prisoners who successfully participate in evidence-based programs that assist prisoners with successful reentry.

The kinds of reforms the Department supports are not unprecedented. Indeed, they build on innovative, data-driven reinvestment strategies that have been pioneered at the State level. State leaders – Republicans and Democrats – have begun to transform sentencing and corrections policy across the country. Their efforts have been driven more by practical, on-the-ground knowledge and data than by and ideology. In fact, in recent years, at least 18 States – supported by the Department's Justice Reinvestment Initiative and led by governors, legislators and law enforcement officials from both parties – have directed significant funding away from prison construction and toward evidence-based programs and services – such as community supervision and drug treatment – that are proven to reduce recidivism while improving public safety. The States that have implemented these reinvestment reforms include: Arkansas, Delaware, Georgia, Hawaii, Kansas, Kentucky, Missouri, Louisiana, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, and West Virginia.

Three additional States that are pursuing Justice Reinvestment but have not yet implemented legislation are, Michigan, Nebraska, and Washington. Rather than increasing costs, a new report funded by the Bureau of Justice Assistance projects that these States will actually save $4.6 billion over an 11-year period.[10] Many have already seen drops in recidivism and overall crime rates even as their prison populations have declined. Although the full impact of our Justice Reinvestment policies and other reforms remains to be seen, it is clear these efforts have achieved important milestones and are continuing to show significant promise across the country.

While the content of Justice Reinvestment legislation differs according to the specific needs and challenges of different jurisdictions, State reforms commonly include two elements that we believe are needed at the Federal level: (1) redirected funding and incentives to reduce reoffending and (2) adjustments to sentencing for non-violent drug offenders. Recent advancements in these areas suggest policymakers and law enforcement agencies at the Federal level can learn a lot from these State initiatives. For example, the reforms in States such as Texas—an early pioneer in the justice reinvestment approach—and the more recent examples of North Carolina and Georgia have already produced tangible results in corrections spending and prison population management, and have coincided with improvements in public safety.

In Texas, the State prison population increased by 300 percent between 1985 and 2005.[11] Between 1997 and 2006, probation revocations to prison increased by 18 percent.[12] In 2007 the

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[10] URBAN INSTITUTE, ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 3 (2014), *available at* http://www.urban.org/uploadedpdf/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf.

[11] Statement of Jerry Madden, Texas House of Representatives, U.S. Dept. of Justice, before the U.S. House of Representatives, Comm. on Appropriations, Subcommittee on Commerce, Justice, Science and Related Agencies, (2009).

Texas legislature enacted Justice Reinvestment legislation reforming corrections by reducing sentencing terms for drug and property offenders from a maximum of ten years to a maximum of five years and by increasing prison capacity for drug and mental health treatment. The law also invests in progressive sanctioning models; social and behavioral intervention programs; and expansion of drug and other specialty courts. The new legislation immediately reduced the anticipated corrections spending from $523 million to $241 million.[13] Moreover, from December 2008 to August 2010, the prison population decreased by 1,125 individuals.[14] There has also been a 25 percent decrease in parole revocations. According to the FBI Uniform Crime Reports, the violent crime rate in Texas peaked in 1991, at 840 violent crimes per 100,000 persons (the violent crime rate for the nation also peaked in 1991).[15] After Texas implemented it's sentencing reforms in 2007, the violent crime rate continued to decline, from 510 offenses per 100,000 people in 2007 to 409 per 100,000 in 2011.[16]

North Carolina has had similar success. Before Justice Reinvestment, North Carolina's prison population was projected to grow by 10 percent over the next 10 years.[17] It was expected to cost the State $378 million to build and staff new prison facilities.[18] Probation revocations accounted for 53 percent of prison admissions while only 15 percent of those released from

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[12] TEXAS, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (2014), http://csgjusticecenter.org/jr/tx/.
[13] THE JUSTICE CENTER, COUNCIL OF STATE GOVERNMENTS, JUSTICE REINVESTMENT IN TEXAS 2 (2009), *available at* http://www.ncsl.org/portals/1/Documents/cj/texas.pdf.
[14] MARSHALL CLEMENT, ET AL., THE NATIONAL SUMMIT ON JUSTICE REINVESTMENT AND PUBLIC SAFETY: ADDRESSING RECIDIVISM, CRIME, AND CORRECTIONS SPENDING 58 (2011).
[15] *See* FBI Uniform Crime Reporting Statistics database: http://www.ucrdatatool.gov/.
[16] FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#Crime.
[17] URBAN INSTITUTE, ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT, NORTH CAROLINA 1 (2014), *available at* http://www.urban.org/uploadedpdf/JRI_CaseStudy_North_Carolina.pdf.
[18] *Id.*

prison received post-release community supervision.[19] In 2011, North Carolina passed the Justice Reinvestment Act, which, among other things, requires mandatory supervision of felony parolees; empowers probation officers to recommend the use of swift and certain jail sanctions; and diverts nonviolent, first-time felony drug offenders from prison using second-chance incentives, saving both prison bed space and tax dollars.[20] As a result of this legislation, North Carolina now has its lowest prison population since 2007.[21] The probation revocation rate is down by nearly 15 percent and now accounts for far less than half of new entries to prison.[22] These policies are projected to save the State up to an estimated $346 million over six years in reduced and averted spending on operations and $214 million in averted construction costs.[23]

Georgia is another of the many Justice Reinvestment States that have been able to bring about impressive improvements in incarceration spending and public safety. During the two decades prior to making these criminal justice reforms, the State's prison population more than doubled to nearly 56,000 inmates.[24] This caused Georgia to have one of the Nation's highest proportions of adult residents under correctional control.[25] Such an explosion in the number of incarcerated individuals placed a substantial burden on Georgia's taxpayers. The State was spending more than $1 billion annually on corrections, up from $492 million in 1990.[26] Yet

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[19] *Id.*
[20] *Id.* at 2.
[21] *Id.* at 3.
[22] NORTH CAROLINA, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (2014). http://csgjusticecenter.org/jr/nc/.
[23] URBAN INSTITUTE, ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT, NORTH CAROLINA 2 (2014) *available at* http://www.urban.org/uploadedpdf/JRI_CaseStudy_North_Carolina.pdf.

[24] [24] URBAN INSTITUTE, ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT, GEORGIA 1 (2014) *available at* http://www.urban.org/uploadedpdf/JRI_CaseStudy_Georgia.pdf.

[25] *Id.*
[26] *Id.*

despite this growth in prison costs, the recidivism rate remained unchanged at nearly 30 percent throughout the past decade.[27] In 2012, Georgia's General Assembly enacted a law focused on providing prison space for serious offenders and strengthening probation and court supervision. It also created graduated degrees of penalties for burglary and forgery; raised felony theft thresholds; relaxed mandatory sentences for some drug trafficking; expanded the use of electronic monitoring; required evidence-based corrections practices; and established procedures for risk and needs assessments.[28] The legislation is expected to avert the projected prison population growth of about 5,000 inmates during the next five years and reduce the population from current levels.[29] Furthermore, policy makers were able to reinvest $17 million in accountability courts and residential programs for fiscal year 2013.[30]

In addition to increasing adoption of Justice Reinvestment practices and legislation, several States have also taken the initiative to reform their drug laws and related sentencing policies. For instance, in New York, a 2009 bill revised New York's Rockefeller drug laws by eliminating mandatory minimums for first time offenders convicted of a Class B, C, D, or E drug felony and second time drug offenders convicted of a Class C, D, or E drug felony.[31] The law also eliminated mandatory minimums for second time offenders convicted of a Class B drug felony who are drug dependent.[32] Mandatory minimum sentences for second time Class B and C drug felony offenders with a prior nonviolent conviction were reduced from 3.5 to two years and

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[27] *Id.*
[28] *Id.* at 2.
[29] *Id.*
[30] *Id.* at 1.
[31] RAM SUBRAMANIAN & REBECKA MORENO, *DRUG WAR DÉTENTE? A REVIEW OF STATE LEVEL DRUG LAW REFORM, 2009–2013*, VERA INSTITUTE OF JUSTICE 6 (Apr. 2014).
[32] *Id.*

from two to 1.5 years, respectively. Similarly, Arkansas' legislature passed reforms in 2011 that shortened mandatory minimum sentences for certain drug offenders.[33]

In 2011, Idaho and Kentucky also amended their treatment of certain drug offenses. Idaho expanded eligibility for drug courts to defendants charged with certain violent crimes.[34] Kentucky repealed the automatic sentence enhancement for certain subsequent drug offenses, including possession and some offenses involving prescription drugs.[35] Additionally, the Kentucky law changed the way drug possession offenses interact with the State's persistent felony offender statute. Under this new law, for example, a first degree drug possession conviction no longer leads to second degree persistent felony offender status upon another non-drug conviction.[36]

All of these evidence- and results-based efforts across the country have demonstrated that there is much to be learned from the experience of the States. It is time to apply these lessons at the Federal level. Our Smart on Crime initiative and the various legislative proposals are derived from, and complement these State efforts. By controlling prison spending and shifting away from an over-reliance on incarceration, we can focus our limited resources on the most important law enforcement priorities, such as violence prevention and protection of vulnerable populations. Our ongoing initiative is only the beginning of our efforts to modernize the criminal justice system. In the months ahead, the Department will continue to hone an approach that is not only more efficient and more effective at deterring crime and reducing recidivism, but also more consistent with our nation's commitment to treating all Americans as equal under the law. We

[33] *Id.* at 8
[34] *Id.* at 20
[35] *Id.* at 21.
[36] *Id.*

cannot achieve these critical goals, however, without the support of Congress. We urge you to seize this opportunity to make our criminal justice system fairer and to keep the American people safer.

Thank you, once again, for the opportunity to appear before you today. I would be happy to answer your questions.

Mr. BACHUS. At this time, I will recognize Judge Keeley for her opening statement.

TESTIMONY OF THE HONORABLE IRENE KEELEY, UNITED STATES DISTRICT JUDGE, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge KEELEY. Thank you, Chairman Bachus and Ranking Member Scott and distinguished Members of the Task Force for inviting me to testify today. It is an honor to appear before you and alongside such distinguished witnesses, especially my good friend and colleague, Chief Judge Saris.

I testify today on behalf of the Judicial Conference of the United States, the policymaking body for the Federal Judiciary. The conference's Committee on Criminal Law that I chair oversees the Federal probation and pretrial services system, and reviews legislation and other issues relating to the administration of criminal law.

My committee has watched this Task Force's progress with keen interest. The Judicial Conference has submitted letters for the record at past hearings, and I thank you for accommodating us with regard to that.

I offer for your consideration today several strategies to address the pressing problem of over-criminalization in the Federal system. Each of these points—curbing over-federalization, reforming mandatory minimum sentences, and amending the guidelines—are discussed at length in my written testimony.

At the outset, however, I do wish to emphasize that major criminal justice reforms currently under consideration, frontend and backend sentencing reform legislation, executive clemency, and reforms to the sentencing guidelines, will increase the Federal Judiciary's workload.

Congress must provide the courts, which currently are operating at 1997 staffing levels, with adequate resources to shoulder those additional burdens. The failure to do so will result in further delays for your constituents and ultimately could have public safety consequences.

For nearly a century, the Federal Judiciary has expressed concern about the federalization of crime. The conference encourages Congress to conserve the Federal courts as distinctive judicial forum of limited jurisdiction in our system of federalism. It is the conference's long-standing position that Federal prosecution should be limited to charges that cannot or should not be prosecuted in State courts.

To this end, the conference has identified five types of crimes that are appropriate for Federal prosecution: first, offenses against the Federal Government or its inherent interests; second, criminal activity with substantial multistate or international aspects; third, criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using Federal resources or expertise; fourth, serious high-level or widespread State or local government corruption; and fifth, criminal cases raising highly sensitive local issues.

The conference also recommends that Congress review existing Federal criminal statutes with the goal of eliminating provisions

that no longer serve an essential Federal purpose, an idea that I know has been discussed at past hearings of this Task Force.

Another pressing problem related to the issue of over-criminalization is the burgeoning population of the correctional system, caused in part by the proliferation of crimes carrying a mandatory minimum sentence.

Mandatory minimums, in the opinion of the conference, are wasteful of taxpayer dollars by unnecessarily increasing correctional costs, which are borne both by the Bureau of Prisons and by the probation and pretrial services system, which is within the Judiciary.

For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences. Mandatory minimums are incompatible with guideline sentencing, a point on which Judge Saris may expand.

In the absence of mandatory minimums, judges would not have unfettered discretion in sentencing. The sentencing guidelines that have been carefully developed with the benefit of the Sentencing Commission's congressionally endorsed expertise would remain fully in force. Departures or variances from the guidelines would be reviewable on appeal for reasonableness.

Mandatory minimums also cause disproportionality in sentencing by treating similarly offenders who actually may pose very different risks to society. The Judicial Conference endorses amending Section 924(c) to preclude the stacking of counts and to clarify that additional penalties only apply when one or more convictions have become final prior to the commission of the next offense.

The conference has already shared draft legislation in this regard with Congress, which I would be pleased to resubmit to this Task Force.

One example of the significant cost of stacking is the case of Weldon Angelos, a first-time nonviolent offender whose 55-year sentence resulted from stacking mandatory minimums.

I would urge your Task Force to consider whether taxpayers are truly well-served by spending $1.4 million or more to incarcerate Mr. Angelos for 55 years.

Thus, the Judicial Conference has agreed to seek legislation, such as the Safety Valve Act of 2013. The Judicial Conference also supports the policies contained in the Smarter Sentencing Act of 2013, legislation that I know several Members of this Task Force have cosponsored.

The third major public policy initiative that the Judicial Conference supports relating to over-criminalization is the Sentencing Commission's April 2014 decision to amend the guidelines to lower the base offense levels in the drug quantity table across drug types. The commission is currently considering whether to make this decision retroactive.

The Judicial Conference endorses these reforms on principles of fairness, nevertheless recognizing that they will impose costs upon the Judiciary. Retroactivity, in particular, would cause a dramatic influx of offenders out of prison and into the probation system.

Inadequate resources or preparation for this event would imperil public safety. The Judicial Conference, therefore, endorses retroactivity only if release of the first wave of prisoners is delayed by

6 months in order to give the probation system time to prepare for the first wave of new supervisees and if the commission coordinates a national training program among all of the affected agencies.

Thank you for inviting me to testify today and for considering the conference's views on curbing over-federalization, reforming mandatory minimum sentences, and amending the sentencing guidelines. I look forward to answering your questions.

[The prepared statement of Ms. Keeley follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES

TESTIMONY OF JUDGE IRENE KEELEY

CHAIR OF THE COMMITTEE ON CRIMINAL LAW

BEFORE

THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
OVER-CRIMINALIZATION TASK FORCE OF 2014

"AGENCY PERSPECTIVES"

FRIDAY, JULY 11, 2014

Chairman Sensenbrenner, Ranking Minority Member Scott and Distinguished Members of the Task Force,

Thank you for soliciting the views of the Judicial Conference of the United States. My name is Irene Keeley and I am a District Court Judge in the Northern District of West Virginia. I also serve as the Chair of the Judicial Conference's Committee on Criminal Law. The Criminal Law Committee is tasked with overseeing the federal probation and pretrial services system and reviewing legislation and other issues relating to the administration of criminal law.

My Committee is keenly interested in the work of the Task Force and is closely following the policy initiatives being considered and implemented throughout the federal criminal justice system. I am pleased to have the opportunity to share with the Task Force several views of the Judicial Conference related to the administration of the federal criminal justice system: curbing over-federalization of criminal law; reforming mandatory minimum sentences, which are inefficient, wasteful, and create sentencing disparities; and, amending the Sentencing Guidelines.

The entire Judicial Branch's appropriation is less than two-tenths of one percent of the federal budget. To put this figure in further perspective, the current appropriation for the entire Judiciary is approximately one-fourth of the Department of Justice's current appropriation alone. Any policy reform, even if it achieves overall net savings to taxpayers, that would shift additional costs onto the Judicial Branch would severely impact the Judiciary's budget and programming, given the small size of our budget.

The Judicial Conference appreciates the support that Congress has shown the Judiciary and hopes that it can continue to rely on that support in the years ahead, especially in light of the

serious discussions occurring in all three branches of government related to sentencing and corrections reforms. The Conference is closely following these efforts, which are designed, in part, to reduce the "crisis" that has been reported in the Federal Bureau of Prisons (BOP) stemming from an inmate population that is over its rated capacity.

In addressing this crisis – whether through legislation; executive action, such as clemency; or policy changes, such as amending the Sentencing Guidelines – policy-makers must not create a new public safety crisis in our communities by simply transferring the risks and costs from the prisons to the caseloads of already strained probation officers and the full dockets of the courts. Instead, lasting and meaningful solutions can be attained only if the branches work together to ensure that the correct cases are brought into the federal system, just sentences are imposed, and offenders are appropriately placed in prison or under supervision in the community.

I. Curbing the Over-Federalization of Criminal Law

The Judicial Conference has long opposed the over-federalization of criminal law, which is a cause of overcrowding in our federal prisons. For nearly a century, the Judiciary has encouraged preserving the limited role of the federal criminal justice system. For example, Chief Justice William Howard Taft expressed concerns about the federalization of crime during a 1922 address to the American Bar Association.[1] The Judicial Conference since has reiterated its "long-standing position that federal prosecutions should be limited to charges that cannot or should not be prosecuted in state courts,"[2] and has suggested that the "jurisdiction of the federal courts

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[1] *See* Hon. William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601 (1922).

[2] JCUS-SEP 91, p. 45.

should be limited, complementing and not supplanting the jurisdiction of the state courts."[3]

The Judiciary appreciates the importance of reducing crime. Accordingly, in 1995 the Conference adopted policies encouraging Congress "to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism," and emphasized that "[i]n principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."[4] At that time, the Conference specifically identified five types of criminal offenses deemed appropriate for federal jurisdiction:

1. Offenses against the federal government or its inherent interests;
2. Criminal activity with substantial multistate or international aspects;
3. Criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
4. Serious, high-level or widespread state or local government corruption; and,
5. Criminal cases raising highly sensitive local issues.[5]

The Conference recommends that Congress review existing federal criminal statutes with the goal of eliminating provisions that no longer serve an essential federal purpose. In addition, the Conference recommends that Congress consider using "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created. Finally, the Conference recommends that Congress and the Executive Branch undertake cooperative efforts with the states to develop a policy to determine whether offenses should be prosecuted in

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[3] JCUS-SEP 93, p. 51.
[4] JCUS-SEP 95, pp. 39, 40.
[5] *Id.* at 40.

the federal or state systems.[6]

II. Reforming Mandatory Minimum Sentences

A. The Failure of Mandatory Minimum Sentences

For sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences and has supported measures for their repeal or to ameliorate their effects.[7] The Conference has had considerable company in its opposition to mandatory minimum sentences,[8] which belies the claim that judges are motivated by a parochial desire to increase their own power in sentencing. Judges routinely perform tasks in which the individual judge has no or very little discretion—but the Judicial Conference does not advocate for the repeal of these legislatively mandated tasks.[9]

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[6] *See id.*

[7] JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17; JCUS-SEP 13, p. 17.

[8] *See, e.g.*, *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66 (1993) [hereinafter *1993 Hearing*] (statement of Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Commission) ("The conference of every circuit with criminal jurisdiction in the federal judicial system,...the U.S. Sentencing Commission, prosecutors and defense attorneys, [and] federal corrections experts...have all spoken of their concerns [about mandatory minimum sentencing]. It is important to note this developing consensus because we occasionally hear the comment that criticisms of mandatory minimums should be dismissed as coming from judges who are unhappy about limits on their discretion.... [T]he spectrum of viewpoints represented by those who have concerns about mandatory minimums is far broader than the federal judiciary. It includes representatives of virtually all sectors in the criminal justice system.").

[9] *See Mandatory Minimums and Unintended Consequences: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 39 (2009) [hereinafter *2009 Hearing*] (statement of Judge Julie E. Carnes, Chair, Committee on Criminal Law, Judicial Conference of the United States) ("In reality..., district judges are continually dictated to in a variety of ways, in both civil and criminal cases. In fact, much of a judge's daily activity is consumed with executing 'mandatory' tasks, using a decision-making process that is 'mandated' by some other entity. Thus, a judge must adjudicate a civil case, according to the prescribed standards, whether or not the judge agrees with the policy judgment made by Congress that gave rise to the cause of action or to the recognized defenses. A judge must instruct a jury as to what the applicable statute and precedent require, regardless of the judge's possible disagreement with some of these instructions. Myriad other examples abound. Judges understand and accept these constraints because judges know that they do not create the law; this is Congress's role. Rather, judges interpret that law and apply it to the facts of the case, within whatever ambit of discretion is deemed permissible for the particular issue.").

Though mandatory minimums have been criticized on numerous grounds,[10] there are three objections that we wish to highlight. First, statutory minimums cost taxpayers excessively in the form of unnecessary prison and supervised release costs. Second, they impair the efforts of the United States Sentencing Commission to fashion Guidelines according to the principles of the Sentencing Reform Act, including the careful calibration of sentences proportionate to severity of the offense and the research-based development of a rational and coherent set of punishments. Finally, mandatory minimums are inherently rigid and often lead to inconsistent and disproportionately severe sentences.

1. Mandatory Minimum Sentences Unnecessarily Increase the Cost of Prison and Supervision in the Community

Mandatory minimums have a significant impact on correctional costs. As the Sentencing Commission stated in its 2011 report to Congress, mandatory minimums have proliferated over the past twenty years. Between 1991 and 2011, the number of mandatory minimum penalties more than doubled, from 98 to 195.[11] There are approximately 195,000 more inmates incarcerated in federal prisons today than there were in 1980, a nearly 790 percent increase in the

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[10] *See, e.g.*, U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Oct. 2011), at 90-103, *available at*: http://www.ussc.gov/Legislative_and_Public_Affairs/ Congressional Testimony_and_ Reports/Mandatory Minimum_ Penalties/ 20111031_ RtC_PDF/Chapter_05.pdf (reviewing policy views against mandatory minimum penalties, including that: they are applied inconsistently; they transfer discretion from judges to prosecutors; they are ineffective as a deterrent or as a law enforcement tool to induce pleas and cooperation; they are indicative of the "overfederalization" of criminal justice policy and as upsetting the proper allocation of responsibility between the states and federal government; and they unfairly impact racial minorities and the economically disadvantaged); Hon. Eric Holder, Attorney General of the United States, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 2013), *available at*: http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html ("Because they oftentimes generate unfairly long sentences, [mandatory minimums] breed disrespect for the system. When applied indiscriminately, they do not serve public safety. They – and some of the enforcement priorities we have set – have had a destabilizing effect on particular communities, largely poor and of color. And, applied inappropriately, they are ultimately counterproductive.").

[11] U.S. Sentencing Commission, *Report to the Congress, supra* note 10, at 71.

federal prison population.[12] This growth "is the result of several changes to the federal criminal justice system, including expanding the use of mandatory minimum penalties; the federal government taking jurisdiction in more criminal cases; and eliminating parole for federal inmates."[13]

Longer prison sentences also mean longer terms of supervised release. Legislation ameliorating the effects of mandatory minimums can save taxpayer dollars, not only through a reduction in the prison population, but also by lowering supervised release caseloads.[14] In a 2010 report, the Sentencing Commission noted that the average term of supervised release for an offender subject to a mandatory minimum was 52 months, which compared to 35 months for an offender who was not subject to a mandatory minimum—a difference of 17 months.[15] Based on fiscal year 2013 cost data, the cost of supervising an offender for one month is approximately $264. Thus, mandatory minimums cost the Judiciary alone, on average, almost $4.5 million in supervision costs per 1,000 offenders (i.e., $264 x 17 months x 1,000 offenders = $4.488 million). If the Judiciary were called upon to play a role in reducing prison over-crowding (which

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[12] Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* (Jan. 2013), at 51, *available at*: http://www.fas.org/sgp/crs/misc/R42937.pdf.

[13] *Id.*; *see also* U.S. Sentencing Commission, *Report to the Congress*, *supra* note 10, at 63 ("Statutes carrying mandatory minimum penalties have increased in number, apply to more offense conduct, require longer terms, and are used more often than they were 20 years ago. These changes have occurred amid other systemic changes to the federal criminal justice system…that also have had an impact on the size of the federal prison population. Those include expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, high rates of imposition of sentences of imprisonment, and increasing average sentence lengths. [T]he changes to mandatory minimum penalties and these co-occurring systemic changes have combined to increase the federal prison population significantly.").

[14] *See also* David Adair, *Revocation of Supervised Release - A Judicial Function*, 6 FED. SENT'G REP. 190, 191 (1994) ("[S]ome argue that persons who serve the longer terms of imprisonment that have resulted from mandatory minimum sentences and the sentencing guidelines may present greater problems in supervision simply by virtue of the longer periods of incarceration.").

[15] U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010), at 51-52, *available at*: http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf.

is a direct result of mandatory minimums) through legislative or executive action transferring inmates to supervision by probation officers, then the Judiciary certainly would require increased appropriations to carry this new burden.

2. Mandatory Minimum Sentences are Incompatible with the Sentencing Reform Act

Mandatory minimum statutes impair the congressional mandate of the Sentencing Commission to fashion Sentencing Guidelines in accordance with the principles of the Sentencing Reform Act. In 1984, Congress passed the Sentencing Reform Act after years of consideration and debate. The Act created the Sentencing Commission and charged it with the responsibility to create a comprehensive system of guideline sentencing.

But mandatory minimum sentences have severely hampered the Commission in its task of establishing fair, certain, rational, and proportional Guidelines. They deny the Commission the opportunity to bring to bear the expertise of its members and staff upon the development of sentencing policy. Since the Commission has embodied within its Guidelines mandatory minimum sentences,[16] the Guidelines have been skewed out of shape and upward by the

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[16] The Sentencing Commission has taken the position that minimum sentences mandated by statute require the Sentencing Guidelines faithfully to reflect that mandate. The Commission has accordingly reflected those mandatory minimums at or near the lowest point of the Sentencing Guideline ranges. The Criminal Law Committee has expressed its concerns to the Commission about the subversion of the Sentencing Guideline scheme caused by mandatory minimum sentences. The Committee believes that setting the Sentencing Guidelines' base offense levels irrespective of mandatory minimum penalties is the best approach to harmonizing what are essentially two competing approaches to criminal sentencing. *See, e.g.*, Letter from Judge Sim Lake, Chair, Committee on Criminal Law, Judicial Conference of the United States, to members of the U.S. Sentencing Commission (Mar. 8, 2004) (on file with the Administrative Office of the U.S. Courts); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Mar. 16, 2007) (on file with the Administrative Office of the U.S. Courts); *see also United States v. Leitch*, No. 11-CR-00609(JG), 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013) ("[T]he Commission can fix this problem by delinking the Guidelines ranges from the mandatory minimum sentences and crafting lower ranges based on empirical data, expertise, and more than 25 years of application experience demonstrating that the current ranges are not the 'heartlands' the Commission hoped they would become.").

inclusion of sentence ranges which have not been empirically constructed.[17] Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered in the establishment of the sentencing range for certain offenses and offenders.

As the Commission explained in their 1991 report to Congress on mandatory minimums, the simultaneous existence of mandatory sentences and Sentencing Guidelines skews the "finely calibrated . . . smooth continuum" of the Guidelines, and prevents the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[18] The Commission concluded that the two systems are "structurally and functionally at odds."[19] Similarly, in 1993, Chief Justice William Rehnquist stated that "one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."[20] Likewise, Senator Orrin Hatch has expressed grave doubts about the ability to reconcile the federal sentencing guidelines and mandatory minimum sentences.[21]

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[17] *1993 Hearing*, *supra* note 8, at 108 (statement of Judge Vincent L. Broderick) ("This superimposition of mandatory minimum sentences within the Guidelines structure has skewed the Guidelines upward.... As a consequence, offenders committing crimes not subject to mandatory minimums serve sentences that are more severe than they would be were there no mandatory minimums. Thus mandatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.").

[18] U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991), *available at*: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm

[19] *Id.*

[20] Chief Justice William H. Rehnquist, *Luncheon Address* (June 18, 1993), *in* U.S. Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 287 (1993).

[21] *See* Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993).

3. Mandatory Minimum Sentences Cause Unwarranted Disproportionality in Sentencing

By deviating from the carefully calibrated Sentencing Guidelines, mandatory minimums are structurally flawed and often result in disproportionately severe sentences. As past chairs of the Judicial Conference's Criminal Law Committee have testified, there is an inherent difficulty in crafting a statutory minimum that should apply to every case. Unlike the Sentencing Guidelines, applied by judges on a case-by-case basis and allowing a consideration of multiple factors that relate to the culpability and dangerousness of the offender, mandatory minimums typically identify one aggravating factor and then pin the prescribed enhanced sentence to it. Such an approach means that any offender who is convicted under the particular statute, but whose conduct has been extenuated in ways not taken into account, will necessarily be given a sentence that is excessive. This reduces proportionality and creates unwarranted uniformity in treatment of disparate offenders. As two former Criminal Law Committee chairs have put it, mandatory minimums "mean one-size-fits-all injustice"[22] and are "blunt and inflexible tool[s]."[23]

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[22] *Mandatory Minimum Sentencing Laws - The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 46 (2007) [hereinafter *2007 Hearing*] (statement of Judge Paul Cassell, Chair, Committee on Criminal Law, Judicial Conference of the United States) ("Mandatory minimum sentences mean one-size-fits-all injustice. Each offender who comes before a federal judge for sentencing deserves to have their individual facts and circumstances considered in determining a just sentence. Yet mandatory minimum sentences require judges to put blinders on to the unique facts and circumstances of particular cases.").

[23] *2009 Hearing*, *supra* note 9, at 42 (statement of Judge Julie E. Carnes); *see also 1993 Hearing*, *supra* note 8, at 67 (statement of Judge William W. Wilkins) ("[Mandatory minimums] treat similarly offenders who can be quite different with respect to the seriousness of their conduct or their danger to society. This happens because mandatory minimums generally take account of only one or two out of an array of potentially important offense or offender-related facts."); U.S. Sentencing Commission, *Report to the Congress*, *supra* note 10, at 346 ("For…a sentence to be reasonable in every case, the factors triggering the mandatory minimum penalty must *always* warrant the prescribed mandatory minimum penalty, regardless of the individualized circumstances of the offense or the offender. This cannot necessarily be said for all cases subject to certain mandatory minimum penalties.") (emphasis in original).

Mandatory minimum sentences typically are adopted to express opprobrium for a certain crime or in reaction to a particular case where the sentence seemed too lenient. And in some cases, of course, the mandatory penalty will seem appropriate and reasonable. When that happens, judges are not concerned that the sentence was also called for by a mandatory sentencing provision because the sentence is fair. Unfortunately, however, given the severity of many of the mandatory sentences that are most frequently utilized in our system, judges are often required to impose a mandatory sentence in which the minimum term seems greatly disproportionate to the particular crime the judge has just examined and terribly cruel to the person standing before the judge for sentencing.

This is frequently the case with drug distribution cases, where the only considerations are the type and amount of drugs.[24] Former Criminal Law Committee Chair Judge Vincent Broderick testified two decades ago that mandatory minimums for drug distribution offenses are often unfair and result in sentences disproportionate to the level of culpability because they are based on the amount of drugs involved,[25] the weight of which is calculated regardless of purity,[26] they

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[24] In its recent report to Congress, the Sentencing Commission reported, based on fiscal year 2010 data, that over 75% of convictions of an offense carrying a mandatory minimum penalty were for drug trafficking offenses. U.S. Sentencing Commission, *Report to the Congress*, *supra* note 10, at 146.

[25] *1993 Hearing*, *supra* note 8, at 106 ("Use of the amounts of drugs by weight in setting mandatory minimum sentences raises issues of fairness because the amount of drugs in the offense is more often than not totally unrelated to the role of the offender in the drug enterprise. Individuals operating at the top levels of drug enterprises routinely insulate themselves from possession of the drugs and participation in the smuggling or transfer functions of the business. It is the participants at the lower levels -- those that transport, sell, or possess the drugs -- that are caught with large quantities. These individuals make up the endless supply of low-paid mules, runners, and street traders, many of them aliens.").

[26] *Id.* ("The weight of inert substances used to dilute the drugs or the weight of a carrier medium (the paper or sugar cube that contains LSD or the weight of a suitcase in which drugs have been ingeniously imbedded in the construction materials of the suitcase) is added to the total weight of the drug to determine whether a mandatory sentence applies. A defendant in possession of a quantity of pure heroin may face a lighter sentence than another defendant in possession of a smaller quantity of heroin of substantially less purity, but more weight because of the diluting substance. Since the relation of the carrier medium to the drug increases as the drug is diluted in movement to the retail level, the unfairness of imposing automatic sentences based on amount without regard to role in the offense is compounded by failure to take purity into account."); *Neal v. United States*, 516 U.S. 284, 296 (1996) (a

apply conspiracy principles to drug sentences,[27] and the most culpable offenders (who often are not caught personally in possession of large quantities of drugs) are able to avoid mandatory minimums by cooperating with prosecutors because they have more knowledge of the drug conspiracy than lower level offenders.[28]

In her congressional testimony five years ago, Judge Julie Carnes (former Chair of the Criminal Law Committee) provided a specific example of how disproportionately severe sentences may result from the mandatory minimum structure governing drug-related offenses.[29] Section 841(b)(l)(A) of Title 21 provides that, when a defendant has been convicted of a drug distribution offense involving a quantity of drugs that would trigger a mandatory minimum sentence of ten years imprisonment—e.g., five kilograms of cocaine—the defendant's ten-year mandatory sentence shall be doubled to a twenty-year sentence if he has been previously convicted of a drug distribution-type offense. Now, if the defendant is a drug kingpin running a long-standing, well-organized, and extensive drug operation who has been previously convicted of another serious drug offense, a twenty-year sentence may be just. The amount of drugs may be

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sentencing court is required by statute to take into account actual weight of blotter paper with its absorbed LSD in determining whether there is sufficient weight of LSD to require mandatory minimum sentence).

[27] *1996 Hearing*, *supra* note 8, at 106 ("Another significant factor of unwarranted unfairness in mandatory minimum sentencing is the application of conspiracy principles to quantity-driven drug crimes....[A]ccomplices with minor roles may be held accountable for the foreseeable acts of other conspirators in furtherance of the conspiracy. A low-level conspirator is subject to the same penalty as the kingpin...despite the fact that [he or she] ha[s] little knowledge of the nature [or amount of the drugs involved].").

[28] *Id.* at 107 ("Who is in a position to give such 'substantial assistance'? Not the mule who knows nothing more about the distribution scheme than his own role, and not the street-level distributor. The highly culpable defendant managing or operating a drug trafficking enterprise has more information with which to bargain. Low-level offenders, peripherally involved with less responsibility and knowledge, do not have much information to offer....There are few federal judges engaged in criminal sentencing who have not had the disheartening experience of seeing major players in crimes before them immunize themselves from the mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the mandatory minimum prison term so skillfully avoided by the kingpins.").

[29] *See 2009 Hearing*, *supra* note 9, at 43.

a valid indicator of market share, and thus culpability, for leaders of drug manufacturing, importing, or distributing organizations. But, kingpins are, by definition, few in number, and they are not the drug defendant whom we see most frequently in federal court.

Instead of a drug kingpin, assume that the defendant is a low-level participant who is one of several individuals hired to provide the manual labor used to offload a large drug shipment arriving by boat. The quantity of drugs in the boat will easily qualify for a ten-year mandatory sentence. This is so even though in cases of employees of these organizations or others on the periphery of the crime, the amount of drugs with which they are involved is often merely fortuitous. A courier, unloader, or watchman may receive a fixed fee for his work, and not be fully aware of the type or amount of drugs involved. A low-level member of a conspiracy may have little awareness and no control over the actions of other members. Further, assume that the low-level defendant has one prior conviction for distributing a small quantity of marijuana, for which he served no time in prison. Finally, assume that since his one marijuana conviction, he has led a law-abiding life until he lost his job and made the poor decision to offload this drug shipment in order to help support his family. This defendant will now be subject to a twenty-year mandatory minimum sentence–*but should he receive the same sentence as the kingpin?* It is difficult to defend the proportionality of this type of sentence, which is not unusual in the federal criminal justice system.[30]

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[30] *See, e.g.*, *Leitch*, *supra* note 16, at *2 ("[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimum sentences that Congress explicitly created only for the leaders and managers of drug operations.").

4. Stacking of Firearms Counts Exacerbates the Unwarranted Disproportionality of Mandatory Minimum Sentences

Section 924(c) of Title 18 provides for enhanced punishments for using or carrying a firearm during the commission of a crime of violence or a drug trafficking offense. Specifically, depending on whether the gun was carried, brandished, or discharged, the defendant must be sentenced to at least five, seven, or ten years, respectively, and that sentence must be made to run consecutively to any other sentence imposed.[31] The same statute provides that, "[i]n the case of a second or subsequent conviction under this subsection," the defendant shall be sentenced to a term of not less than twenty-five years, which again must run consecutively to any other sentence imposed.[32]

Congress did not define the term "second or subsequent conviction" when it enacted Section 924(c). Ambiguity about the meaning of this phrase led to litigation about whether conviction on two counts charged in one indictment would render the second count "a second or subsequent conviction" that would trigger the twenty-five-year enhancement. The Supreme Court determined that each Section 924(c) count for which a defendant is convicted constitutes a conviction subject to the enhanced penalties provided for in Section 924(c).[33] The Court's holding therefore permits the "stacking" of mandatory Section 924(c) sentences based on one judgment for an indictment containing multiple Section 924(c) counts.

The injustice of stacking mandatory minimum sentences is starkly illustrated by the case of *United States v. Angelos*, in which a first-time offender received a 55-year prison sentence for

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[31] 18 U.S.C. § 924(c)(1)(A), (D)(ii).
[32] *Id.* § 924(c)(1)(C)(i).
[33] *Deal v. United States*, 508 U.S. 129 (1993).

carrying a gun to two $350 marijuana deals; several additional handguns were found at his home when the police executed a search warrant.[34] Because he was convicted of distributing marijuana and related offenses, the prosecution and the defense agreed that Angelos, a twenty-four-year-old with two young children, should serve about six-and-a-half years in prison. But Angelos was also subject to three Section 924(c) offenses. The government recommended a prison term of no less than 61½ years: 6½ years for drug distribution followed by 55 years for three counts of possessing a firearm in connection with a drug offense. The judge concluded that a sentence of 660 months (55 years) was adequate, and that he did not need to punish Angelos with an additional 78 months. Accordingly, he used his authority under 18 U.S.C. § 3553(a) and imposed a 55-year sentence.

Because Section 924(c) penalties are mandatory minimums, the judge in *Angelos* was unable to impose a lesser punishment proportionate to the crimes. The judge later denounced the situation as "irrational."[35] The same day that this judge imposed a 660-month sentence upon Angelos, he followed the prosecution's recommendation and sentenced the second-degree murderer of an elderly woman to 262 months (21 years, 10 months).[36] To put this in perspective, *Angelos' sentence was two-and-a-half times longer than the second-degree murderer's* and more than double the sentence for many other serious crimes under the Guidelines (e.g., aircraft hijacker, 293 months;[37] terrorist who detonated a bomb in a public place, 235 months;[38] racist

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[34] *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

[35] *United States v. Booker: One Year Later–Chaos or Status Quo? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 62 (2006) (statement of Judge Paul G. Cassell, Chair, Committee on Criminal Law).

[36] *United States v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005).

[37] U.S.S.G. § 2A5.1 (2003) (base offense level 38). All calculations assume a first offender, like Mr. Angelos, in Criminal History Category I, under the 2003 Sentencing Guidelines.

[38] U.S.S.G. § 2K1.4(a)(1) (cross-referencing § 2A2.1(a)(2) and enhanced for terrorism by § 3A1.4(a)).

who attacked a minority with the intent to kill and inflicted permanent or life-threatening injuries, 210 months;[39] second-degree murderer, 168 months;[40] rapist, 87 months[41]).

B. Solutions to Ameliorate the Effects of Mandatory Minimum Penalties

Last year, the Conference endorsed seeking legislation "such as the Justice Safety Valve Act of 2013, that is designed to restore judges' sentencing discretion and avoid the costs associated with mandatory minimum sentences."[42] Though it favors the repeal of all mandatory minimum penalties, the Conference also supports steps that reduce the negative effects of these statutory provisions. Thus, the Judicial Conference supports the policies contained in the Smarter Sentencing Act of 2013.

The Judicial Conference also endorses an amendment to 18 U.S.C. § 924(c) to preclude the "stacking" of counts and to clarify that additional penalties apply only when one or more convictions of such person have become final prior to the commission of such offense.[43] The Judicial Conference specifically recommends that Section 924(c) be amended to make it consistent with 21 U.S.C. § 962(b). Section 962(a) sets forth the penalty for second or subsequent offenses under subchapter II of Title 21 but, unlike Section 924(c), Section 962(b) defines the phrase "second or subsequent offense." Section 962(b) provides that "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of such person for a felony drug offense have become final." Under the Conference's approach, an offender would be subject to an enhanced twenty-

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[39] U.S.S.G. § 3A1.1 (base offense level 32 + 4 for life-threatening injuries + 3 for racial selection under § 3A1.4(a)).

[40] U.S.S.G. § 2A1.2 (base offense level 33).

[41] U.S.S.G. § 2A3.1 (base offense level 27).

[42] JCUS-SEP 13, p. 17.

[43] JCUS-MAR 09, pp. 16-17.

five-year sentence if he or she had been convicted in the past of a Section 924(c) offense and, following that conviction, committed and was again convicted of another Section 924(c) offense.

All mandatory minimum sentences can produce results contrary to the interests of justice, but Section 924(c) is particularly egregious. Stacked mandatory sentences (counts), even more so than most mandatory terms, may produce sentences that undermine confidence in the administration of justice. The Conference recommends that 18 U.S.C. § 924(c) be amended to preclude stacking so that additional penalties apply only for true repeat offenders.

The good intentions of their proponents notwithstanding,[44] mandatory minimums have created what Chief Justice Rehnquist aptly identified as "unintended consequences."[45] Far from benign, these unintended consequences waste valuable taxpayer dollars, undermine guideline sentencing, create tremendous injustice in sentencing, and ultimately could foster disrespect for the criminal justice system. We hope that Congress will act swiftly to reform federal mandatory minimum sentences.

III. Amending the Drug Quantity Table of the Sentencing Guidelines

On January 17, 2014, the Sentencing Commission published for comment several proposed amendments to the Sentencing Guidelines Manual, including one that would lower by two levels the offense levels in the Drug Quantity Table.[46] At its April 10, 2014, public hearing, the Commission voted to approve the amendment, and assuming that Congress does not take

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[44] *See 2009 Hearing*, *supra* note 9, at 37 (statement of Judge Julie E. Carnes) ("I start by attributing no ill will or bad purpose to any Congressional member who has promoted or supported particular mandatory minimums sentences. To the contrary, many of these statutes were enacted out of a sincere belief that certain types of criminal activity were undermining the order and safety that any civilized society must maintain and out of a desire to create an effective weapon that could be wielded against those who refuse to comply with these laws.").

[45] *Luncheon Address*, *supra* note 20, at 286 (suggesting that federal mandatory minimum sentencing statutes are "perhaps a good example of the law of unintended consequences").

[46] Request for Public Comment, 79 Fed. Reg. 3279 (Jan. 17, 2014).

action to the contrary, the amendment will become effective on November 1, 2014. The Commission expects the lower guidelines to prospectively impact 70 percent of all drug cases, and reduce sentences by an average of eleven months. The Criminal Law Committee submitted a letter to the Commission supporting the prospective amendment citing, among other things, its longstanding view that the Guidelines, which were calibrated to be consistent with mandatory minimum penalties, should be set irrespective of any mandatory minimum.

Also at its April meeting, the Commission voted to publish a notice seeking public comment on whether the amendments to the Drug Quantity Table should be applied retroactively.[47] The Commission sought comments on whether any guidance or limitations should be put in place in connection with the amendment.

At its June 2014 meeting, the Criminal Law Committee discussed at length whether to support the retroactive application of the proposed amendment.[48] Before its deliberations, the Committee reviewed the impact analysis prepared by the Sentencing Commission's staff and solicited the viewpoints of judges in many of the districts most affected by the amendment if it were applied retroactively. The Committee also received input from the Administrative Office of the United States Courts' Probation and Pretrial Services Chiefs Advisory Group and will work collaboratively with the Judicial Conference's Defender Services Committee to ensure the right to counsel would be protected. Members of the Committee wrestled with many difficult issues

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[47] Request for Public Comment, 79 Fed. Reg. 25996 (May 6, 2014).

[48] In September 1990, the Judicial Conference authorized the Committee to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the sentencing guidelines, including proposals that would increase the flexibility of the guidelines. JCUS-SEP 90, pp. 69-70. On several prior occasions (e.g., 1994, 2007, and 2011) the Committee supported retroactive application of amendments lowering the offense levels in the Drug Quantity Table.

including how to balance fairness and public safety, and the reality of significant financial pressures on the Judiciary and other components of the criminal justice system.

After significant and careful thought and evaluation, the Committee voted, by a large majority, to support making the proposed amendment retroactive, but only if: (1) the courts are authorized to begin accepting and granting petitions on November 1, 2014; (2) any inmate who is granted a sentence reduction will not be eligible for release until May 1, 2015; and (3) the Commission helps coordinate a national training program that facilitates the development of procedures that conserve scarce resources and promote public safety. On June 10, 2014, I testified before the Sentencing Commission at its public hearing and conveyed the Judicial Conference's position on this matter (the Committee is authorized to speak for the Conference on amendments to the Sentencing Guidelines).

A majority of the Committee's members do not believe that the date a sentence was imposed should dictate the length of imprisonment; rather, whenever possible, fundamental fairness dictates that the defendant's conduct and characteristics should drive the sentence. The retroactive application of the amendment in this case will put previously sentenced defendants on the same footing as defendants who commit the same crimes in the future. Another important consideration for the Committee's position is that the retroactive application of the amendment will further reduce the influence of mandatory minimums on the Sentencing Guidelines and, in turn, reduce the disproportionate effect of drug quantity on the sentence length.

However, the Conference is acutely aware of the diminished resources of the probation and pretrial services system,[49] and of the significant demands that will be imposed on the system by the retroactive application of the amendment. The Conference hopes that a six-month delay in cases being released to supervision will allow additional time for the probation system to be provided needed resources and fill probation officer vacancies. The additional time also will allow the probation and pretrial services system to marshal its existing resources as much as possible to process petitions and to minimize the threat to community safety stemming from too many inmates being released without adequate planning and supervision.

CONCLUSION

Thank you for soliciting the views of the Judiciary as your Task Force continues its diligent study of the issue of over-criminalization in the federal system. Curbing over-federalization of criminal law and reforming mandatory minimums are significant reforms that would strengthen our system while conserving taxpayer dollars. With adequate resources, including a six-month delay in the release of inmates to supervision and a national training program coordinated by the Sentencing Commission, the Judicial Conference supports retroactivity for the pending amendments to the Drug Quantity Table of the Sentencing Guidelines. Working together, the branches can ensure that the correct cases are brought into the federal system, just sentences are imposed, and offenders are appropriately placed in prison or under supervision in the community.

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[49] Between fiscal years 2003 and 2013, staffing strength in probation and pretrial services declined by 5 percent, falling from 8,176 full-time equivalents (FTEs) to 7,745. During the same time period, the daily post-conviction supervision population increased by 19 percent, growing from 110,621 to 131,869 persons.

Mr. BACHUS. Thank you, Judge Keeley.
At this time, we will hear from Judge Saris.

TESTIMONY OF THE HONORABLE PATTI B. SARIS, CHAIR, UNITED STATES SENTENCING COMMISSION

Judge SARIS. Good morning to everyone. Chairman Bachus, Ranking Member Scott, distinguished Members of the Task Force, thank you so much for providing me with the opportunity to testify on behalf of the United States Sentencing Commission. We are so pleased that the House Judiciary Committee has set up this Over-Criminalization Task Force. I have been waiting for this hearing, and I am thrilled that we are all here with such a distinguished panel.

The commission identified reducing cost of incarceration and overcapacity as a priority for the amendment cycle this year and last year. In doing so, the commission is carrying out its statutory duty, and I quote the statute, "We are required to ensure that the sentencing guidelines minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

While State prison populations have begun to decline slightly due to reforms, the Federal prison population has grown by about a third in the past decade and exceeds capacity by 32 percent overall and by 52 percent in high-security facilities. Drug offenders make up a third of the offenders sentenced federally every year, and a majority of the prisoners serving in the Federal Bureau of Prisons. So they are extremely important to the size and nature of the Federal prison population.

Can you hear me better now? Usually, hearing me is not a problem. [Laughter.]

The commission set out to determine ways to address the crisis in the Federal prison budget and population that are fair and appropriate. We sought out the perspectives of law enforcement to be sure that any proposed changes will be consistent with the goal of promoting public safety.

The commission found in its 2011 review of mandatory minimum penalties that certain mandatory minimum provisions apply too broadly, are set too high, or both. And as a result, certain mandatory minimums penalties are applied inconsistently from district to district, and even within districts.

We also found that 23 percent of all drug offenders were couriers who are usually low-level, and nearly half of these were charged with offenses carrying mandatory minimum sentences.

The category of drug offenders most often subject to mandatory minimum penalties—that is, who didn't receive any kind of relief from mandatory minimums like the safety valve—were street-level dealers who are many steps below high-level suppliers and leaders of drug organizations.

We are concerned, too, about the differences in how mandatory minimum penalties apply and relief is granted in different racial and demographic groups.

Mandatory minimums have contributed to the growth in Federal prison populations. The numbers tell the story. The number of offenders in Federal custody who are subject to a mandatory min-

imum penalty at sentencing increased from 29,603 in 1995 to 75,000 in 2010, a 155 percent increase.

So the bipartisan, seven-member commission has accordingly unanimously recommended that Congress reduce statutory mandatory minimum penalties for drug trafficking; that the provisions of the Fair Sentencing Act of 2010 should be made retroactive; and that Congress should consider expanding the safety valve that is allowing sentences below mandatory minimum penalties for nonviolent, low-level drug offenders to offenders with slightly greater criminal histories than currently permitted.

The commission also this year unanimously approved an amendment to the guidelines to reduce by two levels the base offense levels assigned to most drug trafficking offenders based on drug quantity. Why? The guidelines were originally set slightly above the mandatory minimum penalties, so that even those offenders with no enhancements and minimal criminal history would benefit from pleading guilty and otherwise cooperating.

Congress subsequently created the safety valve, which gives low-level offenders a much greater benefit for cooperating. So setting the guidelines above the mandatory minimum is no longer necessary for that purpose.

Indeed, after a similar reduction for crack offenders in 2007, the rates at which the crack cocaine defendants pled guilty and cooperated with authorities remained stable.

In addition, at the time the original guideline levels were set, the guidelines only had one enhancement for a gun, but now it has 14 enhancements for specific conduct, which reduces somewhat the need to rely so heavily on drug quantity in setting guideline levels.

We were encouraged. We recently did a recidivism study of those offenders who sentences were reduced following the 2007 two-level reduction for crack offenders. After 5 years, there was no statistically significant difference in recidivism rates between those offenders and other ones who were released the previous year after serving their full sentences. This study indicated that a modest reduction in drug sentences may not lead to any increase in recidivism.

The amendment we approved this spring, if it goes into effect on November 1, is an important but modest—and I underline "modest"—first step to addressing prison costs and crowding consistent with the law on public safety.

But more comprehensive change needs to come from Congress. The commission has been encouraged to see the bipartisan legislation introduced here in the House and in the Senate that is consistent with the recommendations we have made. We hope to see further progress toward enacting legislation in this area, and stand ready to work with you and others in Congress.

So thank you very much, and I am sorry I if I spoke too quickly. I am the bane of my court reporter. So, thank you.

[The prepared statement of Ms. Saris follows:]

Testimony of Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
For the Hearing on "Agency Perspectives"
Before the Over-Criminalization Task Force of the
Committee on the Judiciary
United States House of Representatives

July 11, 2014

Chairman Sensenbrenner, Ranking Member Scott, and distinguished members of the Task Force, thank you for providing me with the opportunity to testify on behalf of the United States Sentencing Commission about current sentencing issues in the federal criminal justice system.

We are particularly pleased that the House Judiciary Committee has set up this Over-Criminalization Task Force and that the Task Force has chosen to look in a bipartisan way at issues like mandatory minimum penalties, over-incarceration, and federal sentencing policy – issues that have long been a focus for the Commission. The recent bipartisan interest in criminal justice reform and in sentencing issues in particular is a welcome development. Other issues that the Task Force has focused on, including regulatory crimes, intent requirements, immigration offenses, and the federalization of crime, are also important and worthy of consideration.

The Commission identified reducing costs of incarceration and overcapacity as a priority for its 2013-14 amendment cycle.[1] While state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has grown by about a third in the past decade.[2] In the past few months, the Federal Bureau of Prisons' (BOP) population has begun to decrease slightly, perhaps because budget cuts have reduced the number of prosecutors and agents.[3] Nonetheless, the size of the federal prison population remains a serious problem that needs to be addressed. The size of the BOP's population exceeds the BOP's capacity by 32 percent and by 52 percent in high security facilities.[4] Meanwhile, the nation's budget concerns have become more acute. The overall Department of Justice budget has decreased, meaning that as more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety, including law enforcement officers, prosecutors, assistance to victims, and crime prevention programs. Federal prisons and other

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[1] *See* U.S. Sentencing Comm'n, *Notice of Final Priorities*, 78 Fed. Reg. 51,820-821 (Aug. 21, 2013) (Notice of Final Priorities).

[2] E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts* 2 (July 2013), http://www.bjs.gov/content/pub/pdf/p12ac.pdf.

[3] Testimony of Charles Samuels, Director, Fed. Bureau of Prisons at the U.S. Sentencing Comm'n Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 13, 2014) (Samuels Testimony), March 13, 2014 Public Hearing Transcript (Transcript) at 46-47, 75, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/transcript.pdf.

[4] *Id.* at 47.

detention of federal offenders now cost well over $6 billion a year and account for more than a quarter of the overall Department of Justice budget.[5]

Consistent with its statutory charge to both promote public safety and take into account federal prison capacities, this year the Commission set out to determine ways to address the crisis faced by the federal prisons in ways that are fair, appropriate, and safe. In conducting this review, the Commission has sought out the perspectives of law enforcement to be sure that any proposed changes to the federal sentencing system will not undermine the safety of our communities. The Commission has identified several approaches to sentencing reform that we believe are consistent with the twin goals of reducing the strain on the federal prison population and promoting public safety.

The Commission has found that existing federal mandatory minimum penalties apply too broadly and create problematic disparities, in addition to contributing to the growth in federal prison populations. The bipartisan seven-member Commission[6] has accordingly unanimously recommended statutory changes to reduce and limit mandatory minimum penalties. These recommendations, which are intended to address concerns about federal prison costs and overcapacity and improve the federal sentencing system consistent with public safety, include the following:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.

- The provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.

- Congress should consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.

In addition, recognizing that drug trafficking offenders comprise a significant portion of the federal prison population, the Commission reviewed the sentencing guidelines for drug offenses and determined that a modest reduction in the drug quantity table was appropriate to account for several changes in the law and the guidelines since the drug quantity table was developed. Accordingly, this spring, the Commission unanimously approved an amendment to the sentencing guidelines to reduce by two levels the base offense levels assigned to most drug trafficking offenders based on drug quantity.

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[5] *See* U.S. Dep't of Justice, *Federal Prison System, FY 2014 Budget Request at a Glance* 1 (2013) (USDOJ FY2014 Budget Request), http://www.justice.gov/jmd/2014summary/pdf/bop.pdf; U.S. Dep't of Justice, *Federal Prison System FY 2013 Congressional Budget* 1 (2013) http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf.; *see also* Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013) (http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf).

[6] By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

I. Task Force Priorities

Before turning to the sentencing issues that have been the focus of the Commission recently, it is worth noting some of the other important issues that the Over-Criminalization Task Force has been examining. The Task Force has given significant consideration to issues of regulatory crime, *mens rea*, and criminal code reform. These are significant issues, and the Commission appreciates the Task Force examining them. The Commission is statutorily charged with advising Congress on penalty levels as opposed to identifying criminal elements or determining what conduct should be made criminal, and our sentencing data is not collected in a manner that generally permits an analysis based on whether offenses are regulatory in nature or have intent requirements. Still, the Commission does collect data based on statutes of conviction, so if the Task Force were to identify specific regulatory crimes of concern, we would be happy to be as helpful as we can be.

The Task Force has also considered whether there has been excessive federalization of crime. The Commission found in a 2011 report that federalization of crime seems to have increased over the past several decades and that this increased federalization had contributed to the increasing size of the federal prison population.[7] The Commission pointed to both the continuing creation of new federal criminal statutes covering conduct traditionally addressed by states and to Department of Justice initiatives to increase prosecution of certain types of crime as contributing to this trend.[8]

The Task Force has also examined alternatives to incarceration. The sentencing guidelines provide for alternative penalties within certain zones of the sentencing guidelines table,[9] and the Commission included in its proposed priorities for the next amendment cycle a study of the availability of alternatives to incarceration in the federal system.[10] The Commission is also engaged in a multi-year study of recidivism, which may provide insights into the effectiveness of various alternatives to incarceration. We hope to have more to say on this important issue in the next several years.

Finally, members of the Task Force have expressed significant interest in immigration offenses. In fiscal year 2013, there were 24,972 federal immigration offenders, making up 31.2 percent of offenders in the federal system.[11] The number of immigration offenders has declined the past two years, but had been steadily increasing for many years before that. The Commission agrees that this is an important area for federal sentencing policy and has included a study of the

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[7] U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 63-64 (October 2011) (Mandatory Minimum Report), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[8] *Id.* at 64-66.

[9] U.S. Sentencing Comm'n, *Guidelines Manual* §§ 5B1.1, 5C1.1.

[10] *See* U.S. Sentencing Comm'n, *Notice of Proposed Priorities and Request for Public Comment*, 79 Fed. Reg. 31,409 (June 2, 2014) (2014 Notice of Proposed Priorities).

[11] *See* U.S. Sentencing Comm'n, *2013 Sourcebook of Federal Sentencing Statistics* S-12 (2014) (2013 Sourcebook).

guidelines applicable to immigration offenses among its proposed priorities for the next amendment cycle.[12] Offenders convicted of immigration offenses are overwhelmingly male (93.6%) and Hispanic (95.4%).[13] Almost all of them (99.4%) plead guilty,[14] and the average sentence for an immigration offense is 16 months.[15] We are happy to provide additional data and analysis in this important area.

Drug offenders make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the BOP,[16] so they are extremely important to the size and nature of the federal prison population. Accordingly, the Commission's testimony will discuss issues concerning sentencing of drug offenders in depth.

II. Mandatory Minimum Penalties

In our 2011 report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,[17] the Commission set out in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. We set out a series of recommendations for modifying the laws governing mandatory minimum penalties that would make sentencing laws more uniform and fair and help them operate as Congress intended. Since issuing that report, our increasing concern about federal prison populations and costs has only heightened our sense that these statutory changes are necessary.

The Commission found that certain severe mandatory minimum penalties lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders. The Commission further found that, in the drug context, statutory mandatory minimum penalties are often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress intended to target. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population. Finally, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission continues to recommend unanimously that Congress consider a number of statutory changes.[18] The Commission recommends that Congress reduce the current statutory mandatory minimum penalties for drug trafficking. We

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[12] *See* Notice of Proposed Priorities, *supra* note 10.

[13] 2013 Sourcebook, *supra* note 11, at S-14-15.

[14] *Id.* at S-26.

[15] *Id.* at S-29.

[16] Carson & Golinelli, *supra* note 2, at 2; 2013 Sourcebook, *supra* note 11 at S-12.

[17] Mandatory Minimum Report, *supra* note 7.

[18] This testimony focuses on several of the most important recommendations and those under consideration by Congress presently. The Mandatory Minimum Report included a broader array of recommendations. For more information on the report's recommendations, *see* Mandatory Minimum Report, *supra* note 7, at 345-369.

further recommend that the provisions of the Fair Sentencing Act of 2010,[19] which Congress passed to reduce the disparity in treatment of crack and powder cocaine, be made retroactive. Finally, we recommend that Congress consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.

Republican and Democratic members of this Task Force and others in Congress have proposed legislation to reform certain mandatory minimum penalty provisions. The Commission strongly supports these efforts to reform this important area of the law.

A. The Commission's Findings on Mandatory Minimum Sentences

Congress created the United States Sentencing Commission as an independent agency to guide federal sentencing policy and practices as set forth in the Sentencing Reform Act of 1984 ("SRA").[20] Congress specifically charged the Commission not only with establishing the federal sentencing guidelines and working to ensure that they function as effectively and fairly as possible, but also with assessing whether sentencing, penal, and correctional practices are fulfilling the purposes they were intended to advance.[21]

In section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Congress directed the Commission to evaluate the effect of mandatory minimum penalties on federal sentencing.[22] In response to that directive, and based on its own statutory authority, the Commission reviewed legislation, analyzed sentencing data, studied scholarship, and conducted hearings. The Commission published the Mandatory Minimum Report in October 2011 and has continued to perform relevant sentencing data analysis since the report was published. That comprehensive process has led the Commission to several important conclusions about the effect of current mandatory minimum penalty statutes.

i. Severe Mandatory Minimum Penalties Are Applied Inconsistently

The Commission determined that some mandatory minimum provisions apply too broadly, are set too high, or both, for some offenders who could be prosecuted under them. These mandatory minimum penalties are triggered by a limited number of aggravating factors, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower penalty.[23] This broad application can lead to a perception by those making charging decisions that some offenders to whom mandatory minimums could apply do not merit them. As a result, certain mandatory minimum penalties are applied inconsistently from district to district and even within districts, as shown by the Commission's data analyses

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[19] Pub. L. No. 111–220, 124 Stat. 2373 (2010).

[20] *See* 28 U.S.C. § 991(b); 18 U.S.C. § 3553(a)(2).

[21] 28 U.S.C. § 991.

[22] Div. E of the Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, 123 Stat. 2190, 2843 (2009).

[23] Mandatory Minimum Report, *supra* note 7, at 345-46.

and our interviews of prosecutors and defense attorneys. Mandatory minimum penalties, and the existing provisions granting relief from them in certain cases, also impact demographic groups differently, with Black and Hispanic offenders constituting the large majority of offenders subject to mandatory minimum penalties and Black offenders being eligible for relief from those penalties far less often than other groups.

Interviews with prosecutors and defense attorneys in thirteen districts across the country revealed widely divergent practices with respect to charging certain offenses that triggered significant mandatory minimum penalties. These differences were particularly acute with respect to practices regarding filing notice under section 851 of title 21 of the United States Code for drug offenders with prior felony drug convictions, which generally doubles the applicable mandatory minimum sentence. In some districts, the filing was routine. In others, it was more selectively filed, and in one district, it was almost never filed at all.[24] Our analysis of the data bore out these differences. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty.[25]

Similarly, the Commission's interviews revealed vastly different policies in different districts in the charging of cases under section 924(c) of title 18 of the United States Code for the use or possession of a firearm during a crime of violence or drug trafficking felony. In that statute, different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. The Commission found that districts had different policies as to whether and when they would bring charges under this provision and whether and when they would bring multiple charges under the section, which would trigger far steeper mandatory minimum penalties.[26] The data bears out these geographic variations in how these mandatory minimum penalties are applied. In fiscal year 2013, just 16 districts accounted for 49.7 percent of all cases involving a conviction under section 924(c), even though those districts reported only 30.0 percent of all federal criminal cases that year. In contrast, 36 districts reported 10 or fewer cases with a conviction under that statute.

When similarly situated offenders receive sentences that differ by years or decades, the criminal justice system is not achieving the principles of fairness and parity that underlie the SRA. Yet the Commission has found severe, broadly applicable mandatory minimum penalties to have that effect.

The current mandatory minimum sentencing scheme also affects different demographic groups in different ways. Hispanic offenders constituted 44.9 percent of offenders convicted of an offense carrying a mandatory minimum penalty in 2013; Black offenders constituted 28.1 percent, and White offenders were 24.5 percent. The rate with which these groups of offenders qualified for relief from mandatory minimum penalties varied greatly. Black offenders qualified for relief under the safety valve in 11.0 percent of cases in which a mandatory minimum penalty

[24] *Id.* at 111-13.

[25] *Id.* at 255.

[26] *Id.* at 113-14.

applied, compared to White offenders in 18.9 percent of cases, and Hispanic offenders in 45.5 percent.[27] Because of this, although Black offenders in 2013 made up 25.2 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty, they accounted for 33.7 percent of the drug offenders still subject to that mandatory minimum at sentencing.

ii. Mandatory Minimum Drug Penalties Apply to Many Lower-Level Offenders

In establishing mandatory minimum penalties for drug trafficking, it appears that Congress intended to target "major" and "serious" drug traffickers.[28] Yet the Commission's research has found that those penalties sweep more broadly than Congress may have intended. These mandatory minimum penalties are tied only to the quantity of drugs involved, but the Commission's research has found that the quantity involved in an offense is often not as good a proxy for the function played by the offender as Congress may have believed. A courier may be carrying a large quantity of drugs, but may be a lower-level member of a drug organization. Similarly, an offender convicted as part of a drug conspiracy can be held responsible for all the drugs trafficked as part of the conspiracy even if that offender personally handled a much smaller quantity or had a minor role in the conspiracy.

Mandatory minimum penalties currently apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who conspire with others to bring large quantities of drugs into the United States.[29] For instance, in the cases the Commission reviewed, 23 percent of all drug offenders were couriers, and nearly half of these were charged with offenses carrying mandatory minimum sentences. The category of drug offenders most often subject to mandatory minimum penalties at the time of sentencing — that is, those who did not obtain any relief from those penalties — were street-level dealers, who were many steps below high-level suppliers and leaders of drug organizations.[30] While Congress appears to have intended to impose these mandatory penalties on "major" or "serious" drug traffickers, in practice the penalties have swept more broadly.

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[27] Offenders were most often disqualified from safety valve relief because of their criminal history or because of involvement of a dangerous weapon in connection with the offense. *See* Mandatory Minimum Report, *supra* note 7, at xxviii.

[28] *See* U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200205_RtC_Cocaine_Sentencing_Policy/index.htm; *see also* 132 Cong. Rec. 27,193-94 (Sept. 30, 1986) (statement of Sen. Byrd) ("For the kingpins … the minimum term is 10 years. … [F]or the middle-level dealers … a minimum term of 5 years."); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

[29] To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special analysis project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the presentence report. The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form. For more information on the Commission's analysis, please *see* Mandatory Minimum Report, *supra* note 7, at 165-66.

[30] *Id.* at 166-70.

iii. Mandatory Minimum Penalties Have Contributed to Rising Prison Populations

The federal prison population has increased dramatically over the past two decades, and offenses carrying mandatory minimum sentences have played a significant role in that increase. The number of inmates housed by the BOP on December 31, 1991 was 71,608.[31] By December 31, 2012, that number had more than tripled to 217,815 inmates.[32]

Offenses carrying mandatory minimum penalties were a significant driver of this population increase.[33] The number of offenders in the custody of the BOP who were convicted of violating a statute carrying a mandatory minimum penalty increased from 40,104 offenders in 1995 to 111,545 in 2010, an increase of 178.1 percent.[34] Similarly, the number of offenders in federal custody who were subject to a mandatory minimum penalty at sentencing — who had not received relief from that mandatory sentence — increased from 29,603 in 1995 to 75,579 in 2010, a 155.3 percent increase.[35]

These increases in prison population have led not only to a dramatically higher federal prison budget, which has increased from $1.36 billion for fiscal year 1991[36] to well over $6 billion this year,[37] but also to significant overcrowding, which the BOP reports causes particular concern at high-security facilities and which courts have found causes security risks and makes prison programs less effective.[38] Changing the laws governing mandatory minimum penalties would be an important step toward addressing the crisis in the federal prison population and prison costs.

iv. Recent Reductions in the Sentences of Some Drug Offenders Have Not Increased Offenders' Propensity to Reoffend

The Commission recognizes that one of the most important goals of sentencing is ensuring that sentences reflect the need to protect public safety.[39] The Commission believes

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[31] Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin 1 (1995).

[32] Carson & Golinelli, *supra* note 2, at 2.

[33] An increase in the number of prosecutions brought and individuals convicted overall, including for offenses without mandatory minimum penalties, has also contributed to the increasing federal prison population. *See* Mandatory Minimum Report, *supra* note 7, at 81-82.

[34] *Id.* at 81.

[35] *Id.*

[36] Pub. L. No. 101–515, 104 Stat. 2101, 2114 (1990).

[37] USDOJ FY 2014 Budget Request, *supra* note 5.

[38] Mandatory Minimum Report, *supra* note 7, at 83 (quoting Testimony of Harley Lappin, Director, Fed. Bureau of Prisons, to U.S. Sentencing Comm'n (Mar. 17, 2011)); Brown v. Plata, 563 U.S. ___, 131 S.Ct. 1910, 1923 (2011) (finding the "exceptional" overcrowding in the California prison system was the "primary cause of the violation of a Federal right" and affirming a decision requiring the prison system to reduce the population to 137.5% of its capacity).

[39] 18 U.S.C. § 3553(a)(2)(B) and (C).

based on its research that some reduction in the sentences imposed on drug offenders would not lead to increased recidivism and crime.

In 2007, the Commission reduced by two levels the base offense level in the sentencing guidelines for each quantity level of crack cocaine and made the changes retroactive. The average decrease in sentences among those crack cocaine offenders receiving retroactive application of the 2007 amendment was 26 months, which corresponds to a 17 percent reduction in the total sentence.[40] In order to determine whether drug offenders serving reduced sentences posed any increased public safety risk, the Commission undertook a study in 2011 of the recidivism rates of the offenders affected by this change. The Commission studied the recidivism rate of offenders whose sentences were reduced pursuant to retroactive application of this guideline amendment and compared that rate with the recidivism rate of offenders who would have qualified for such a reduction, but were released after serving their full sentence before the 2007 changes went into effect.[41] The analysis showed no statistically significant difference between the two groups.[42]

Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the 2007 sentencing amendment, 30.4 percent recidivated within two years. Of the 484 offenders studied who were released in the year before the new amendment went into effect after serving their full sentences, 32.6 percent recidivated within two years. The difference is not statistically significant.[43] An updated study of the same offenders conducted this year showed that, after five years, there continued to be no statistically significant difference in the recidivism rates of the two groups.[44]

The Commission's study examined offenders released pursuant to retroactive application of a change in the sentencing guidelines, not a change in mandatory minimum penalties. Still, the Commission's 2011 study found that federal crack offenders released somewhat earlier than their original sentence were no more likely to recidivate than if they had served their full sentences. That result suggests that reductions in drug penalties can be accomplished without significantly impacting public safety, particularly when, as the Department of Justice has asserted, these reductions in penalties would allow more resources to be devoted to catching and

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[40] U.S. Sentencing Comm'n, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010).

[41] U.S. Sentencing Comm'n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[42] *Id.* at 2.

[43] *Id.* at 4-7.

[44] U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

punishing the most serious criminals and to other programs and initiatives that more effectively prevent crime and thus would promote public safety.[45]

B. The Commission's Recommendations for Statutory Changes

Based on the Commission's research and analysis in preparing our 2011 report and in the years since, we support several statutory changes that will help to reduce disparities, help federal sentencing work more effectively as intended, and control the expanding federal prison population and budget.

i. Reduce Mandatory Minimum Penalties for Drug Offenses

In the Mandatory Minimum Report, the Commission recommended that, should Congress use mandatory minimum penalties, those penalties not be excessively severe. The Commission focused in detail on the severity and scope of mandatory minimum drug trafficking penalties. The Commission now recommends that Congress consider reducing the mandatory minimum penalties governing drug trafficking offenses.

Reducing mandatory minimum penalties would mean fewer instances of the severe mandatory sentences that led to the disparities in application documented in the Commission's report. It would also reduce the likelihood that lower-level drug offenders would be convicted of offenses with severe mandatory sentences that were intended for higher-level offenders.

Reducing mandatory minimum penalties for drug trafficking offenses would reduce the prison population substantially. For example, under one scenario, a reduction in drug trafficking mandatory minimum penalties from twenty, ten and five years to ten, five and two years, respectively, would lead to savings for those offenders sentenced in the first fiscal year after the change of 42,120 bed years over time and would lead to a total reduction in the BOP population of 15,507 after five years.[46] That bed savings would translate to significant cost savings,[47] with corresponding savings over time for each subsequent year of reduced sentences, unless offense conduct or charging practices change over time.

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[45] Testimony of Hon. Eric H. Holder, Jr., U.S. Attorney General, U.S. Dep't of Justice at the U.S. Sentencing Comm'n Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 13, 2014) (Holder Testimony), Transcript, *supra* note 3, at 18, 23-24.

[46] This analysis was based on a set of broad assumptions, some or all of which might not in fact apply should the law change. These assumptions included, among others, the assumption that offenders subject to a mandatory minimum penalty at the time of sentencing would have their sentences reduced by an amount proportional to the reduction in that mandatory minimum (i.e., offenders subject to the 20- and 10-year mandatory minimum penalties, which would be reduced to 10 and 5 years respectively in this model, would have their sentences reduced by 50%; offenders subject to the 5 year mandatory minimum, which would be reduced to 2 years in this model, would have their sentences reduced by 60%). For those offenders convicted of an offense carrying one of these mandatory minimum penalties but receiving relief from that mandatory minimum because of substantial assistance or the safety valve, this model assumed a lesser reduction in the sentence.

[47] The Bureau of Prisons estimated the average annual cost per inmate to be $26,359. Bureau of Prisons, *Federal Prison System Per Capita Costs* (2012), http://www.bop.gov/foia/fy12_per_capita_costs.pdf. This cost estimate does not take into account potential increased costs for the United States Parole Commission, the United States Probation Office, and other aspects of the criminal justice system should certain offenders be released earlier.

A reduction in the length of these mandatory minimum penalties would help address concerns that certain demographic groups have been too greatly affected by mandatory minimum penalties for drug trafficking. As noted above, currently available forms of relief from mandatory minimum penalties affect different demographic groups differently, particularly Black offenders, who qualify for the "safety valve" much less frequently than other offenders. These changes would lead to reduced minimum penalties for all offenders currently subject to mandatory minimum penalties for drug trafficking.

ii. Make the Fair Sentencing Act Statutorily Retroactive

The Fair Sentencing Act of 2010 (FSA),[48] in an effort to reduce the disparities in sentencing between offenses involving crack cocaine and offenses involving powder cocaine, eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.[49] The law did not make those statutory changes retroactive. The Commission recommends that Congress make the reductions in mandatory minimum penalties in the FSA fully retroactive.

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and made these guideline changes retroactive. In making this decision,[50] the Commission considered the underlying purposes behind the statute, including Congress's decision to act "consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere'"[51] and Congress's statement in the text of the FSA that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction."[52] The Commission also concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively, that although a large number of cases would be affected, the administrative burden caused by retroactivity would be manageable.[53] To date, 12,572 offenders have petitioned for sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts have granted relief in 7,503 of those

[48] Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010) (FSA).

[49] FSA § 2.

[50] The Commission, in deciding whether to make amendments retroactive, considers factors including "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively." USSG §1B1.10, comment. (backg'd).

[51] U.S. Sentencing Comm'n, *Notice of Final Action Regarding Amendment on Retroactivity*, Effective November 1, 2011, 76 Fed. Reg. 41,332-33 (Jul. 13, 2011) (2011 Notice of Final Action Regarding Retroactivity).

[52] *See generally* FSA.

[53] 2011 Notice of Final Action Regarding Retroactivity, *supra* note 51 at 10.

cases.[54] The average sentence reduction in these cases has been 30 months, which corresponds to a 19.9 percent decrease from the original sentence.[55]

The same rationales that prompted the Commission to make the guideline changes implementing the FSA retroactive justify making the FSA's statutory changes retroactive. Just as restoring fairness and reducing disparities are principles that govern our consideration of sentencing policy going forward, they should also govern our evaluation of sentencing decisions already made. A large number of those currently incarcerated would be affected, and recent experiences with several sets of retroactive sentencing changes in crack cocaine cases demonstrate that the burden is manageable and that public safety would not be adversely affected.

The Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, 8,829 offenders would likely be eligible for a sentence reduction, with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and in significant cost savings. The Commission estimates that 87.7 percent of the inmates eligible for a sentence reduction would be Black.

iii. Consider Expanding the Statutory Safety Valve

In the Mandatory Minimum Report, the Commission recommended that Congress consider "expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent offenders who receive two, or perhaps three, criminal history points under the federal sentencing guidelines."[56] The "safety valve" statute allows sentences below the mandatory minimum in drug trafficking cases where specific factors apply, notably that the offense was non-violent and that the offender has a minimal criminal history. The Commission recommended that Congress consider allowing offenders with a slightly greater criminal history to qualify.

The Commission found that the broad sweep and severe nature of certain current mandatory minimum penalties led to results perceived to be overly severe for some offenders and therefore to widely disparate application in different districts and even within districts.[57] The Commission also found that in the drug context, existing mandatory minimum penalties often applied to lower level offenders than may have been intended. It would be preferable to allow more cases to be controlled by the sentencing guidelines, which take many more factors into account, particularly in those drug cases where the existing mandatory minimum penalties are too severe, too broad, or unevenly applied. Accordingly, Congress should consider allowing a broader group of offenders who still have a modest criminal history, but who otherwise meet

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[54] U.S. Sentencing Comm'n, *Preliminary Crack Retroactivity Data Report Fair Sentencing Act*, Table 3 (April 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/fsa-amendment/20140415-USSC-Crack-Retro-Report-Post-FSA.pdf.

[55] *Id.* at Table 8.

[56] Mandatory Minimum Report, *supra* note 7, at xxxi.

[57] *Id.* at 346.

the statutory criteria, to qualify for the safety valve, enabling them to be sentenced below the mandatory minimum penalty and in accordance with the sentencing guidelines.

In 2013, 7,706 offenders received relief under the safety valve provision in the sentencing guidelines.[58] If the safety valve had been expanded to offenders with two criminal history points, 737 additional offenders would have qualified. Had it been expanded to offenders with three criminal history points, a total of 1,289 additional offenders would have qualified.[59] While this change would start to address some of the disparities and unintended consequences noted above, it would likely have little effect on the demographic differences observed in the application of mandatory minimum penalties to drug offenders because the demographic characteristics of the offenders who would become newly eligible for the safety valve would be similar to those of the offenders already eligible.[60] For reduced sentences to reach a broader demographic population, Congress would have to reduce the length of mandatory minimum drug penalties.

III. The Role of the Sentencing Commission and New Amendments to the Guidelines

The above recommendations, which impact statutory mandatory minimum penalties and require statutory change, can only be effectuated by Congress. However, the Commission is dedicated to working within its authority and responsibilities to address the issues of unwarranted sentencing disparities and over-incarceration within the federal criminal justice system. First, the Commission is committed to working with Congress to implement the recommendations of the Mandatory Minimum Report. We identified doing so as a major priority for this past year and again for the coming year,[61] and we have supported legislative initiatives and worked with Congress to help members craft and pass appropriate legislative provisions that are consistent with our recommendations. We have also called on Congress to request prison impact analyses from the Commission as early as possible when it considers enacting or amending mandatory minimum penalties. This analysis may be very helpful for congressional consideration, particularly at this time of strained federal resources.[62]

The Commission also continues to believe that a strong and effective sentencing guidelines system best serves the purposes of the SRA. Should Congress decide to limit mandatory minimum penalties, the sentencing guidelines will remain an important baseline to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing. The Commission will continue to work to ensure that the guidelines

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[58] 2013 Sourcebook, *supra* note 11, at S-113.

[59] These totals include offenders not convicted of offenses carrying a mandatory minimum sentence, but subject to safety valve relief under the sentencing guidelines because they meet the same qualifying criteria. The guidelines would need to be amended to correspond to the proposed statutory changes to realize this level of relief. These totals also represent the estimated maximum number of offenders who could qualify for the safety valve since one of the requirements, that the offender provide all information he or she has about the offense to the government, is impossible to predict. *See* 18 U.S.C. § 3553(f).

[60] Mandatory Minimum Report, *supra* note 7, at 356.

[61] *See* 2013 Notice of Final Priorities, *supra* note 1; 2014 Notice of Proposed Priorities, *supra* note 10.

[62] *See* Mandatory Minimum Report, *supra* note 7, at xxx.

are amended as necessary to most appropriately effectuate the purposes of the SRA and to ensure that the guidelines can be as effective a tool as possible to ensure appropriate sentencing going forward.

The Commission has recently acted on its own authority to amend the guidelines to reduce drug sentences for many offenders in a way that is consistent with the existing statutory framework but will act in a modest way to address many of the concerns set out above. Specifically, in April, the Commission unanimously approved an amendment which revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in §2D1.1 of the guidelines incorporate the statutory mandatory minimum penalties for such offenses.[63]

When Congress passed the Anti-Drug Abuse Act of 1986,[64] the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing ranges for all drug quantities,[65] with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.

The 2014 amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties.[66] Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at

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[63] U.S. Sentencing Comm'n, *Notice of (1) Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2014; and (2) Request for Comment*, Amend. 3, 79 Fed. Reg. 25,996 (May 6, 2014).

[64] Pub. L. 99–570, 100 Stat. 3207 (1986).

[65] *See* §2D1.1, comment. (backg'd.).

[66] *See* 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be "consistent with all pertinent provisions of title 18, United States Code"); *see also* 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements "consistent with all pertinent provisions of any Federal statute").

Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types are retained, as are previously existing minimum and maximum base offense levels for particular drug types.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission had set base offense levels at guideline ranges slightly higher than the mandatory minimum levels to leave some room to adjust downward for defendants who plead guilty or otherwise cooperate. However, changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide a benefit to those who accept responsibility and save resources by pleading guilty or who otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the safety valve provision, which applies to certain non-violent drug defendants and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."[67] The guidelines incorporate the safety valve at §5C1.2 and, furthermore, provide a 2-level reduction if the defendant meets the safety valve criteria.[68] These statutory and guideline provisions provide a framework that rewards defendant who accept responsibility and save resources by pleading guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the safety valve than if they do not. In fiscal year 2013, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.2 percent if they qualified for the safety valve and a plea rate of 94.4 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. The Commission's 2007 amendment reducing guideline levels for crack offenses worked the same as the amendment approved this spring, so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32.[69]

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable.

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[67] *See* 18 U.S.C. § 3553(f).

[68] *See* §§2D1.1(b)(16).

[69] *See* U.S. Sentencing Comm'n. *Guidelines Manual*, App. C, Amend. 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32. *See id.*, Amend. 748 (effective November 1, 2011).

Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively. For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under §5K1.1 were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect. This recent experience indicates that this year's amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to plead guilty or otherwise cooperate with authorities.

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times – often in response to congressional directives – to provide a greater emphasis on the defendant's conduct and role in the offense rather than on drug quantity. The version of §2D1.1 in the original 1987 *Guidelines Manual* contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 presently contains fourteen enhancements and three downward adjustments. These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce somewhat the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders, and the amendment permits these adjustments to differentiate among offenders more effectively.

These structural considerations complemented the Commission's interest in addressing the significant overcapacity and costs of the Federal Bureau of Prisons, as explained above. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are "formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[70] Federal prisons are now 32 percent overcapacity, as noted above, and drug trafficking offenders account for approximately 50 percent of the federal prison population.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under §2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457 — or 69.9 percent — of drug trafficking offenders sentenced under §2D1.1, and their average sentence will be reduced by 11 months — or 17.7 percent — from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment is consistent with the goal of protecting public safety. In particular, the Commission was informed by the studies described in detail above that compared the recidivism rates for

[70] *See* 28 U.S.C. § 994(g).

offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, existing sentencing enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced under the amendment. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with the smallest quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment is consistent with protecting public safety and advancing law enforcement initiatives. The Commission received testimony from the Department and other stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.[71]

The Commission believes that this amendment is a modest but important first step toward addressing prison costs and populations while promoting public safety. We believe this action complements legislation under consideration by Congress.

Pursuant to statutory requirements, the Commission also began consideration of whether this amendment should be applied retroactively.[72] We asked our staff to study the impact of retroactive application of the amendment, and we have now made that study publicly available.[73] We held a hearing on the issue on June 10 and solicited public comment on whether the amendment should be made retroactive. We welcome your input on this important question.

IV. Conclusion

The Commission is pleased to see the Task Force and others in Congress undertaking a serious examination of important criminal justice issues including federal sentencing policy. The bipartisan Commission strongly supports legislative provisions that are consistent with the recommendations outlined above and stands ready to work with you and others in Congress to enact these statutory changes. We also look forward to discussions with you to further explain

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[71] *See, e.g.*, Holder Testimony, *supra* note 45 at 22-24, 36-39; Samuels Testimony, *supra* note 3, at 79-80.

[72] *See* 28 U.S.C. § 994(u).

[73] *See* U.S. Sentencing Comm'n, *Analysis of the Impact of the 2014 Drug Guidelines Amendment If Made Retroactive* (May 27, 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf.

the amendment we have approved to address similar concerns through modifications of the sentencing guidelines. The Commission thanks you for holding this very important hearing and looks forward to continuing to work with you on these issues in the months ahead.

Mr. BACHUS. Thank you.

Mr. Patton, look forward to your testimony.

TESTIMONY OF DAVID E. PATTON, EXECUTIVE DIRECTOR, FEDERAL DEFENDERS OF NEW YORK, EASTERN AND SOUTHERN DISTRICTS OF NEW YORK

Mr. PATTON. Thank you, Mr. Chairman. Thank you, Members. It is truly an honor for me to be here.

Mr. Chairman, as you said, I am the Federal public defender in New York City.

It is good to see you, Representative Jeffries.

Together with my defender colleagues from around the country and court-appointed attorneys who are assigned to cases, we collectively represent all those accused of Federal crimes who are too poor to afford a lawyer. Nationwide, that means we represent over 80 percent of all defendants in the Federal criminal justice system.

And I can tell you that we are grateful to this Committee for holding these hearings on a very important topic of over-criminalization.

When I think of the term "over-criminalization," I think of a quote by the late Harvard Law Professor William Stuntz who wrote, "Legal condemnation is a necessary but terrible thing, to be used sparingly, not promiscuously."

As I think this Committee knows, the Federal criminal justice system has become remarkably promiscuous by any measure, whether it is by the size of the Federal Criminal Code, which has doubled since 1970; whether it is the sheer number of people arrested and prosecuted for Federal offenses, which has tripled since 1980; or, most significantly, if measured by the number of people the Federal Government imprisons.

The Federal prison population has increased by 1,000 percent since 1980. And in the past 10 years, it has increased at a rate three times the rate of State prison populations, and this is at the time of historically low crime rates. So it is not an increase in crime that is driving the increase in incarceration.

So what is driving it? Two things in the Federal criminal justice system: one, a vast increase in the number of Federal prosecutions of basic, routine crimes that were once solely the province of State and local law enforcement; and two, vast increases in the severity of Federal sentences, largely driven by mandatory minimums that prevent sentencing judges from imposing what would otherwise be reasonable, common-sense appropriate levels of punishment.

You have already heard a great deal about the human toll this state of affairs has taken and the fiscal toll it has taken. I would like to focus in my brief time on the toll it is taking on the very structure of the Federal criminal justice system.

What do I mean by that? I will summarize it with one number: 2.7—2.7 is the percentage of Federal criminal defendants who go to trial.

Thirty years ago, the trial rate was five times that number. It is a state of affairs that caused the Supreme Court just 2 years ago to state that criminal justice today is, for the most part, a system of pleas, not a system of trials.

This vanishing trial rate poses a serious threat to the quality of justice in Federal courts. Why is that? Well, first, we have to ask, why are they disappearing? And the answer is straightforward: The disappearing trial rates correspond precisely with the enormous increase in power we have given prosecutors via severe and mandatory sentencing regimes.

Prosecutors have always had enormous discretion in charging, but they now have full control over many cases from start to finish. And they control whether to charge a mandatory minimum or not. It is entirely at their discretion. And that power is used largely to create a spread in the sentence that someone will receive if they plead guilty versus if they go to trial. And that spread can be enormous, orders of magnitude, 10, 20, 30 years or more.

Why is that a problem? It is a problem because juries are fundamental to our criminal justice system. They are the most direct way that ordinary citizens can check government overreach. They are vital to a constitutional democracy like ours. And they also happen to be the best way we know in the history of the world at transparently and accountably getting at the truth of various matters.

Juries teach us that sometimes government agents make mistakes. Sometimes witnesses make stakes mistakes. Sometimes witnesses lie. And those truths get lost in a system where only 2.7 percent of defendants can go to trial, because they can't risk the decades of additional time they might face if they go to trial, not based on the severity of the offense, but purely based on their exercise of that trial right.

It is a system that our Founders would surely find unrecognizable. It is a system that does great damage to our constitutional values.

I see that my time is up, and I look forward to answering your questions. Thank you, Mr. Chairman.

[The prepared statement of Mr. Patton follows:]

STATEMENT OF DAVID E. PATTON

Executive Director
Federal Defenders of New York
Eastern and Southern Districts of New York

House Judiciary Committee's Over-Criminalization Task Force
"Agency Perspectives"

July 11, 2014

INTRODUCTION

Thank you for holding this hearing and for the opportunity to speak with you regarding over-criminalization in the federal system. I head the Federal Defenders of New York, and together with my colleagues from around the country who serve in federal public defender offices or on panels of appointed private attorneys, we represent defendants in federal criminal cases who are too poor to afford lawyers. Nationwide, our clients comprise over 80 percent of all federal defendants.

I am honored to speak with you at this time of great crisis and great opportunity for the criminal justice system. The crisis is obvious from the truly staggering rates of incarceration in the United States – rates that set us far apart from our own American history and from every modern country in the world. The numbers have become numbingly familiar: with only five percent of the world's population America has 25% of the world's prisoners; one in one hundred American adults is incarcerated; and one in thirty is under the supervision of the criminal justice system. The federal prison population has increased 1000% since 1980 and has grown at a rate three times higher than state prison populations in the past 10 years.

In recent years, mass incarceration has been heavily criticized from both the left and right side of the political spectrum. Conservatives denounce the unnecessary and unwise fiscal costs, the assault on personal liberty, and the harshness of a system that has become unmoored from foundational religious principles such as redemption and mercy. Liberals focus their criticism on the social injustices created by the vastly disproportionate number of poor and minority defendants arrested and prosecuted, and the resulting damage to the families and communities left behind.

The great opportunity for the criminal justice system is precisely that both sides are now vigorously airing those concerns. Government accountability and commitment to individual liberty are not ideological issues, and a growing consensus is emerging that fundamental American values are advanced when we exercise a measure of restraint in the prosecution of criminal laws. As the late Professor William Stuntz wrote in his recent, final book, "The Collapse of American Criminal Justice" (a distinctly non-partisan critique of the justice system): "Legal condemnation is a necessary but terrible thing – to be used sparingly, not promiscuously."

The Task Force on Over-Criminalization deserves great credit for reminding us of that honorable American tradition and for investigating ways to return to it. Here, I discuss the federal criminal justice system from my perspective as a federal public defender and offer thoughts about how the damaging effects of over-criminalization can be addressed.

I. Over-Criminalization: A Defender Perspective

Commentators mean many different things when using the term "over-criminalization" in the context of the federal criminal justice system. This is so because "over" describes almost everything about the current system. The term can be used to describe:

- the sheer proliferation in the number of criminal laws (the federal criminal code has increased to over 4,000 crimes, about double what it was in 1970 and one third more than 1980);[1]
- the vastly expanded enforcement of those laws (100,366 persons were charged with federal crimes in 2010, up from 39,914 in 1980, 66,341 in 1990, and 83,963 in 2000);[2]
- the explosion in the prison population (from a federal inmate population of 24,252 in 1980 to 209,771 in 2010, and growing at a pace three times faster than state inmates between 2000-2010);[3]
- the high rates of pretrial detention (in 1984 before passage of the Bail Reform Act, 74% of defendants were released on bail; last year 34% were released);
- the ever multiplying number of conditions and restrictions associated with probation or supervised release (including life time terms of supervision, invasive penile plethysmograph, limitations on contact with family and friends, DNA collection for everyone, residency restrictions, and many others);[4] or
- the large number of collateral consequences that attend most convictions, often affecting not only the individuals convicted but also their families (restricting access to public housing, employment opportunities, government benefits including nutrition assistance, loans for education, access to professional licenses, and civic participation including voting and jury service).[5]

The Task Force has already heard from numerous witnesses about many of those topics. Bryan Stevenson spoke eloquently about the human toll of severity and over-incarceration. Marc Levin, from Right on Crime, testified about the fiscal costs and the damage to traditional notions of federalism. And Mathias Heck, a prosecutor, and Rick Jones, a defense lawyer, spoke on behalf of the ABA and NACDL, respectively, about the ever-expanding collateral consequences that attend criminal convictions – consequences that impede successful rehabilitation and productivity, and ultimately harm public safety.

As part of today's panel on the effects of over-criminalization, I will discuss two additional harms that perhaps receive less attention in public discourse: (1) damage to the traditional role of the American jury; and (2) the strain on defender resources and lack of parity between defenders and prosecutors. Both developments have troubling consequences for the quality of justice in America.

A. Over-Criminalization: The Demise of the Jury and the Age of Inquisition

If there is a single defining feature of the American justice system, it is the jury. The Constitution's insistence that ordinary citizens stand as a check on the government's power to deprive individuals of life or liberty expresses one of America's highest commitments to

restraining government overreach. Indeed, jury service is the most direct and meaningful form of democracy most citizens will ever exercise.

Sadly, we are now witnessing the decline of this great institution. In its place we are left with the government itself, *via* prosecutors, determining guilt, innocence, and punishment, with little check from other actors. In the federal criminal justice system today, a mere 2.7% of defendants exercise their right to a jury trial. As the Supreme Court stated two years ago in *Lafler v. Cooper*, "criminal justice today is for the most part a system of pleas not a system of trials."[6]

This "system of pleas" is not rooted in traditional American values. For the first half of our country's history, pleas were looked upon with disfavor, and at times found to be constitutionally suspect.[7] Even throughout most of the 20th Century as guilty pleas became a routine part of the criminal justice system, they did not represent the overwhelming feature of criminal justice in the way they do today. A mere 30 years ago, the trial rate in federal court was five times higher than it is today.[8]

1. Why Are Federal Trials Disappearing?

So what caused the recent precipitous decline in trial rates? Most scholars point to the significant changes in federal criminal laws beginning in the mid-1980s that correspond precisely with disappearing trials, including (1) the combination of greatly increased severity in sentencing laws, (2) unprecedented rigidity in sentencing via mandatory minimums and strictly enforced Sentencing Guidelines, and (3) the enactment of the Bail Reform Act which greatly reduced the number of accused persons who were released pending the determination of their guilt.

These changes brought an enormous shift in power from judges and juries to prosecutors. The shift occurred because prosecutors, who always had unfettered charging discretion, now became empowered to determine sentences with nearly the same ease. This meant that prosecutors could create stark differences in the amount of time an accused person faced based on nothing more than whether the person went to trial – the so-called "trial penalty." Prosecutors used that leverage chiefly to pressure those charged with crimes to either cooperate or plead guilty. And as the 97% plea rate has shown, prosecutors used that new found power liberally.

Prosecutors have been most prolific about using their leverage in drug cases. In 1980, of the 6,343 persons charged with federal drug crimes, nearly 25% went to trial.[9] In 1990, three times the number of people were charged -- 19,271 -- and only 16.9% went to trial.[10] By 2010, 28,756 people were charged with federal drug crimes, and only 2.9% went to trial.[11] A big reason is surely that the trial penalty in drug cases is a sentence three times as long as the sentence for those who plead guilty.[12]

Although the statutes carrying five and 10-year mandatory minimum sentences were meant by Congress to apply only to the most serious offenders -- managers of drug trafficking organizations and the leaders and organizers of the operations, respectively -- they have been used far more indiscriminately, capturing mostly lower level offenders. This happens because the role in the offense does not actually trigger a mandatory sentence -- the weight of the drugs

involved does.[13] Thus, even a minor participant in a larger conspiracy can face the most draconian of sentences.

The visible examples of injustices relating to the trial penalty are those where defendants turn down a plea offer, go to trial, and suffer an extraordinary sentence as a result. One such example from my home district is *United States v. Midyett*, 07 Cr. 874 (KAM)(E.D.N.Y. June 17, 2010). Tyquan Midyett was charged with selling small quantities of crack cocaine at the age of 26 after a short lifetime of substance abuse which began at the age of 14 when he was in foster care. He was charged during the time when the 100:1 crack/powder cocaine disparity was still in effect. His Guidelines range called for approximately 7-9 years imprisonment, but he faced a 10-year mandatory minimum (absent the crack/powder disparity, his Guidelines range would have been roughly 4 to 4 ½ years). He turned down the "offer" of a mandatory 10 years at which point the Government filed a "prior felony information" pursuant to 18 U.S.C. § 851. Section 851 allows prosecutors to double or increase to life the already steep mandatory minimum if a defendant has one or two prior convictions for selling or merely possessing drugs, no matter how old, and no matter if no jail time was imposed.[14] Midyett went to trial, lost, and was sentenced to the mandatory minimum of 20 years. It was a sentence four times longer than even the Department of Justice had claimed was fair -- before he went to trial.

The story of Tyquan Midyett is relayed by United States District Judge John Gleeson, himself a former prosecutor (and not a sheepish one), in a recent opinion he authored regarding another sentencing. That case, *United States v. Kupa*, 11 Cr. 345 (JG) (E.D.N.Y. 2013), represents the less visible, yet far more common scenario in which mandatory minimum sentences regularly distort the justice system. Cases like Kupa's – and his co-defendant Joseph Ida -- are stark examples of why we see trials disappearing.

Kupa was charged with being part of a conspiracy to distribute cocaine and faced a 10-year mandatory minimum. Because he had prior convictions for marijuana distribution, he was subject to the filing of a prior felony information – just like Midyett had been. The prosecutor initially offered a plea agreement of roughly 9-11 years in prison. Kupa turned it down. As the trial approached, the prosecutor informed Kupa that if he went to trial the government would file a prior felony information containing both of his prior marijuana convictions. The result would be a mandatory life sentence after conviction. Ultimately, Kupa agreed to yet a different "offer," pled guilty, and was sentenced to 140 months imprisonment. Assuming he lives to the age of 75, his trial penalty would have been an additional 30 years imprisonment. Indeed, even the mere consideration and planning for trial cost him three years – the difference between his first offer and the last.

Kupa's co-defendant, Ida, was considered by the Government to have played a minor role in the conspiracy, yet it charged him with a count carrying a 10-year mandatory minimum. To persuade him to plead guilty, the prosecutor agreed to a roughly five-year prison term. Like Midyett, had he gone to trial, the effect would have been a doubling of his sentence -- for someone the government itself believed played a minor role.

The Kupa and Ida scenarios are hidden from any statistical compilation, yet they represent routine business in federal courts. When Judge Gleeson questioned the prosecutor

about why the United States Attorney was using the threat of a prior felony information to coerce a guilty plea, the prosecutor claimed that the decision was based on an "individualized assessment" of the defendant and generically listed things such as "the seriousness of the defendant's crimes, the defendant's role in those crimes, the duration of the crimes, and whether the defendant used or threatened communities and society as a whole." To that, Judge Gleeson responded:

> That sounds nice, but actions speak louder than words. Whatever the result of the "individualized assessment" with regard to Kupa, he was indisputably stuck with a prior felony information – and a life sentence – only if he went to trial, and he was indisputably not stuck with it only if he pled guilty. Despite the government's patter, there was only one individualized consideration that mattered in his case, and it was flat-out dispositive: Was Kupa insisting on a trial or not? If he was, he would have to pay for a nonviolent drug offense with a mandatory life sentence, a sentence no one could reasonably argue was justified.

Even proponents of severe sentences cannot reasonably claim that severity should be determined almost exclusively by an accused person's decision to exercise the constitutional right to a jury trial. And yet that is the result of granting so much unchecked power to prosecutors.

2. Why Should We Care that Criminal Trials Are Disappearing?

Some defenders of the current state of prosecutorial control and mass incarceration essentially respond, "So what?" Those commentators make the claim that increased prosecutorial power and the steep rise in rates of imprisonment worked over the past three decades to reduce crime dramatically – so much so that the tradeoffs in the loss of individualized justice and fairness are worth it.[15] Whatever one might think of the morality of that trade off, the evidence shows they are simply wrong.

Two of the most highly respected criminology scholars, Professors Michael Tonry and David Farrington, have convincingly shown that many other western countries, including Canada, experienced a rise and fall in crime rates that closely mirror those of the United States over the past several decades, yet none of those countries saw a significant increase in incarceration rates – much less an increase remotely close to the quadrupling of rates in the United States.[16] And the vast majority of researchers agree that no matter one's view of how severe penalties ought to be, severity of punishment as a method for reducing crime is almost certainly the weakest method of those available.[17]

So what are we sacrificing in the name of a benefit most researchers think is non-existent? Sadly, the answer is an awful lot. Jury trials are a vital part of the criminal justice system not just for the symbolic role they play in our constitutional democracy. They are vital because they actually represent the best mechanism in the history of the world for sorting facts, separating the guilty from the innocence, and holding the government to account in a responsible and transparent way.

We know that even with the checks and balances that exist at trial, mistakes get made. The revelations in the past decade from the Innocence Project in which over 300 people have been conclusively proven innocent through the use of DNA evidence, including 18 people who were sentenced to death, has demonstrated this point beyond any doubt. But perhaps one of the most shocking statistics to those not familiar with the criminal justice system is that over 10 percent of those conclusively shown to have been innocent *had pled guilty*.

Of course, a tiny fraction of all cases are subject to conclusive proof of innocence. But as United States District Judge Jed Rakoff noted in a recent speech entitled, "Why Innocent People Plead Guilty," if even a small fraction of accused persons are wrongfully convicted, the raw numbers are staggering. A mere .5% error rate in the federal courts would mean that more than 1,000 innocent people are currently incarcerated in federal prisons.

When I think about the possibility of an innocent person pleading guilty, I think of a recent case from my office. Justin Rodriguez[18] was charged in the Southern District of New York with robbing a grocery store in the Bronx by holding up the clerk at gunpoint. The evidence included a confident eyewitness and the store's security video. The likely sentence was in the range of 20 to 25 years, much of it mandatory, because of Mr. Rodriguez's prior record and the gun enhancement penalty provisions of 18 U.S.C. § 924(c).

Mr. Rodriguez insisted that he was innocent. But he was a recovering heroin addict, had a long rap sheet, and no one believed him. We were assigned to his case, and to be honest, even our lawyer and her investigator were skeptical of his claims. But they dug into the case the way great professionals dig in regardless of what a case looks like at the outset. They started finding pieces of evidence that didn't add up. The man in the video had tattoos on his arms that didn't seem to match Mr. Rodriguez's. Our attorney went to the prosecutors, but the prosecutors were not convinced. They thought there were explanations for why the video might appear different or possible ways that his arm's appearance could have been altered. We filed a motion to suppress the identification of the eyewitness because of how unreliable it was. The prosecutors strongly objected in a lengthy brief in which they explained all the reasons why our client was obviously guilty.

In the meantime, our investigator followed up on the places that Mr. Rodriguez might have been during the time of the robbery. Mr. Rodriguez was married, had a young daughter, and had been steadily putting his life back together after recovering from years of substance abuse. He couldn't recall precisely where he had been at the time of the robbery. Our investigators went to one of many places he mentioned as a possibility – a children's furniture store where he and his wife had returned a chair for his daughter. They retrieved the security video from the day of the crime, and sure enough, it showed Mr. Rodriguez and his wife. They were at the furniture store far from the robbed grocery store at the time of the robbery. We presented the evidence to the prosecutors, and they dropped the case.

I think of that case because I wonder what would have happened if we had not been so diligent and lucky in finding that security video. What if the government had offered Mr. Rodriguez a plea offer to 10 years rather than the 25 he faced after a trial? Given his criminal record and the evidence against him, he could have easily decided that a guilty plea was his best

option. By pleading guilty, he could ensure his release from prison in time for his daughter's teenage years rather than missing her childhood entirely. And as his lawyer, I almost surely would have agreed – and possibly even encouraged him, an innocent man, to plead guilty.

Trials are vital not just for the case at hand but for the lessons they teach all of us, including defense lawyers and prosecutors. They teach us that cooperating witnesses sometimes lie. Law enforcement agents sometimes make mistakes. Defendants are sometimes improbably foolish but not criminally malevolent. In a system where plea bargaining is the central means of resolving cases, those truths rarely come to light. There is a reason the great legal scholar John Henry Wigmore famously said that cross-examination, not plea bargaining, "is the greatest legal engine ever invented for the discovery of truth."

B. Over-Criminalization: The Resource and Information Imbalance

My office, the Federal Defenders of New York, represents indigent federal defendants in the Southern and Eastern Districts of New York. Those two federal districts cover all of New York City, five counties north of the city, and Long Island. We have a total of 39 lawyers. For those same two districts, there are approximately 300 federal prosecutors in the criminal divisions of the United States Attorney's Offices. That is a nearly 8 to 1 ratio even though we represent more than a third of all defendants.[19]

When budget crises hit, we are hit particularly hard. That is because we don't have the ability to choose what work we will do: we are entirely responsive to the cases and clients who are assigned to us. Unlike the Department of Justice, we cannot "reprogram" money and shift enforcement priorities. And we have no "fat" to cut in our program – 80 % of our budget goes to the salaries of our already understaffed offices, and the other 20% goes to things like rent and other basic expenses that cannot be cut. In our best years, we are vastly under-resourced as compared to the U.S. Attorney's Office. In a bad year like the one we just experienced during sequestration, we are simply not able to adequately perform our Constitutional and professional duties. Last year my employees and I took 12 days of unpaid furloughs – more than two weeks of not being paid -- pay that will never be recouped. I was also forced to lay off several staff members and leave many positions vacant when others voluntarily left. Our clients and the cause of justice suffered in ways that cannot be measured. And what is the truly absurd aspect of the cuts to our office? When we are cut, it actually costs the taxpayer more money because the cases we cannot handle are assigned to private attorneys who are paid statutory rates at higher expense.

The disparity in the number of staff only tells part of the story about the resource imbalance between the prosecution and defense. Federal, state, and local law enforcement agencies bring additional, vast resources to bear on the cases we must defend. Increasingly, even simple factual scenarios call for complicated research and expert services. Prosecutors routinely use cell phone records and computer data to make claims about a person's whereabouts, activities, and communications. Those claims can be central to the determination of someone's guilt or innocence, but they can also be wrong. In the past year, my office has represented clients against whom cell site data was incorrectly used to allege that they were in places they were not. In other cases, computer "meta data" purporting to show when certain documents or

photographs were created or stored was shown to be inconclusive, contrary to initial government claims. The only way to challenge such evidence is to hire expensive experts and to spend time and money examining the details of the government charges. Sometimes we public defenders have neither to spare.

Adding to the imbalance are discovery rules that severely constrain the defense in attempting to gather information. Unlike the Federal Rules of Civil Procedure, which encourage full factual disclosure in civil cases through the use of such devices as document requests, interrogatories, and depositions of relevant witnesses, criminal defendants receive only the barest of information. Not only are defendants unable to depose witnesses against them, there is no requirement that the government inform defendants of the identity of the witnesses against them until the very moment the witnesses are called at trial. Nor are defendants typically given access to witness statements until the eve of trial at the earliest. And the government and law enforcement have virtually unchecked discretion to decide whether they must disclose evidence tending to show a defendant's innocence to the defense, a situation which recently prompted a prominent Reagan-appointed federal appeals court judge to declare: "There is an epidemic of *Brady* violations abroad in the land."

C. Over-criminalization: The Way Forward

These resource and information imbalances when combined with the awesome power prosecutors wield in making charging and sentencing decisions create a justice system that is too one-sided to expect anything other than a "promiscuous" use of the criminal laws. The resulting state of mass incarceration, with its human and fiscal toll and its damage to the cause of a transparent and accountable democracy, is the inevitable result of policy decisions granting prosecutors too much control over the entire course of a criminal case – from the initial charging decision to the final sentence.

The good news is that there are straightforward, common sense reforms that would return the criminal justice system to its more traditional form.

- Congress should work to alleviate and ultimately eliminate mandatory minimum sentences. They do not result in more uniformity in sentencing, nor do they reflect the seriousness of offenses. They only diminish the traditional role of juries and judges, reduce transparency, and provide prosecutors with enormous, unchecked power.
- In particular, Congress should eliminate the truly draconian penalty provisions of 18 U.S.C. § 851 and 18 U.S.C. § 924(c). They distort the criminal justice system beyond all recognition by threatening defendants with decades and sometimes life in prison for offenses far less serious than many others that carry much lower sentences.
- When Congress amends sentencing laws to make them more just, it should make them retroactively applicable. If a sentence imposed the day after a law is passed would be considered unjust, surely it was unjust the day before the law passed. Judgments involving the highest of stakes should not be left to the fortuity of legislative timing.

- Congress should increase funding for public defenders and other appointed counsel so that the large resource disparities that currently exist between prosecutors and defense counsel for the poor can be ameliorated. The quality of justice dispensed in federal courts should not depend so heavily on the size of defendants' wallets.
- Congress should support expanded discovery in criminal cases. More information will only result in a better truth-seeking process. In appropriate cases where there are compelling, individualized reasons for prosecutors to withhold certain evidence, they should be permitted to do so. But the baseline standard should be greater disclosure.

There are, of course, many other reforms that could improve the quality of justice in American courts, but those five changes would dramatically improve our system and help to solve the problem of over-criminalization.

Conclusion

Every time new laws are passed that expand the criminal code, increase severity, or impose mandatory sentences, prosecutors accumulate more unchecked power. When that happens, it is not surprising that the authority will be abused. We have a system of checks and balances precisely because we believe in a nation of laws, not a nation of men. As John Adams famously said on the eve of American independence: "There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty."

Again, I am profoundly grateful to the Committee for reminding us all of these great principles.

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[1] *See, e.g.*, John Baker, *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545 (2005).

[2] Judicial Facts and Figures, Table 5.1, available at www.uscourts.gov/uscourts/Statistics/JudicialFactsandFigures/2012/Table501.pdf ; *see also*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755 (2005).

[3] HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINEtbl.6.30.2010 (Kathleen Maguire ed.) available at http://www.albany.edu/sourcebook/pdf/t6302010.pdf (showing state prison populations grew at a pace of 1.4% from 2000-2009, whereas the federal rate of growth was 4.1%).

[4] *See generally* Guide to Judiciary Policy, Ch. 2: Conditions of Supervision (2014); Jonathan Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 Ind. L.J. 1327 (2014); 18 U.S.C. § 3663A (restitution); 18 U.S.C. § 3600 (DNA testing); 18 U.S.C. § 3583 (supervised release terms and conditions).

[5]*See* ABA, *National Inventory of the Collateral Consequences of Conviction*, available at http://www.abacollateralconsequences.org(cataloguing collateral consequences in all U.S. jurisdictions).

[6] 132 S. Ct. 1376, 1388 (2012).

[7]*See, e.g.*, Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PENN. L. REV. 79, 91-92 (2005).

[8]HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINEtbl.5.22.2010 (Kathleen Maguire ed.), http://www.albany.edu/sourcebook/pdf/t5222010.pdf (showing that in 1980, out of a total of 36,560 defendants "disposed of in U.S. District Courts," 6,816 defendants were convicted or acquitted after trial (18.6%), whereas the corresponding numbers for 2010 were 2,746 out of a total of 98,311 (2.7%)).

[9]*Id.*at tbl. 5.37.2010.

[10]*Id.*

[11]*Id.*

[12]*See* Human Rights Watch, An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty (Dec. 5, 2013), http://www.hrw.org/node/120896/section/11.

[13]*See United States v. Dossie*, 851 F.Supp.2d 478 (E.D.N.Y. 2012)(providing a thorough explanation of the history and rationale of federal mandatory minimum sentences in drug cases).

[14] The term "prior conviction for a felony drug offense" includes simple possession of drugs, which can include misdemeanors in states where misdemeanors are punishable by more than one year (such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont), and includes diversionary dispositions where the defendant was not convicted in state court. It also places no limit on how old the conviction or diversionary disposition can be.

[15]*See, e.g.*, William Otis, *Statement of William G. Otis Before the House Judiciary Committee Over-criminalization Task Force of 2014 Hearing on "Penalties"* (May 30, 2014).

[16] Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, 33 CRIME & JUST. 1 (2006).

[17]*See* Nat'l Resource Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (2014) (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are "not an effective deterrent"); Daniel S. Nagin, *Deterrence in the Twenty-First* Century, 42 Crime & Justice 199, 202 ("[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis."); *see also* Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, Prison Journal 91: 48S(2011); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?* 10 Criminology & Pub. Pol'y 13, 37 (2011); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Justice: A Review of Research 28-29 (2006); Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) ("[I]t is unlikely that the dramatic increase in drug imprisonment was cost-effective").

[18] "Justin Rodriguez" is not our client's real name. For privacy's sake, I have changed it.

[19] Roughly 75% of federal defendants in the SDNY and EDNY require appointed counsel. My office represents every defendant with whom we do not have a conflict. The most common conflict arises from multi-defendant cases – in which we can represent only one defendant. The remaining defendants are represented by private attorneys who serve on the Criminal Justice Act Panel and are paid statutory hourly rates.

Mr. BACHUS. Thank you very much.

At this time, we are going to have questions from Members. I am going to go directly to Mr. Scott, and I will reserve my questions, if there is enough time.

Mr. SCOTT. Thank you, Mr. Chairman.

I wanted to thank all the witnesses for their testimony and ask Judge Keeley, on mandatory minimums, I want to thank the Judicial Conference for their opposition to mandatory minimums. They have been studied. They violate common sense. They discriminate against minorities. They waste taxpayer money and frequently require judges to impose sentences that violate common sense.

Now, if we eliminate mandatory minimums, not just in the Smarter Sentencing Act but in the Safety Valve Act that would allow judges to sentence below the mandatory minimum when the sentence violates common sense, would the departure from the sentencing guidelines be an appealable issue?

Judge KEELEY. Yes, as I noted in my comments, whether it is a departure specified under the guidelines or variance pursuant to the 3553(a) factors of the Sentencing Reform Act, it is reviewable on appeal for reasonableness, so no judge has unfettered discretion in that area.

Mr. SCOTT. Thank you.

Judge Saris, on the retroactivity, you mentioned the fact that those who got retroactive benefit last time recidivated at a rate statistically insignificant. In fact, is was actually a little lower than those who did not, is that right?

Judge SARIS. Yes, it was.

Mr. SCOTT. Are there any statutory barriers that we need to look at that slow up the work of the Sentencing Commission?

Judge SARIS. That slow up our work? No. I mean, if I had a wish list, I could probably go through them.

But I think right now, we are a bipartisan commission working at the crossroads. I think we feel as if we have worked well with Congress. We feel as if we have our hearings. At this point there are no statutory barriers to doing what we want.

There are certain things that we would love, but the commission at this point feels as if we are able to work very well on the whole area of recommending changes to the Congress, as well as doing our own work with respect to the guidelines.

Mr. SCOTT. Thank you.

Mr. Heaphy, are you prepared to discuss prison issues?

Mr. HEAPHY. Yes, I think so.

Mr. SCOTT. Okay, can you tell me some prison programs that help reduce recidivism?

Mr. HEAPHY. The Bureau of Prisons has created a reentry coordinator position in every Federal prison. Director Samuels has an assistant director who focuses exclusively on reentry programs.

It is imperative that we spend time for people, men and women who are incarcerated, to develop skills so that when they get out, they can be productive. In our view, the vast majority of them want very much to make choices that are productive and not criminal, but they need assistance.

And there are programs from anger management to substance abuse counseling to job skills, educational programs from GED on

up to college classes. We are working very hard in Virginia, actually, to get some of the online content providers like Liberty University to provide content to the prisoners in the Virginia system.

There is a great bipartisan movement across the country to provide more of these very tangible services to those who are incarcerated, to help reduce recidivism when they get out.

Mr. SCOTT. Have those programs been studied to ascertain whether they are effective?

Mr. HEAPHY. Those studies really are ongoing because a lot of those programs are new. Anecdotally, we have lots of evidence that they absolutely work.

And the Second Chance Act, which I think you pioneered, has been hugely successful. And we would urge that it continue to be fully funded.

Mr. SCOTT. What about employment programs like Unicor?

Mr. HEAPHY. Unicor also provides tangible skills to those incarcerated. That translates to job opportunities when they get out. If Unicor also provides a bonding opportunity or certification for those incarcerated, then those are very portable skills that are used on the outside.

Mr. SCOTT. That pays for itself, is that right?

Mr. HEAPHY. Absolutely, it does.

Mr. SCOTT. And the recidivism rate for those who have had the opportunity to get into Unicor, how does that compare to the general recidivism rate?

Mr. HEAPHY. I can't give you a specific figure, but absolutely lower, Congressman.

And it makes common sense that when you have a skill, and you can get a job, then you are less likely to make a criminal choice.

Mr. SCOTT. And the opportunity to get into Unicor, as I understand it, is a great management tool?

Mr. HEAPHY. It is. It enforces discipline within an institution, and people who are involved in prison programs generally have a lot fewer disciplinary actions when they are incarcerated.

Mr. SCOTT. Can any of the panelists discuss the need to get a mens rea requirement before we prosecute people?

Mr. HEAPHY. The vast majority of criminal statutes do include a specific mens rea standard. There are some, however, that do not.

The department believes that there is a role for the very careful use of some strict liability offenses where there are highly regulated industries that impact health and safety or environmental protection. There are occasions when we believe statutes that provide for strict liability are appropriate. They just have to be very judiciously used.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. BACHUS. Now the Ranking Member and the former Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I welcome the contributions of the witnesses.

I can't emphasize too much how important this Task Force is in the Judiciary Committee, and I am so glad that this discussion is taking place.

Judge Saris, the commission's own impact analysis demonstrates that 70 percent of the 51,000 inmates eligible for the "drugs minus

two" amendment are of color, Black or Hispanic. Would you agree that denying retroactivity would disproportionately impact minorities who have already been prosecuted and sentenced at disproportionate rates?

Judge SARIS. Let me start off by saying we haven't made our decision yet. We vote next week, actually, next Friday. I am back in D.C., 1 o'clock, we vote. So we have not yet made a decision on retroactivity.

We have, however, held extensive hearings, had innumerable letters from everyone from law enforcement to the courts to people from the various stakeholders groups, religious groups, prisoners. We have heard from everyone. And we will be making that decision next week.

What I will say is that mandatory minimum penalties and our drug sentencing scheme overall have had a particularly significant impact on racial and ethnic minority communities, and that more than 70 percent of offenders subject to mandatory minimums are minorities, Black and Hispanic.

One of the reasons for that is, especially Black offenders, they have qualified for the safety valve less, so that the mandatory minimums have disproportionately affected minority populations.

Mr. CONYERS. Thank you so much.

Could I ask for the opinions of Judge Keeley and David Patton on the same issue, please? Thank you.

Judge KEELEY. Thank you, Ranking Member Conyers. I wanted to remind everyone that our committee, the Criminal Law Committee, did have authority from the Judicial Conference to make a decision regarding retroactivity. And at our June meeting of the Criminal Law Committee, we voted by a large majority in favor of making the "drugs minus two" amendment retroactive.

Mr. CONYERS. Thank you.

Mr. Patton, would you comment on this, if you choose?

Mr. PATTON. I think it is safe to say defenders would strongly encourage the commission and Congress to make any ameliorative changes retroactive.

It really does not serve the interest of justice for the amount of time somebody serves to just depend on the fortuity of when the law goes into place. If it is an unjust sentence, it is unjust for those people serving the time now, in addition to people who will be sentenced tomorrow.

And it would, I think, greatly help to ameliorate some of the racial disparities, the significant racial disparities, that we see in the system.

Mr. CONYERS. Thank you.

My last question is directed to Judge Saris, Judge Keeley, and Mr. Patton, and here it is. Congress intended mandatory minimums to be imposed against drug kingpins, but as we found out, it is often low-level offenders, often people of color, who receive it.

Does this comport with your experience?

Judge SARIS. I am just going to jump in, because Congress asked us a few years ago to do a study on exactly this issue, and we issued our report in 2011. And at least as of that time, we studied it, and in fact the mandatory minimums, as we said, apply very

broadly, not just to serious and major drug offenders, but they are also applying to street-level dealers, couriers, and mules.

Now many of those get safety valve relief, but they are being hit at very high levels with convictions of statutes carrying mandatory minimums, and particularly the street-level dealers are, in the end, subject to them.

Mr. CONYERS. Thank you.

Can I finish, Mr. Chairman, by asking Judge Keeley to weigh in on this, please?

Judge KEELEY. As you know, I speak for the conference, and the conference for 60 years has opposed mandatory minimums. One of the basic reasons we have opposed it is because of the disproportionality in sentencing that results by treating similarly offenders who actually may pose very different risks to society.

And so to the extent that the statistics demonstrate that that disproportionality affects the African-American and the Hispanic community in a more disparate fashion, that is a result of the fact that mandatory minimums are viewing an offender who isn't similar in a very similar way, instead of individually, which is the way sentencing ought to result.

Mr. CONYERS. David Patton, would you give us your opinion?

Mr. PATTON. Absolutely. To your initial point about the fact that mandatory minimums sweep in people that they were not originally intended for, I think that the evidence is in. That is absolutely the case.

Congress intended for mandatory minimums to apply to managers and organizers of large-scale drug organizations, and instead, they have swept in much lower level offenders.

Mr. CONYERS. Thank you all very much.

Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

At this time, I recognize the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman.

Let me first just thank the distinguished panel for your presence here today, and, of course, your tremendous service to our country.

Let me start with Mr. Patton.

It seems to me that there are four primary actors in the criminal justice system. You have the prosecution, the defense, the presiding judge, and the jury. But if you have a trial participation rate—I believe the number was 2.7 percent—it seems to me that the course of the criminal prosecution, as you point out in your testimony, is largely determined by only one of those four actors, the prosecution, to the exclusion of the other four contemplated to bring about a just result in our constitutional system. Meaning the presiding judge, largely excluded. Certainly, the jury, largely excluded. The opportunity to mount a meaningful defense, largely excluded.

So the system is out of balance, in my view, I think it is fair to say.

What would be your recommendations in terms of how to restore some balance to the system in a manner that allows for meaningful engagement and participation by all of the actors in a criminal justice system, so that we can have a better shot of reaching the most just result?

Mr. PATTON. I think the Committee is probably growing tired of hearing it, but the answer is straightforward in one respect, and that is to ameliorate and eliminate mandatory minimums.

Prosecutors have always had a great deal of authority, and they always will, in the charging process. But when they control the backend of the process as well, that is an unhealthy state of affairs.

And I want to be clear, I am not suggesting—I think most prosecutors like most Americans are trying to do the right thing, most of the time. But we are a Nation of laws, not of men. We are very wary, historically, and with good reason, of investing too much power in nontransparent decision-making. And that is what happens in the plea bargaining process.

When a judge imposes a sentence, it is on the record. There is a transcript. It can be appealed. Others can review it. Congress can look at the reasoning and decide whether or not changes need to be made.

But charging decisions about whether or not to stack multiple 924(c)s or file an 851 that exponentially increased somebody's sentences, those are done not transparently and not accountably.

Mr. JEFFRIES. Well, thank you. Let me pick up on that point with Mr. Heaphy.

Thank you for your service and your testimony, and the progressive positions that are being articulated. But I want follow up on this point in terms of prosecutorial incentives to move forward.

Notwithstanding the direction I think appropriately that has been given by the Attorney General, in the context of a U.S. Attorney receiving a performance evaluation, a line attorney, is it normal practice that that performance evaluation is based in part on their conviction rate?

Mr. HEAPHY. No, absolutely not.

Mr. JEFFRIES. How is prosecutorial advancement determined?

Mr. HEAPHY. It depends on the individual, but it is about judgment. It is about fairness. It is about compliance with our discovery, and obligations, and our legal requirement to provide what is material and exculpatory to the defense.

I have never, in my 20 years as a Federal prosecutor, been asked about a conviction rate. I don't even know what it is, and I don't keep track of that for the lawyers in our office.

Our paramount objective is to do justice, and we evaluate our people on their consistency with the pursuit of that goal.

Mr. JEFFRIES. So how do you measure judgment and discretion, and the ability to do justice, consistent with what a prosecutor's ultimate obligation is?

Mr. HEAPHY. It is hard to do that empirically or statistically. I don't think justice is always reflected in a conviction rate or in a number of cases handled. It is really a product of a case-by-case evaluation of whether or not someone is fair, has an innate sense of justice, and is achieving outcomes that in the view of the management of the office are fair and are just, and that is what our people are trying to do every day.

Mr. JEFFRIES. So some have articulated a concern based on performance evaluations being largely measured by conviction rate and/or enhanced length of sentencing. I am pleased to hear, at

least from your perspective from what you sit in your capacity, that is not your view. Hopefully, that is the case across the country.

The other side of the coin is the notion of what are the disincentives for prosecutorial misconduct? Can you cite instances where examples of bad judgment, perhaps even judgment that crosses the legal boundary into potentially unlawful conduct, has actually been sanctioned in a way that every other American citizen has to face consequences in the context of the criminal justice system when they make a grievous error?

Mr. HEAPHY. In the Federal system, we have the Office of Professional Responsibility that very closely monitors, receives complaints, and then investigates allegations of professional misconduct. State bars do the same thing.

There is a doctrine of sovereign immunity, that actors, whether they are law enforcement or prosecutors, in good faith attempting to their job, if they make decisions that are later view to be unwise, are protected with immunity.

But there are tremendous checks and balances internal within our department to ensure that our lawyers, our junior lawyers on up to senior decision-makers, are playing by the rules and are doing what is right.

Mr. JEFFRIES. I think my time has expired, so I yield back. Thank you.

Mr. BACHUS. Thank you.

Let me first go to our U.S. Attorney. You mentioned environmental crimes, where there may not be need to be a mens rea.

We have had testimony before this Committee, and I personally know of two businessmen in my district that were convicted in the 1980's of violation of environmental statutes.

I have actually looked at the statutes and none of them are actually criminal statutes. By regulation, it was made a crime, and the regulation basically said the storing of toxic materials.

In both of those cases, what happened, and I will just give you one example, a gentleman who was a Vietnam War veteran, a businessman, bought a piece of property, which had been a business, an ongoing business. He found on that site some barrels, and he reported it to the EPA that he had found these barrels. He was told that he needed to dispose of them.

He then contacted them back and said it was going to cost over $1 million. He started disposing of them, but they gave him a deadline, and he didn't meet that deadline.

Here was an individual who bought a piece of property, not knowing there are chemicals stored on it, notified the agency, started disposing of them. But it was hard to get people to take these chemicals. That is a very expensive process.

And then going with Mr. Patton, what he is saying, his testimony on page 7, I can actually see in a lot of cases where the U.S. Attorney's Office for the Environmental Protection Agency, they have all the resources. He is faced with a situation of hiring an attorney. He actually was indicted.

He is offered a year and a day to serve 60 days. He is told that if he doesn't accept that, that he could get 10 years. He spent over $100,000 in the 1980's on attorneys.

And what Mr. Patton said, he can go to court. He can roll the dice. He can pay his attorneys money he doesn't have, borrowed money.

But he chooses to take a plea. He is obviously very bitter about this, because he thinks he has done everything.

And he says to me, "Everybody says, well, why didn't you go to trial?" Of course, he's saying, "I can't. I can't risk this. I have young children." He has a criminal record. He can't vote. That is how I found out about one of the situations. I don't think many people knew.

Mens rea to me, and you mentioned environmental, so that triggered it. Shouldn't there be some intent? I mean, is intent to violate the law, even after you notify an agency of something that you didn't cause?

Does anybody have any comment on that? And I have been told, I actually talk to people up here on various Committees and the Judiciary Committee, former staffers, they said, oh, there were a slew of these convictions back in the 1980's. There were literally thousands of these cases.

Mr. HEAPHY. Congressman, I appreciate the question.

I would not want someone 20 years from now to second-guess every charging decision. But that said, if that case, just on the facts as you described and nothing more, came to me today, that would not be a Federal criminal case.

Mr. BACHUS. Now it is not. I think it has changed. They do not, as a matter of policy, prosecute right now.

Mr. HEAPHY. But let's assume that instead of it being an individual, sole practitioner, or someone that has a piece of property, found the barrels, that it is a company who routinely deals with hazardous waste, has sophisticated professionals who are aware of the regulations, perhaps are warned that you must dispose, or you will face a legal consequence, and they affirmatively choose not to, knowingly do not, then that probably should be a crime.

And this gets down to prosecutorial discretion. The reality that we are dealing with, Congressman, is I don't have enough people, we don't have agents, we don't have enough prosecutors, to deal with the 100 statutes, the guns, the drugs, the fraud, the child exploitation, that we face every day, because we have so many people in prison and our budgets are so stretched.

So in a case like an environmental regulation of someone not appropriately disposing of a barrel of waste, to be honest, that is anomalous and peripheral matter that I am even less likely to reach now, because I can't get my core work done.

It is only if we really look hard at sentencing reform that we increase the amount of resources available for us to get our core work done, that we are really going to be sustain the system going forward.

Mr. BACHUS. Anybody else have any comment on it?

My time has expired.

Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I don't know if we usually introduce guests in the audience, but a group of Sixth Mount Zion Baptist Temple children just arrived.

Could they stand, so we know where they are?

Thank you. They are touring the Capitol and wanted to see what a congressional hearing looks like.

Mr. BACHUS. So what church?

Mr. SCOTT. Sixth Mount Zion Baptist Temple church.

Mr. BACHUS. Where are they located?

Mr. SCOTT. Hampton, Virginia.

Mr. BACHUS. Oh, okay. That is your district, isn't it? [Laughter.]

You have an outstanding Congressman. [Laughter.]

Thank you very much.

Mr. SCOTT. Thank you.

I wanted to follow-up on the questions to Mr. Heaphy.

You suggested that, perhaps, strict liability may not be appropriate if health and safety is not a factor. Even if it is a factor, we have willful disregard to get past the strict liability, and we have civil fines.

What rational basis would there be even on health and safety where the people just didn't know? It is no deterrent effect, if you didn't know.

Mr. HEAPHY. Congressman, I think there is a greatly enhanced deterrent effect, if there is a criminal sanction. When you are talking about people who work in highly regulated industries like food and drugs, and the protection of public health and safety, then it is a policy choice that Congress has made to force those people to know the rules. And if they do not know the rules, then there is a criminal sanction.

We had a recent case involving Jensen Farms. This was a business that produced fresh fruit, and they had cantaloupes that were insufficiently washed and they had listeria bacteria on the cantaloupe. Those cantaloupes got into the stream of commerce of 20 or 30 States and ultimately were tied to 33 deaths because of the ingestion of that listeria.

There is no evidence that the two proprietors or the two owners of the business, the Jensens, intentionally sent tainted cantaloupe. But because they are operating a business that directly has that kind of impact on the health, the strict liability misdemeanor of being responsible for ensuring that that did not happen was employed by the department.

Mr. SCOTT. You mentioned misdemeanor. That was not a felony?

Mr. HEAPHY. It was not a felony. It was a misdemeanor.

Mr. SCOTT. And civil fines were insufficient?

Mr. HEAPHY. The judgment of the prosecutor in that case is that if it is a business problem that can be ameliorated by writing a check and resolving a civil case, it is insufficient deterrence. That is a policy determination that Congress made, and we, frankly, agree with it.

Criminal sanction has a greater attention-getting deterrent effect with corporate entities.

Mr. SCOTT. But all of this would be limited to situations where health and safety are involved?

Mr. HEAPHY. Generally, strict liability offenses—the BP oil spill, for example. There is no one who intentionally injected oil into the Gulf of Mexico, but it was of such magnitude that a responsible corporate officer could be held responsible, as could the company.

Generally, those crimes in that area are highly regulated industries with sophisticated actors who would have to make it their business to know the rules and ensure that people are protected.

Mr. SCOTT. Highly regulated is an important factor because they know about the highly regulated nature of the business they are in.

Mr. HEAPHY. Congress has decided that we will put the onus on them. Essentially, the public, the person eating the cantaloupe, he can't really protect himself. That is why as a policy matter, the onus is on the company that distributes that to ensure health and safety is protected.

Mr. SCOTT. Thank you.

Judge Keeley, you mentioned State offenses should not be tried in Federal court. Should we repeal the statutes or rely on the discretion of the prosecutors to reduce the number of State offenses that are tried in Federal court?

Judge KEELEY. I think the response of the conference would be that we have always urged Congress to do reasonable review of statutes to see if they are still effective, if there is still a need for them.

So, in those circumstances, it would make sense to review those statutes. It would, of course, be within the discretion of Congress to determine whether the statutes should remain in place or be repealed.

Mr. SCOTT. Is the decision to try something in Federal court reasonable if there is a differential in punishment? Should that be a factor in ascertaining whether or not the Federal Government ought to prosecute?

Judge KEELEY. Certainly, it is not within the conference's prerogative to say what crimes should be prosecuted in Federal court for a particular reason, but we would say that among the factors that we have recommended to Congress to review, that would not be one of them.

Mr. SCOTT. Thank you.

Thank you, Mr. Chairman.

Mr. BACHUS. Back to me, I guess.

Let me pursue again just some of the line I was hearing, and I know that when people read laws, they say, "Well, Congress intended this." Many times, Congress didn't intend.

You read a statute that says you shall not store hazardous waste. When that statute was passed, I don't think Members of Congress realized they were saying that if you buy a piece of property and discover toxic waste on it, or stored chemicals in barrels, or you buy a building and there are some chemicals stored in that building in an ongoing business, and you almost immediately report that, and you find out what it is and you report it, and the cost is several times even more than what you bought the piece of property for.

I am back to this gentleman, because this is a real example. He actually said to the EPA, you can just have the property. But he said, can you just take the property?

I am not sure that Congress ever intended, and it may be a misdemeanor, but a civil fine or forfeiture of a property or something of that nature.

Do each of you agree that maybe there should just be a tighter general statute on mens rea? I will just start with you.

Mr. HEAPHY. No, candidly, Congressman Bachus. No matter what we do, the system depends upon the individual discretion of decision-makers. And if you came to my office on behalf of that client who had the barrel of hazardous waste, again, I cannot imagine why I would bring that case.

Mr. BACHUS. Oh, I agree.

Mr. HEAPHY. It just does not make sense without more facts.

But to apply a uniform mens rea standard, without a careful review, case-by-case, statute-by-statute, in our view, it would be wildly overinclusive, because there may be cases, rare cases, with more sophisticated actors, more persistent conduct, where a responsible corporate officer should be held accountable as a matter of policy.

And Congress really, again, has passed these statutes in the area of health and safety, so, again, Congress needs to be explicit, obviously, when drafting statutes. Generally, they are.

Judges try hard to interpret them, and apply certain standards to their interpretation. But a blanket standard that would apply universally we think would be overinclusive.

Mr. BACHUS. Judge Keeley?

Judge KEELEY. Mr. Bachus, as you know, I am appearing here today as a conference witness, and I can only speak on issues on which the conference has taken a position, and it has not taken a position on the mens rea question.

Mr. BACHUS. Judge Saris?

Judge SARIS. As you know, the commission focuses on penalties, not on the elements of a crime, so we have not taken a position there either.

Mr. BACHUS. Okay.

Mr. PATTON. And I am sure that it won't come as a surprise to you, Mr. Chairman, that most of our clients are not facing regulatory misdemeanors. [Laughter.]

Mr. BACHUS. I am sitting here asking these questions and kind of the elephant in the room is this is maybe a half of 1 percent of all cases. We are not dealing with the 99.5 percent here.

I read on page 7 of your testimony, I saw this last night, and I am thinking this is Custer's last stand almost, but you say my office of the Federal defenders of New York represents indigent defendants in the Southern and Eastern Districts of New York. Those two Federal districts cover all of New York City, five counties north of the city, and Long Island.

You have 39 lawyers. For those same two districts, there are 300 Federal prosecutors—39 to 300.

Now, of course, my first question is, I read that and I didn't read the next sentence, of "Well, a lot of them hire attorneys." But you have even considered that and you say, even after that, you represent over a third of those defendants. So over one third of them don't. And there is still an 8-to-1 ratio of prosecutors to defense attorneys.

Now, there is no way that you can try all of those cases.

Mr. PATTON. And, I would say, Mr. Chairman, that that really understates the resource imbalance, because that doesn't take into account all of the Federal and local law enforcement agencies, and

all of the resources they bring to bear. And cases require more and more time and energy these days.

Mr. BACHUS. DNA. So 90 percent of your budget is for salaries, so you have 10 percent. I wouldn't think that you could pay for many DNA tests.

Mr. PATTON. Well, we can. I don't want to overstate it. I think that the Judicial Conference works with us to help us with our funding.

But it is out of whack. It is thoroughly out of balance with the resources on the other side of the aisle.

Even a routine case today, not even a complicated case, will often involve cell phones or computers that need to be examined. The government will make claims based on cell site data or metadata on a computer.

These are things that require experts, that require diligence and time and energy to investigate. And we are, certainly, outgunned in that regard.

Mr. HEAPHY. Could I jump in on that? The people who are with me are probably going to be upset that I am jumping in on any question, but I have to, very quickly.

The Federal public defender, very talented lawyers, only represent in every district a percentage of all of the indigent criminal defendants. If a defendant cannot afford counsel of his or our choice, then they are appointed a lawyer who has to be constitutionally effective. It could be the Federal public defender. It could be a private lawyer who is on a list from which a judge selects.

But we agree. The department strongly supports adequate funding of indigence defense. It is important for the system to work effectively that the resources are relatively balanced, that if a defendant needs a DNA expert or wants to bring a witness in from some other place, that he be able to do that, and that if he is indigent, that the court pays for that.

The Attorney General has consistently spoken of the need for adequate funding for indigent defense. I as a trial lawyer, I know that I am frankly in a better position if my opponent on the defense side is an effective advocate. I think juries want to see a fair fight. And that is fair. That is the way the system should work.

So we agree with David that indigent defense, Federal public defenders, and the Criminal Justice Act-appointed lawyers need to be well-resourced.

Mr. BACHUS. And I guess you mentioned you were a trial lawyer. I was a trial lawyer and you know if you have the resources, it is a tremendous advantage.

I have actually sued the railroad, and I represented the railroads, and I appreciate the difference in resources. [Laughter.]

Mr. HEAPHY. You ought to go into environmental defense too. There is a future there.

Mr. BACHUS. My people, you are talking about your people, my people want me to ask this question. How would a requirement that a person, we are talking about cases where there doesn't seem to be any overt act or intention to violate, how would a requirement that the person actually acted willfully, did something, not just failed to do something—but I guess the food case you were talking about was a failure—but acted willfully to prevent prosecu-

tion of these types of egregious cases that I have described. And their characterization is "egregious."

Mr. HEAPHY. The cases in which we have charged a person or company for doing something that was not willful, are extremely rare.

Let me just emphasize again, they are a very, very small percentage of the overall number.

But again, there are instances where Congress has made a policy judgment, and we agree that it is important as a matter of strict liability to hold someone accountable because they should have known the rules.

The biggest example of strict liability offense in American justice is drunk driving. You don't necessarily have to hurt anyone. But if you make a decision to get behind the wheel while intoxicated, you are strictly liable even if you cause no harm.

And again, that is because drunk driving——

Mr. BACHUS. Of course, that is a willful act, getting behind the wheel.

Mr. HEAPHY. That is true. But it doesn't necessarily have to cause injury.

And I guess what we believe is that there are times when holding a company or an individual responsible, even if they weren't willful, they didn't take steps to prevent an injury, those rare instances we believe ought to be an arrow in our quiver to use in an appropriate case.

Mr. BACHUS. Of course, your case on food, there were deaths.

Mr. HEAPHY. There were, yes.

Mr. BACHUS. That was sort of different. In this case, it was toxic chemicals that had been stored there, and only just continued to be stored there. But there was actually an affirmative act of reporting. "I have something here. What do I need to do?"

Mr. HEAPHY. We had a case in our district years ago involving a pharmaceutical firm that was marketing a pain-killing medication, OxyContin, affirmatively hiding evidence of its addictiveness. And in that case, my predecessor in this job had three individual executives of that company plead guilty because they were responsible corporate officers who should have been aware that the marketing was deceptive. And they pled guilty to those misdemeanors.

Mr. BACHUS. And I understand, they acted willfully. They concealed, or they were warned. They were cautioned. I understand.

Do you have any final comments?

Mr. SCOTT. Yes, Mr. Chairman. Willful blindness is prosecutable under a mens rea requirement. The problem is when people honestly did not know if it violated some arcane regulation and end up in criminal court.

I don't think there is any limitation on civil fines in that situation. But getting into a criminal prosecution is one of concern. When you are dealing with health and safety, I guess you can have different standards.

But at some point, you have to know you were actually committing a crime.

Mr. Chairman, I ask unanimous consent that three documents, one from the Urban Institute,* one from Families Against Mandatory Minimums, and a letter from Ranking Member Conyers and myself to the Sentencing Commission be entered into the record.

Mr. BACHUS. Well, thank you. In fact, without objection, all Members will have 5 legislative days to introduce any extraneous materials or statements, or to submit written questions to the witnesses.

[The information referred to follows:]

*The material from the Urban Institute, "Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System," is not reprinted in this hearing record but is on file with the Subcommittee and can be accessed at http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf

Statement of Julie Stewart, President,
Families Against Mandatory Minimums (FAMM)
to the
U.S. House Judiciary Committee Over-criminalization Task Force

Hearing on Agency Perspectives
July 11, 2014
Washington, DC

Families Against Mandatory Minimums (FAMM) is a national nonpartisan, nonprofit organization that advocates for sentencing laws that are fair, cost-effective, and fit both the crime and the offender. Thank you for this opportunity to share, once again, our view that mandatory minimum sentencing reform is essential to any effort by this Task Force to reduce the unsustainable fiscal and human costs resulting from our expanding federal criminal code and prison system.

The Problem

Three decades of lengthy federal mandatory minimum drug sentencing laws have driven dramatic and costly increases in the federal criminal caseload and prison population. A recent Congressional Research Service (CRS) report[1] traces the source of the current prison overcrowding and budget crises to policy choices made by Congress and the U.S. Sentencing Commission. CRS has identified four factors causing over-incarceration: (1) increased numbers of federal offenses carrying mandatory minimum sentences; (2) the increase in the length of mandatory minimums, which has compelled the creation of increasingly lengthy sentencing ranges under the federal sentencing guidelines; (3) the creation of more federal offenses; and (4) the elimination of parole.[2]

Prison populations, costs, and overcrowding increase when more people are convicted, incarcerated for lengthy prison stays, and required to serve virtually all of their sentences. Despite a drop in crime over the same period, the number of people sentenced in federal courts almost doubled from 42,436 in FY 1996 to 80,035 in FY 2013.[3] The number of federal prisoners has grown from roughly 25,000 in FY 1980 to nearly 219,000 in FY 2013.[4] The Federal Bureau of Prisons' (BOP) budget has grown accordingly, from $330 million in FY 1980 to $6.874 billion in FY 2014.[5] The Inspector General (IG) of the Department of Justice (DOJ) anticipates that, absent significant changes, the BOP's 25% share of the FY 2013 DOJ budget will grow to 28% by 2018.[6] The BOP currently operates at 36% above its rated capacity.[7] The IG describes the system's outlook as "bleak: … the BOP projects system-wide crowding will continue to rise to 44% over rated capacity through 2018."[8] The BOP's inmate-to-correctional officer ratio has been 10-to-1 for a decade, far exceeding the 6-to-1 ratio of the five largest state prison systems.[9] This puts correctional officers and prisoners alike at greater risk of harm.[10]

Keeping this behemoth prison system running has grown even more difficult in the era of the sequester and flattening budgets. The DOJ recently reprogrammed $90 million in funds from the FBI[11] and an additional $60 million from other DOJ programs to keep BOP staff on duty in the face of automatic funding cuts.[12] Community Oriented Policing Services and Byrne Justice

Assistance Grants were reduced by 44 and 34 percent, respectively, between FY 2010 and FY 2013, to the detriment of state, local, and Tribal law enforcement and victim services providers.[13] The Urban Institute recently concluded that "[i]n these fiscally lean times, funding the expanding BOP population crowds out other priorities, including federal investigators and prosecutors and support for state and local governments."[14]

Indeed, two statistics in particular highlight the detrimental public safety impact of the last 30 years of federal sentencing policies: one of every three federal offenders sentenced annually is a drug offender,[15] and half of all federal prisoners are drug offenders.[16] These offenders are overwhelmingly low-level and nonviolent. In FY 2013, half of all federal drug offenders had little or no criminal record;[17] 84 percent did not possess or use weapons;[18] only seven percent played a leadership role in the offense;[19] yet 62 percent were subject to the five-, 10-, or 20-year mandatory minimum prison sentences[20] that Congress intended for "major" and "serious" traffickers.[21] The person most likely to receive a mandatory minimum drug sentence in federal court is not a kingpin, but a street-level seller distributing grams and ounces, not kilograms, of drugs.[22] Every dollar spent on locking up such a person is a dollar that cannot be spent on fighting violent crime and terrorism, hiring police and prosecutors, or serving victims and treating the addicted.

Even formerly ardent supporters of harsh mandatory minimum sentences have begun to question whether these policies are effective. Economist Steven D. Levitt once believed that "the social benefits approximately equaled the costs of incarceration," but told the *New York Times* in December 2012, "I think we should be shrinking the prison population by at least one-third."[23] Former National Rifle Association president David Keene now supports mandatory minimum sentencing reform because "spending too much on prisons skews state and federal budgetary priorities, taking funds away from things that are proven to drive crime even lower, such as increasing police presence in high-violence areas and providing drug treatment to addicts."[24]

The Solution

The solution lies with Congress, and the solution is mandatory minimum sentencing reform.

Reforming federal mandatory minimum drug sentencing laws is a first step to solving the problems facing the agencies testifying at today's hearing. Incarceration – and particularly mandatory incarceration for lengthy minimum periods of time – costs money. Congress's unanimous enactment of the Fair Sentencing Act of 2010 (FSA)[25] is a recent example of how lowering mandatory minimum prison terms reduces costs by reducing time spent in prison. The legislation raised the triggering quantities for crack cocaine mandatory minimums from five to 28 grams for the five-year term and from 50 to 280 grams for the 10-year term.[26] The FSA has affected both sentence length and how many people are subjected to mandatory minimum sentences for crack cocaine offenses. In FY 2013, 2,851 defendants sentenced for crack cocaine received average sentences of 100 months,[27] which is 11 months shorter than the average for crack offenders sentenced in FY 2010.[28] Today, it costs the BOP, on average, $29,291.62 per year to incarcerate a federal prisoner.[29] Using these figures, savings generated from the FSA's sentence reductions last year alone were $76,551,207.[30]

The FSA has also reduced the total number of federal convictions and prison sentences for crack cocaine offenses. While the number of people sentenced for most other federal drug offenses has risen since 2010,[31] the number of individuals prosecuted federally for crack cocaine offenses fell. Judges sentenced 4,742 defendants for crack cocaine offenses in FY 2010[32]; by 2013 the number had fallen to 2,851.[33] That 40 percent drop in federal crack cocaine prosecutions represents millions of dollars and thousands of prison bed years saved. A 40 percent decline in crack cocaine trafficking in the last three years seems unlikely. Rather, the FSA's sentence adjustments may have refocused federal prosecutors on large-quantity crack cocaine traffickers, or perhaps discouraged state and federal prosecutors alike from federalizing low-level crack offenses that can be better handled by state authorities. If fewer federal prosecutions are an admirable goal, the FSA is apparently accomplishing it, with significant monetary savings attached.

Like the FSA, passage of the Smarter Sentencing Act (H.R. 3382) would produce significant cost savings and prison population reductions by reducing mandatory minimum drug sentences. The Smarter Sentencing Act was introduced by two of this Task Force's members – Representatives Robert Scott (D-VA) and Raul Labrador (R-ID) – and is cosponsored by 41 other members of the House, including five other Task Force members – Representatives Spencer Bachus (R-AL), Karen Bass (D-CA), Steve Cohen (D-TN), Hakeem Jeffries (D-NY), and Hank Johnson (D-GA). The bill has a Senate companion (S. 1410), introduced by Senators Mike Lee (R-KY), Richard Durbin (D-IL), and Patrick Leahy (D-VT). It has been approved by the Senate Judiciary Committee and has 25 other Senate cosponsors.

The Smarter Sentencing Act takes a first step toward solving the federal prison crisis by reducing current 20-, 10-, and five-year mandatory minimum sentences for nonviolent drug offenses to 10, five, and two years, respectively. One conservative estimate shows that these sentence reductions would yield savings of at least $2.485 billion and 240,000 prison bed years in the first decade alone, not including the averted costs of building new prisons and the savings from prison closures as the federal prison population shrinks.[34] According to The Urban Institute, these reforms would not just reduce the federal prison population, but have a "monumental effect on the prison system": ten years after the Smarter Sentencing Act's enactment, the BOP's prison population would be at a manageable level, at 120 percent of capacity rather than at the 155 percent of capacity projected if Congress does nothing.[35]

These savings would not come at the cost of public safety. By alleviating prison overcrowding, reducing the need for new prisons and more correctional officers, and lowering the BOP budget, the Smarter Sentencing Act would restore funding for DOJ and law enforcement priorities that protect the public from violent offenders and terrorists (alternatively, such savings could be used to reduce the federal deficit or be returned to taxpayers in the form of tax cuts). Federal drug offenders would still receive significant punishments, but experience shows that shorter drug sentences do not produce more crime. Thirty states have reduced or eliminated their mandatory minimum drug sentences in the last decade,[36] and no crime wave has resulted.[37] In fact, crime has dropped in states that have reduced their prison populations,[38] and voters of all parties support the rejection of mandatory minimum sentences for drug crimes.[39] Crack cocaine sentencing guideline changes in 2007 reduced sentences for more than 16,500 federal prisoners by an average of 26 months; they went on to reoffend at slightly lower rates than those who received no such reductions.[40] This raises a serious question for Congress: if taxpayers can

receive the same level of public safety using less incarceration, at lower costs, why should we persist in using our current excessive mandatory minimum drug sentences?

The Smarter Sentencing Act's other provisions also reduce sentences, cut costs, and downsize prisons, without increasing crime. The legislation would apply the FSA's crack cocaine sentencing reforms retroactively to approximately 8,800 people – 88 percent of whom are black[41] – still serving the old, repudiated sentences in federal prisons. No sentence reductions are automatic. Rather, prisoners must petition the court for a sentence reduction in accord with the FSA's penalties. Prosecutors would be permitted to oppose and argue against a sentence reduction, and courts could deny the reductions to protect public safety. This reform would save, conservatively, $229 million and 21,000 prison bed years over 10 years.[42]

Finally, the Smarter Sentencing Act moderately expands one of the only and oldest means to being sentenced below a mandatory minimum drug sentence, the five-part drug "safety valve" at 18 U.S.C. § 3553(f). Safety valve exceptions to mandatory minimum terms also save money. For example, in 2010, 5,539 federal drug offenders received sentences below the applicable mandatory minimum sentence because they met the safety valve's strict criteria of being low-level, non-violent drug offenders who did not possess weapons, pled guilty, and had minimal criminal records.[43] These offenders received sentences averaging 49 months[44] – a full 83 months shorter than the average sentence of 132 months[45] received by defendants who did not receive the benefit of the safety valve. It is impossible to know how much of a sentence reduction each person received, but even if all 5,539 defendants received sentences just 12 months shorter than the applicable mandatory minimum, the savings in FY 2010 alone was 5,539 prison years and at least $156,665,076.[46] The Smarter Sentencing Act would increase the cost-saving power of the safety valve by making it applicable to low-level, nonviolent drug offenders with up to three criminal history points under the U.S. Sentencing Guidelines. This small expansion would save $544 million and 53,000 prison bed years over 10 years, conservatively.[47]

Combined, the Smarter Sentencing Act's modest reforms would save at least $3 billion over 10 years, without harming public safety.[48] These reforms far outstrip cost and bed savings projections for any other currently proposed reforms.[49] In short, meaningful mandatory minimum drug sentencing reform is the key to solving the prison budget and overcrowding crises plaguing our federal criminal justice system.

Conclusion

Thank you for your leadership and thoughtful evaluation of the factors driving the enormous budget and population growth in our federal prison system. After your careful deliberations, the time has come to act. This dilemma is not an accident, but one of our own making. Though well-intentioned, the mandatory minimum sentencing policies of the 1980s have produced realities that are counterproductive and unsustainable in the 21st century. After three decades of experience, advances in crime prevention and addiction treatment, and successful reforms in 30 states, it is time to adopt more cost-effective federal sentences. We thank the Task Force for considering our views and those of the agencies making heroic efforts to grapple with these problems, and we respectfully urge this Task Force and the full House Judiciary Committee to support and advance mandatory minimum sentencing reforms as soon as possible.

[1] CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS (Apr. 15, 2014) [hereinafter CRS Report], *available at* http://fas.org/sgp/crs/misc/R42937.pdf.
[2] *Id.* at 2, 8.
[3] *Cf.* U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 2 (1996), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-2.pdf, *with* U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. 2 (2013) [hereinafter 2013 SOURCEBOOK], *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table02.pdf.
[4] CRS Report, at 2.
[5] *Id.* at 10.
[6] Michael E. Horowitz, *Top Management Challenges Facing the Dep't of Justice – 2013*, U.S. DEP'T OF JUST. (Dec. 11, 2013, reissued Dec. 20, 2013) [hereinafter Top Management Challenges], *available at* http://www.justice.gov/oig/challenges/2013.htm.
[7] Statement of Charles E. Samuels, Jr., Dir. of the Fed. Bureau of Prisons, *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before the Subcomm. On Commerce, Justice, Sci. & Related Agencies of the H. Comm. on Appropriations*, 113th Cong. 4 (April 17, 2013) [hereinafter Samuels Statement], *available at* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).
[8] Top Management Challenges.
[9] *Id.*
[10] Samuels Statement, at 4-5 ("[I]ncreases in both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are related to increases in the rate of serious inmate assaults. An increase of one in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates.").
[11] *Federal Bureau of Prisons FY 2014 Budget Request: Hearing Before U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, Transcript of Testimony of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons 6 (April 17, 2013) (on file with author).
[12] Statement of Eric H. Holder, Jr., Att'y Gen. of the U.S., *Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations*, 113th Con. 1 (June 6, 2013), *available at* http://www.appropriations.senate.gov/sites/default/files/hearings/AG%20Senate%20Testimony%20FY%202014%20final.pdf.
[13] NAT'L CRIMINAL JUSTICE ASS'N & VERA INSTITUTE OF JUSTICE, THE IMPACT OF FEDERAL BUDGET CUTS FROM FY10-FY13 ON STATE AND LOCAL PUBLIC SAFETY: RESULTS FROM A SURVEY OF CRIMINAL JUSTICE PRACTITIONERS, at 2, *available at* http://www.vera.org/sites/default/files/resources/downloads/impact-federal-budget-cuts-public-safety.pdf.
[14] URBAN INSTITUTE, STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM 14 (Nov. 2013) [hereinafter STEMMING THE TIDE], *available at* http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf.
[15] 2013 SOURCEBOOK, at Figure A, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureA.pdf.
[16] BUREAU OF PRISONS, INMATE STATISTICS: OFFENSES, *at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.
[17] 2013 SOURCEBOOK, at Tbl. 37, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table37.pdf.
[18] *Id.* at Tbl. 39, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table39.pdf.
[19] *Id.* at Tbl. 40, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table40.pdf.
[20] *Id.* at Tbl. 43, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table40.pdf.
[21] U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011) [hereinafter MANDATORY MINIMUM REPORT], *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf.

[22] *Id.* at 171, Fig. 8-11, *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf.
[23] John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 12, 2012, at A1, *available at* http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0.
[24] David Keene, *Prison-Sentence Reform*, NAT'L REV. ONLINE (May 24, 2013, 4:00 AM), *available at* http://www.nationalreview.com/article/349118/prison-sentence-reform-david-keene.
[25] Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).
[26] *Id.*
[27] 2013 SOURCEBOOK, at Fig. J, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureJ.pdf.
[28] U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig. J (2010) [hereinafter 2010 SOURCEBOOK], *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/FigureJ.pdf.
[29] 79 Fed. Reg. 26996 (May 12, 2014).
[30] This sum is calculated by multiplying the 11-month sentence differential by the annual cost of incarceration ($29,291.62) and the number of prisoners (2,851) who did not serve that excess period of time.
[31] *Cf.* 2010 SOURCEBOOK, at Fig. J, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/FigureJ.pdf, *with* 2013 SOURCEBOOK, at Fig. J, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureJ.pdf.
[32] 2010 SOURCEBOOK, at Fig. J, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureJ.pdf.
[33] 2013 SOURCEBOOK, at Fig. J, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureJ.pdf.
[34] STEMMING THE TIDE, at 3, Tbl. ES.1.
[35] *Id.* at 24.
[36] VERA INSTITUTE OF JUSTICE, DRUG WAR DÉTENTE?: A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009-2013, App. B (Apr. 2014), *available at* http://www.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013-v6.pdf.
[37] *See, e.g.*, PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 7 (June 2012) (describing crime declines in 17 states that reformed their sentencing laws), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf.
[38] PEW CHARITABLE TRUSTS, STATES CUT BOTH CRIME AND IMPRISONMENT (Dec. 2013), *available at* http://www.pewtrusts.org/en/multimedia/data-visualizations/2013/states-cut-both-crime-and-imprisonment; *see also* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 130-56 (2014) (describing the lack of connection between length of incarceration and crime reduction), *available at* http://www.nap.edu/catalog.php?record_id=18613.
[39] PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, AMERICA'S NEW DRUG POLICY LANDSCAPE 8 (Apr. 2, 2014) (showing that 63% of Americans find state reforms to mandatory minimum drug sentences a good thing), *available at* http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/.
[40] U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 3 (May 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf (showing that 43.3% of recipients of retroactive sentence reductions recidivated, compared with 47.8% of those who did not).
[41] Statement of Judge Patti Saris, Chair, U.S. Sentencing Comm'n, submitted to the U.S. Senate Judiciary Committee for the Hearing on "Reevaluating the Effectiveness of Mandatory Minimum Sentences," Sept. 18, 2013, at 10, *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20130918_SJC_Mandatory_Minimums.pdf.
[42] STEMMING THE TIDE, at 5, Tbl. ES.2.
[43] 2010 SOURCEBOOK, at 113, Tbl.44 (2010), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table44.pdf.
[44] MANDATORY MINIMUM REPORT, at 161.

[45] *Id.*
[46] This sum is reached by multiplying 5,539 prison years by the annual cost of incarceration in FY 2010, $28,284. *See* 76 Fed. Reg. 57081 (Sept. 15, 2011).
[47] STEMMING THE TIDE, at 3, Tbl. ES.1.
[48] *Id.* at 24-25, App. A.
[49] *Id.* at 36, App. A.

ONE HUNDRED THIRTEENTH CONGRESS

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July 7, 2014

Chair Patti Saris
U.S. Sentencing Commission
One Columbus Circle NE, Suite 2-500
Washington, DC 20002-8002

Attn: Public Affairs-Retroactivity Public Comment

Dear Chair Saris:

We write to express our support for amending U.S.S.G. § 1B1.10 to make Amendment 3, the "drugs minus two" amendment submitted by the U.S. Sentencing Commission to Congress on April 30, 2014, retroactive.

The "drugs minus two" amendment should be made retroactive without restriction or limitation, as a matter of equity and fundamental fairness. Retroactive application of the amendment will save billions of dollars, ease overcrowding in federal prisons, and lessen the disproportionate impact that drug sentences have had on tens of thousands of people and communities of color. It will also improve public safety and, as past experience proves, can be handled efficiently by the courts, U.S. Probation ("Probation"), federal public defenders, and the Department of Justice ("DOJ").

As a threshold matter, the "drugs minus two" amendment fixes a flaw in the guidelines that has resulted in excessive sentences for approximately 51,000 currently incarcerated federal drug offenders who have been sentenced since 1987. Since 1987, the "low end" of the calculated guideline drug sentence has actually been ***higher*** than the mandatory minimum prison term. As a direct result, as the Commission has recognized, the drug guidelines have been higher-than-necessary for many years. This amendment would bring federal drug guidelines into line with the mandatory minimums Congress created.

It is commendable that this fix will go into effect on November 1, 2014 and apply automatically to everyone sentenced after that date. Its anticipated benefits are notable: a reduction in the federal prison population by 6,500 inmates in the first five years in addition to federal drug sentences after that date that will be, on average, 11 months shorter than what the current guidelines require.

But the truly critical and significant benefit is in giving this amendment retroactive effect. In order to remedy the excessively harsh sentences that have resulted from this flaw in the guidelines since 1987, the "drugs minus two" amendment should be applied retroactively to those sentenced ***before*** November 1, 2014. Applied retroactively, this amendment would make those 51,000 currently incarcerated federal drug offenders---70% of which are Black and Hispanic---eligible for sentence reductions averaging 23 months.

Fundamental fairness demands that all eligible prisoners receive a chance to seek punishments that hew more closely to the mandatory minimum drug sentences that set the baseline for the drug sentencing guidelines. The Commission has a long and commendable track record of recognizing that corrections to flawed drug sentencing guidelines should, as a matter of fairness, be made retroactively applicable. The Commission has previously applied guideline changes to sentences retroactively for LSD (1993), marijuana (1995), and crack cocaine (2007 and 2011). The same concern for fairness that drove the Commission to make those guideline adjustments retroactive applies to the "drugs minus two" amendment today: justice should not depend on something as arbitrary as the date a person was sentenced, especially when the flaw being corrected has been present since the guidelines' creation in 1987.

Retroactivity of the "drugs minus two" amendment will not harm public safety. First, no currently incarcerated prisoner would receive an automatic sentence reduction. The statute governing sentence modifications, 18 U.S.C. § 3582(c)(2), requires individualized review and specific procedures in each case. If the amendment applied retroactively, the prisoner would need to file a request with the court, the prosecutor and law enforcement agent may oppose it based upon the facts of the case, and the court would make the ultimate highly individualized determination after its consideration of the facts, including any additional ones adduced at a hearing. Of particular importance to the court is the consideration of the prisoner's dangerousness; courts can and will deny sentence reductions if the prisoner poses a threat to public safety. After the 2007 crack cocaine retroactive amendment, courts denied 6% of all sentence reduction requests on public safety grounds. Moreover, under current statutory law, career offenders will not be eligible for sentence reductions.

Both in 2007 and 2011, there were no automatic sentence reductions. Courts reviewed each motion for sentence reduction presented to it and, when merited, denied retroactive sentence reductions to crack cocaine offenders who posed a danger. Experience and the statutory mandate in § 3582(c)(2) demonstrate that courts will continue to employ this highly-individualized review and procedure to ensure our continued public safety when the "drugs minus two" amendment is given retroactive effect. Furthermore, the Commission's previous retroactive crack cocaine guideline fixes did not increase recidivism; in fact, those who received sentence reductions re-offended at a ***lower*** rate (43%) than those who did not receive retroactive reductions (47%) within five years of their release.

For the retroactive crack cocaine guideline amendments in 2007 and 2011, courts, prosecutors, federal defenders, and probation officers all ably handled retroactive sentence reduction requests from over 25,000 and 17,000 applicants, respectively, when the Commission changed crack cocaine sentencing guidelines. For this "drugs minus two" amendment, to be

clear, many of the approximately 51,000 prisoners who would be eligible for retroactive sentence reductions will still have many years left to serve on their sentences before they would be eligible for release. This allows the courts, prosecutors, federal defenders, and probation officers to do what they have always done: employ planning and foresight to prioritize cases based upon amended release dates so as to prevent any disruption to case and docket management.

Furthermore, the impact on Probation would be lower now than in previous reduction years 2007 and 2011. This is because Probation's caseloads are down 5% since FY 2012. It is also due to the fact that many of these federal drug offenders do not have legal status in the United States or their convictions are deportable/removable offenses such that upon their release, would be immediately transferred and placed into U.S. Department of Homeland Security Immigration and Customs Enforcement custody and deported or removed, thus eliminating the need for Probation's involvement.

Our federal prison system is currently at 132% overcapacity---half of all federal prisoners are drug offenders---and consumes more than 25% of the DOJ's budget. This level of overcrowding and funding is unsustainable and threatens the safety of correctional officers, inmates, and the general public.

The Commission's own analysis estimates that making the "drugs minus two" fix retroactive will save 83,525 prison bed years over the period of more than 30 years. Assuming an average sentence reduction of 23 months for those eligible and then applying the current annual cost of federal incarceration of approximately $29,000, making the "drugs minus two" fix retroactive equates to $2.42 billion in savings.

In conclusion, the Commission should apply Amendment 3 retroactively to all those who are eligible, without limitation or restriction. It should reject DOJ's proposal to limit the retroactivity of this amendment to "lower level, nonviolent drug offenders without significant criminal histories." To begin with, criminal history is already included in the guidelines calculation and the judge's consideration and imposition of the sentence, including any enhancement or upward departure or variance. Thus, the sentence the offender is serving is already calibrated to reflect and account for prior criminal records. A retroactive reduction without restriction would be a reduction from a sentence that has already been increased due to criminal history.

Not only does the DOJ's proposal automatically cut the pool of eligible prisoners by almost half---thus halving the beneficial impact on prison overcrowding and costs---but it disproportionately excludes Black offenders, leaving them to serve what the Commission has already determined are excessive, unfair, and empirically-unsound sentences. This is particularly troubling because the federal "war on drugs" and our corresponding drug sentencing laws and guidelines have disproportionately impacted communities of color.

According to the Commission's own retroactivity impact analysis, almost 75% of the people eligible for retroactive application of the "drugs minus two" amendment are Black or Hispanic. While national data show that people of all races use drugs at about the same rate,

Black and Hispanic men and women are sentenced and imprisoned for federal drug offenses at disproportionately high rates, for virtually every kind of drug. For example, in FY 2013, Blacks and Hispanics comprised almost 75 percent of all federal drug offenders and more than 80 percent of offenders sentenced for powder cocaine, crack cocaine, and heroin offenses. Currently, almost 40 percent of all federal inmates are Black; 35 percent are Hispanic.

Making the "drugs minus two" amendment retroactive will not only provide the more proportionate sentences that eligible offenders of color should have received to begin with, but also restore these offenders to their communities and families sooner, strengthening communities of color and increasing the perception – and reality – that the justice in our system applies equally to everyone, irrespective of race or proxies for race. Proposals to categorically exclude certain offenders based on criminal history category and gun enhancements or convictions will disproportionately impact prisoners of color and thus should be rejected. These prisoners of color were not excluded from previous retroactive amendments in 2007 and 2011 nor should they be for this amendment. As noted before, public safety concerns can and must be taken into consideration by reviewing courts as part of their statutory mandate in granting or denying these requests.

For all these reasons, we urge the Commission to make Amendment 3 fully retroactive, without limitation or restriction as it did with other amendments in 2007 and 2011. We thank you for your leadership and commitment to repairing the flaws in our sentencing guidelines. We appreciate your continued commendable record of ensuring that equal justice under the law.

Sincerely,

John Conyers, Jr.
Ranking Member

Robert C. "Bobby" Scott
Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations

cc: The Honorable Bob Goodlatte, Chairman, House Committee on the Judiciary

Mr. BACHUS. And at this time, I am going to recognize the Chairman of the full Committee for questions.

Mr. GOODLATTE. Mr. Chairman, thank you very much. I apologize for having to slip away. We have a Task Force that the Speaker appointed regarding the issue of our border, and children and others coming to the border, and I had to go to that meeting, but I am glad I got back in time to ask a few questions.

I will address this to U.S. Attorney Heaphy. We learned recently that the Solicitor General's office filed briefs with the Supreme Court in three cases that reflect the Department of Justice's new position that the "willfully" element of 18 USC Sections 101 and 1035 requires proof that defendant made a false statement with knowledge that his conduct was unlawful.

So my question to you is, do you believe it is appropriate to require proof of knowledge of unlawfulness for every Federal crime? And what about for every element of a crime?

Mr. HEAPHY. Yes, I am familiar with the recent position taken by the Solicitor General. It is limited to false statements in Federal health care programs, 1035 and 1001, which is the general statute, which prohibits false statements in a matter of Federal interest.

But "willfully" in those statutes has to be read in context. I feel like I am giving you a very lawyerly answer, but it is important because the language matters.

There are other contexts and statutes in which the word "willfully" has a different interpretation, like in the Securities Act or in tax offenses. There is no specific intent requirement, even though the word "willfully" appears there, and that has been repeatedly upheld by the Supreme Court.

So the Solicitor General opinion was limited to 1035 and 1001, but it does not touch the long-settled view of how "willfully" is defined in other areas of the law because of a different context.

Mr. GOODLATTE. I would imagine that would cause a lot of confusion for those who are not as lawyerly as you and I try to be. And I wonder, do you believe that the definition of "willfully" should be consistent?

Mr. HEAPHY. Again, I think it depends on the sentence in which it appears. I think most of us understand——

Mr. GOODLATTE. As a legal term, so that when one is being given legal advice, and when one is attempting to abide by the law and not act in a willful way that would cause them to encounter that, would it not be helpful to have a definition that was consistent across the law?

Mr. HEAPHY. I think the department's position was based on sort of a similar view that it was important to make clear that "willfully" in the context of 1001 and 1035 meant someone had to know that the statement was false. As a matter of fair notice, the important goal that you flagged, yes, it is important for people to understand that certain decisions will or will not violate the law.

But again, Congressman, a uniform standard that would apply to that word in every context, we would not go that far.

Mr. GOODLATTE. And with regard to the underlying question of the appropriateness of requiring proof of knowledge of unlawfulness for every crime, I take it your answer is that you wouldn't require that in every case.

Can you give us some examples of cases where it would not be appropriate to require that the person have mens rea or criminal intent?

Mr. HEAPHY. Yes. Right when you walked in, we were talking about the Purdue Pharma case, which you are probably familiar with that happened right in our district. And that was a responsible corporate officer prosecution, where Purdue Pharma was marketing OxyContin, explicitly not flagging the addictiveness of the medication. Three executives from the company, with no evidence that they were personally aware of and monitoring the marketing messages that were sent by the company, but they should have, and under that responsible corporate officer doctrine, they were charged with and pled guilty to a misdemeanor, essentially, responsible corporate officer doctrine misdemeanor.

So again, these are rare cases, and I want to emphasize that we are talking here about a very miniscule percentage of the overall portfolio of the work that we have to do. The garden-variety, *malum in se*, day-to-day work in our department, as you know, Mr. Chairman, is dealing with garden-variety crimes. And that is what we are underresourced to do, and that is why we are talking so much about sentencing reform.

But there are limited circumstances, like the Purdue Pharma matter, where we think that it is appropriate as a policy matter to hold people accountable even if they didn't know because they should have known, given that they work in a regulated industry.

Mr. GOODLATTE. And what about the rule of lenity and the possibility of codifying this rule, that, as I understand it, is a judicial construction that says when a statute is not clear, it should be interpreted in favor of the defendant?

Mr. HEAPHY. Yes, it would be anomalous for Congress to say, if we are ambiguous, give the benefit of the doubt to the defendant. Judges do that. That, as you said, is a canon of statutory construction.

The answer is for Congress to very specifically identify intent standards, and we don't need a rule of lenity. That only kicks in if the language is ambiguous.

So we would always urge Congress to be very specific in terms of what level of intent is required in defining crimes.

Mr. GOODLATTE. Congress tries, but with 4,500 separate Federal criminal statutes, it is not always as clear as one might think, especially when you don't have the real-life case matter before you that you are applying the test of that language to.

And that is why I think some of the criminal law scholars who testified before us have advocated for something like that.

Let me ask any of the panel witnesses if they have anything to offer on either of those two subjects.

Judge KEELEY. I had mentioned earlier, Chairman Goodlatte, that the Judicial Conference has not take a position on mens rea, and I am here as the conference representative, so I don't have any additional comments.

Judge SARIS. As I mentioned, as well, we focus on penalties, not on elements. The commission doesn't have a position.

Mr. GOODLATTE. All right. You are the representative of defendants in these cases, but what do you think?

Mr. PATTON. I am, Congressman. And a few moments ago, to many laughs, I noted that we don't deal with too many regulatory offenses, in my line of work. Most of our clients are facing more serious felonies.

Of course, as a broad principle, I think mens rea is——

Mr. GOODLATTE. But this could apply in any type of criminal violation of the law.

Mr. PATTON. It could, and, certainly, we do deal with issues of false statements. And I do think that the mens rea requirement in those situations, outside of the health and environmental and regulatory situations, which we really don't deal with on a regular basis, but as a general principle, I, of course, agree that mens rea is vital.

It is what often distinguishes criminal from civil misconduct, and it is an important distinction. It is why we impose some sort of separate moral sanction because of the person's intent and what they meant or didn't mean to do.

Mr. GOODLATTE. Well, thank you. I want to thank you all. I do have a concern that individuals who believe they are acting in good faith and do not know that they are willfully violating the law, I think the overall effectiveness of the rule of law is weakened when you don't take into account a requirement that you have a showing of mens rea.

And I would be happy to work with you, Mr. Heaphy, and others on whether there is a narrow band of exception to that. But I think, in general, that should be a requirement.

Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

At this time, we are going to adjourn. Do any of you have closing statements you want to give?

I will say this, there is a bipartisan recognition in this Congress, and I am retiring after 22 years, but I have never seen such a bipartisan recognition about the urgency to address over-criminalization, over-federalization of criminal cases, and sentencing reform, particularly. There is broad agreement among U.S. Attorneys, judges, Members of Congress, I think the general public. And it is a very important thing.

And I commend Members of this Committee and our Chairman for recognizing that, Mr. Scott and Mr. Conyers and others for offering legislation, which we have some of our most conservative Members and our most liberal Members on.

So hopefully, it is something that we can do. If we have to do it incrementally, I don't think there is any perfect solution, but I would hope that we can take some action on that.

It looks like some of the other issues are going to be much harder to gain consensus.

We appreciate your testimony. Our Federal judges have been telling us in my district for years we had a problem, and they continue to tell us. And I know our inaction, to a certain extent, is precipitating the problem.

So I thank you for your attendance, and this is important testimony. As we read your testimony, we may have additional questions for you.

We have a vote and less than 5 minutes remaining on the floor, and some of us are not as fast as others, so this hearing is adjourned.

[Whereupon, at 10:31 a.m., the Task Force was adjourned.]

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