

**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**

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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

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 Commission⁶ 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.

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

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

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

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.

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 1991³⁶ 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

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

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.

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

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

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

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.

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

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.