



March 21, 2016

Public Affairs  
United States Sentencing Commission  
One Columbus Circle NE., Suite 2-500  
Washington, DC 20002-8002

**RE: Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary.**

To Whom It May Concern:

The Center for American Progress is pleased to have the opportunity to comment on the Proposed Amendments to Sentencing Guidelines.

United States criminal justice policies, including efforts to over-criminalize the reentry of undocumented individuals and families, have produced tragic consequences for entire communities. They continue to drive poverty and racial inequality in America with people of color making up more than 60 percent of the prison population despite making up approximately 39.9 percent of the U.S. population.

These policies also have harmful ripple effects. As many as one-in-three individuals in the United States have a criminal record, creating lifelong barriers to opportunity, including the ability to obtain employment, housing, or an education. However, the criminal record of a loved one can also carry lifelong consequences for families, particularly children. Indeed, between 33 million and 36.5 million American children—nearly 1 in 2—now have a parent with a criminal record and approximately 5.1 million U.S. citizen children live with an unauthorized immigrant parent who, if removed from the country, would potentially fall within the category of people subject to prosecution and imprisonment for attempting to reunite with their loved ones.<sup>1</sup> This high degree of exposure to the criminal justice system—particularly on top of the unique risk factors that children of unauthorized immigrants face generally—severely limits a child’s life chances.

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<sup>1</sup> See Randy Capps, Michael Fix, and Jie Zong, “A Profile of U.S. Children with Unauthorized Immigrant Parents,” Migration Policy Institute, January 2016.

***Proposed amendment to §2L1.2 “Unlawfully Entering or Remaining in the United States.”***

The Commission’s April 2015 report, *Illegal Reentry Offenses*, and other data make clear that the number of people sentenced under this Guideline has increased significantly since 2007, constitutes a major proportion of the overall federal district-court caseload (26% in fiscal year 2013), and is especially pronounced in southwest-border districts.<sup>2</sup> CAP strongly disagrees with policy choices that have led to mass prosecutions and incarceration of border-crossers who do not meet any of the Department of Justice’s stated prosecutorial interests, namely national security, violent crime, financial fraud, and protection of the most vulnerable members of society.<sup>3</sup>

A report by CAP and the Movement Advancement Project found LGBT immigrants are more likely than the broader population to come into contact with law enforcement, which can result in detention and deportation.<sup>4</sup> For LGBT people, particularly transgender people fleeing violence in their home countries, their options after deportation are to remain and face discrimination, persecution, or death or try to seek safety in the U.S. again. The report profiles the story of Johanna Vasquez, a transgender woman who came to the U.S. seeking safety after being raped and harassed in El Salvador because of her gender identity. She was deported back to El Salvador in 2009 and returned to the U.S. a few weeks later because the situation in El Salvador had not improved. Johanna was placed in federal prison for illegally re-entering the U.S. and deported back to El Salvador again in 2010 where she was abducted and gang raped and then raped again by a police officer when she attempted to report the initial rape. Johanna returned to the U.S. a third time in 2011 and, with the help of a pro bono attorney, she obtained a grant of withholding of removal.<sup>5</sup> A study conducted by CAP on LGBT people seeking asylum in the U.S. found that Johanna’s story is not uncommon. Transgender women were less likely to affirmatively seek asylum than cisgender people

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<sup>2</sup> TRAC, “Immigration Prosecutions for December 2015.” (Feb. 19, 2016), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlydec15/fil/>

<sup>3</sup> U.S. Department of Justice, SMART ON CRIME 2 (Aug. 2013), <http://www.justice.gov/ag/smart-on-crime.pdf>; see generally ACLU, “Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing” (2015), [https://www.aclu.org/sites/default/files/field\\_document/15\\_12\\_14\\_aclu\\_1325\\_1326\\_recommendations\\_fin al2.pdf](https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_fin al2.pdf)

<sup>4</sup> Center for American Progress and Movement Advancement Project, “Unjust: How the Broken Criminal Justice System Fails LGBT People,” (February 2016) available at <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>.

<sup>5</sup> *Ibid.*

and when they sought asylum in removal proceedings, 43% received withholding of removal.<sup>6</sup> This indicates that many transgender asylum seekers had clear protection needs but, due to past criminal convictions including convictions for illegal re-entry, were unable to access the full protection that comes with an asylum grant.<sup>7</sup>

The expansive use of illegal entry and reentry prosecutions interferes with humanitarian protections in still another way. According to a recent report by the Department of Homeland Security Office of the Inspector General, Border Patrol agents in some sectors refer apprehended persons who have expressed a fear of persecution to the Department of Justice for prosecution.<sup>8</sup> Under domestic and international law, entering the country without authorization in order to request asylum is not unlawful and persons who are fleeing persecution ought not to be prosecuted and imprisoned before they have had a full and fair opportunity to articulate a claim for protection.

Given a U.S. deportation regime that tears families apart and provides little in the way of individualized discretion, criminal prosecutions and punishments for people seeking to reunite with their families or protection from persecution should be sharply reduced. We therefore urge the Commission and other implicated government agencies to reexamine comprehensively – and reduce – the damaging impacts of border-crossing prosecutions and sentences.

*We emphatically urge the Commission not to increase the base-offense level from 8 to 10 for persons with no prior illegal-reentry convictions (and to adjust other enhancements down accordingly).* CAP is deeply troubled that at a time of national attention to criminal-justice reform and deincarceration the Commission’s proposed amendments would increase sentences for most offenders.

The Commission’s data analysis states that persons with no applicable criminal-conviction enhancements or other upward departures would see their average guideline-minimum sentence increase from 1 to 6 months: an unconscionable 500% increase.

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<sup>6</sup> Center for American Progress, “Humanitarian Diplomacy: The U.S. Asylum System’s Role in Protecting Global LGBT Rights,” (June 18, 2015) available at <https://www.americanprogress.org/issues/lgbt/report/2015/06/18/115370/humanitarian-diplomacy/>.

<sup>7</sup> Unlike being granted asylum, being granted withholding of removal does not make a person eligible to adjust status to that of lawful permanent residence. As a result, it does not provide a means by which a person may petition to reunite with family members abroad, nor does it provide a means to obtain citizenship.

<sup>8</sup> Office of the Inspector General, “Streamline: Measuring its Effect on Illegal Border Crossing,” Department of Homeland Security, March 15, 2015.

Persons with a 4-level enhancement for any felony conviction with a sentence under a year, which could have resulted in no jail time and/or had as an element or motivation the individual's immigration status, would see their average guideline minimum *double* from 12 to 24 months.

No rationale is given for increasing the base offense level to 10 rather than 8, nor for the levels assigned to persons with prior reentry convictions, which start at levels 12 and 14. The Commission's data from FY 2013 show that 72.8% of individuals in that sample had no prior illegal-reentry convictions. This harsh change in no way responds to the specific concerns animating the Commission's proposal.<sup>9</sup>

*We urge the Commission to base enhancements on served rather than imposed sentences.* We appreciate the Commission eliminating the "categorical approach" for previous felony convictions, basing enhancements on sentences imposed as opposed to the type of offense and the Commission's recognition that prior convictions for illegal reentry should be addressed separately from other types of convictions. We also endorse the philosophy of gauging how serious any pertinent past convictions are by looking at judicial officers' punishment decisions, rather than through the mechanical application of a categorical approach. However, we believe the reliance on imposed rather than served sentences will continue to calculate enhancements in a manner that does not accurately assess the seriousness of past convictions.

*Enhancements should not be based on all post-first-entry conduct.* We fundamentally disagree with the proposed amendments' inclusion of enhancements based on all post-first-entry conduct. Convictions that precede the most-recent entry are already accounted for in Criminal History calculations and enhancements should focus exclusively on post-last-entry conduct. This would capture the Commission's evident concern with punishing more severely people who return and then commit a crime, without sweeping in a much-larger universe of past offenses than are currently punished.

Finally, we suggest that the Commission change its proposed amendment allowing for an upward departure based on multiple prior deportations so sentencing courts do not consider prior deportations that occurred without due process.

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<sup>9</sup> The Commission should also leave intact its 2014 amendment allowing for departures based on time served in state custody. The rationale accepted so recently for taking into account state-custody terms would continue to be important, and eliminating the departure would not further any of the Commission's purposes for considering these reentry-Guideline amendments.

***Proposed amendment to Policy Statement § 1B1.13 “Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons.”***

*We urge the Commission to expand opportunities for compassionate release. CAP supports the Commission's efforts to expand the compassionate release of federal prisoners, including, but not limited to, the August 2013 Bureau of Prisons (BOP) Statement on Compassionate Release and the recommendations of the Department of Justice's Office of the Inspector General concerning BOP's implementation of its compassionate release program related to elderly inmates. A 2013 report by Human Rights Watch and Families Against Mandatory Minimums found that compassionate release was made available to inmates under a very narrow set of circumstances<sup>10</sup> and that inmates were "arbitrarily denied early release even when they would pose no public safety risk."<sup>11</sup> Keeping inmates in prison who pose no threat to public safety, are elderly, terminally ill, or needed by family members as caregivers exacerbates burdens already created by the criminal justice system's overly harsh sentencing laws. CAP urges the Commission to adopt guidelines that would remove unnecessary barriers to and expand opportunities for compassionate release.*

We look forward to working with the US Sentencing Commission and thank you for your continued efforts to promote fair sentencing in your guidelines.

Sincerely,  
The Center for American Progress

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<sup>10</sup> The Answer is No: Too Little Compassionate Release in US Federal Prisons, available at <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons>

<sup>11</sup> Jamie Felner, Dispatches: Good News for US Prisoners Seeking 'Compassionate Release, available at <https://www.hrw.org/news/2013/08/13/dispatches-good-news-us-prisoners-seeking-compassionate-release>