THE SENTENCING PROJECT
RESEARCH AND ADVOCACY FOR REFORM

October 8, 2010

The Honorable William K. Sessions III, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

RE: Proposed Emergency Amendment: Fair Sentencing Act of 2010 Comment

Dear Judge Sessions:

The Sentencing Project and allied organizations—Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, Drug Policy Alliance, Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil and Human Rights, NAACP, NAACP Legal Defense and Educational Fund, National Black Police Association International Leadership Institute, Open Society Policy Center, and the United Methodist Church General Board of Church and Society—appreciate this opportunity to comment on the Proposed Emergency Amendment: the Fair Sentencing Act of 2010, according to the United States Sentencing Commission's ("USSC or the Commission") notice for comment. Our organizations support the Commission's decision to revise the Drug Quantity Table in § 2D1.1 ("Drug Quantity Table") and to modify sentencing ranges for all crack cocaine drug quantities in light of the Fair Sentencing Act ("FSA"). We are writing to address three issues the Commission will need to consider in promulgating the Amendment to the Sentencing Guidelines. These issues are: (1) whether the Commission will keep the base offense levels at 24 and 30 rather than setting them at 26 and 32 using the new drug quantities established by the FSA; (2) whether the Commission should interpret the sentencing enhancements for drug trafficking offenses mandated under the FSA as warranting a cumulative application of enhancements—or "double" enhancements; and (3) whether the Amendment should be made retroactive at this time.

First, the Commission should leave the base offense levels at 24 and 30, rather than increasing them to 26 and 32. Increasing the base offense levels to 26 and 32 would undermine the goals of the FSA—namely, ensuring greater proportionality between the crime and the imposed sentence, reducing the over-incarceration of lower-level offenders, and creating greater equity within and respect for the criminal justice system. Moreover, neither the FSA nor the Sentencing Guidelines require the base offense levels to be set at 26 and 32, and keeping the base offense levels for crack cocaine at 24 and 30 is necessary to avert the kinds of draconian consequences that have resulted from crack cocaine sentencing policy.

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Second, the Commission should not interpret the FSA as mandating "double" enhancements in cases in which the three sentencing enhancements for drug trafficking offenses set out in Section 6 of the FSA[1] duplicate an enhancement or offense level already provided in the Guidelines. The text of the FSA does not expressly require such "double counting," and basic rules of statutory interpretation and the underlying objectives of the FSA strongly indicate that such an interpretation is unwarranted.

Third, we encourage the Commission to make the Amendment retroactive at this time under its emergency authority. Making the Amendment immediately retroactive would alleviate the severe problems with crack cocaine sentencing policy that were targeted by the FSA and that currently infect the system, and would thereby restore trust and confidence in the criminal justice system.

I. THE SENTENCING COMMISSION SHOULD CONTINUE TO SET THE BASE OFFENSE LEVELS FOR CRACK COCAINE AT 24 AND 30 USING THE NEW DRUG QUANTITIES ESTABLISHED BY THE FSA.

The Commission has requested public comment on how it should revise the Drug Quantity Table in light of the new drug quantities established by the FSA. In particular, the Commission has asked whether the base offense levels for crack cocaine should be set so that the statutory minimum penalties correspond to levels 26 and 32 (the "level 26 option"), or whether the base offense levels should continue to be set so that the statutory minimum penalties correspond to levels 24 and 30 (the "level 24 option"). In order to effectuate Congress's intent in enacting the FSA, the Commission should adopt the level 24 option. In addition, neither the FSA nor the Sentencing Guidelines themselves require the base offense levels to be set at 26 and 32, and keeping the base offense levels for crack cocaine at the distinct level of 24 and 30 is necessary to alleviate the draconian consequences caused by prior crack cocaine sentencing policy.

A. Maintaining the base offense levels for crack cocaine at 24 and 30 would effectuate the true intent of Congress.

With the passage of the Anti-Drug Abuse Act of 1986, Congress established mandatory minimum penalties applicable to federal drug trafficking offenses. A two-tiered structure was established to focus on "kingpins" and other significant traffickers, with "serious" traffickers being linked to five-year mandatory minimum penalties and "major" traffickers being given ten-year mandatory minimum penalties.[2] The drug quantity triggers for the mandatory minimum

[1] Under Section 6 of the FSA, drug trafficking offenses involving being a leader of drug trafficking activity; maintaining an establishment for drug manufacture or distribution; and bribing a law enforcement official in connection with a drug trafficking offense are all mandated for sentencing enhancements.

[2] *See* United States Sentencing Commission [hereinafter "USSC" or "Commission"], 2002 Report to Congress: Cocaine and Federal Sentencing Policy (May 2002) [hereinafter "2002 Commission Report"] at 4-6, *referring to* 132 CONG. REC. 27,193-94 (1986) (statement of Sen. Robert Byrd) ("For the kingpins – the masterminds who are really running these operations – and they can be identified by the amount of drugs with which they are involved – we require a jail term upon conviction. If it is their first conviction, the minimum term is 10 years. . . . Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well. Those criminals would also

sentences were based on the "minimum quantity that would be controlled or directed by a trafficker in a high place in the processing and distribution chain."[3] The crack cocaine quantity triggers were set at 1/100 of the amounts for powder cocaine because crack cocaine was believed at the time to be a much more addictive drug and more likely to be associated with violent crime.[4]

However, the assumptions made about the addictive qualities of crack cocaine and the link between it and violent crimes did not materialize in the years (and even decades) following the passage of the legislation. In both the 2002 and 2007 Commission Reports to Congress, the Commission found that the quantity-based penalties overstated both the harmfulness of crack cocaine as compared to powder cocaine and the seriousness of the offenses associated with the drug.[5] In fact, both reports found that the majority of both crack cocaine and powder cocaine offenses do not involve aggravating conduct, such as weapon involvement, bodily injury, and distribution to protected persons or in protected locations.[6] Moreover, neither report found that the differences in the rate of addiction merited the 100-to-1 disparity.[7] Members of Congress have similarly questioned the assumptions underlying the Anti-Drug Abuse Act of 1986.[8] Unfortunately, the empirical data shows that the low-quantity triggers for the mandatory minimums involving crack cocaine offenses have most often been applied to lower-level offenders.[9] For instance, the 2007 Commission Report found that most crack cocaine offenders are actually street-level dealers.[10]

The application of these penalties to lower-level offenders is in direct contrast to the intent of the Anti-Drug Abuse Act of 1986, which was focused on applying mandatory minimum sentences to "serious" and "major" traffickers. The FSA increased the five-year and ten-year mandatory minimum threshold quantities to help focus the penalties more closely on serious and major traffickers and reduce the harsh penalties received by lower-level offenders—most of

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have to serve time in jail."); 132 CONG. REC. 22,993 (1986) (statement of Rep. John LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

[3] 2002 Commission Report at 8, *quoting* The Narcotics Penalties and Enforcement Act: Markup on H.R. 5394 before the Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong. 131 (1986) (statement of Rep. Hughes).

[4] *Id*. at 9-10.

[5] 2002 Commission Report at v-vi; USSC, 2007 Report to Congress: Cocaine and Federal Sentencing Policy (May 2007) [hereinafter "2007 Commission Report"] at 7-8.

[6] 2007 Commission Report at 11.

[7] 2002 Commission Report at v-vi; 2007 Commission Report at 7-8.

[8] 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Dick Durbin) ("Earlier this year, I held a hearing in the Senate Judiciary Committee on this disparity in sentencing and we learned the following: Crack is not more addictive than powder cocaine, and crack cocaine offenses do not involve significantly more violence than powder cocaine offenses. Those were the two things that led us to this gross disparity in sentencing between powder cocaine and crack cocaine. We were told it is different; it is more addictive. It is not. We were also told it was going to create conduct which was much more violent than those who were selling powder cocaine and their activities. It did not.").

[9] 1995 Special Report to Congress: Cocaine and Federal Sentencing Policy (Feb. 1995), Executive Summary; 1997 Special Report to Congress: Cocaine and Federal Sentencing Policy (Ap. 1997) at 5; 2002 Commission Report at v-vi; 2007 Commission Report at 7-8.

[10] 2007 Commission Report at 19.

whom are African American. Because the FSA's punitive scheme focuses on major offenders while reducing the unfair burden felt by lower-level offenders, it will foster greater respect for and trust in the criminal justice system. Maintaining the base offense levels for crack cocaine at 24 and 30 would better achieve the FSA goals of (1) ensuring greater proportionality between the nature of the crime and the imposed sentence; (2) reducing the over-incarceration of lower-level offenders; and (3) creating greater equity within and greater credibility for the criminal justice system.

1. **Maintaining the base offense levels at 24 and 30 would ensure that crack cocaine sentences are more aligned with the severity of the crime.**

During his comments introducing the FSA, Senator Leahy noted that the goal of the Anti-Drug Abuse Act of 1986 had been thwarted by the fact that most of the crack cocaine penalties have been applied to lower-level offenders. He explained that "[t]he primary goal underlying the crack sentence structure was to punish the major traffickers and drug kingpins who were bringing crack into our neighborhoods. But the law has not been used to go after the most serious offenders. In fact, just the opposite happened. The Sentencing Commission has reported for many years that more than half of Federal crack cocaine offenders are lower-level street dealers and users, not the major traffickers Congress intended to target."[11] In other introductory comments, Senator Leahy explained that the purpose of the FSA is to correct this problem and "return the focus of Federal cocaine sentencing policy to drug kingpins, rather than street level dealers."[12]

Continuing to set the base offense levels for crack cocaine at 24 and 30 is the best solution for carrying out the congressional intent of the FSA and ensuring to a greater degree that lower-level offenders do not receive sentences that are disproportionate to the seriousness of the offense. A Commission analysis examined the impact of both the level 24 option and the level 26 option on sentencing using the USSC Impact Model FY2009 data file. According to that analysis, the level 24 option would reduce the average sentence from 110 months to 75 months, a difference of 31.8%, for cases affected by the FSA.[13] In contrast, the level 26 option would reduce the average sentence from 106 months to 79 months, a change of 25.5% for affected cases.[14] Since a primary goal of the FSA is to decrease the number of lower-level offenders receiving significant sentences, the base offense level should be set so as to reduce the average crack cocaine sentences to the greatest extent possible in accordance with the legislation—namely the level 24 option. By contrast, because the FSA increased the drug quantities that trigger the mandatory minimums in order to alleviate the number of lower-level offenders receiving disproportionately severe sentences, it would be directly at odds with the legislation to set the base offense levels at 26 and 32, such that these same lower-level offenders would receive more significant penalties.

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[11] 156 Cong. Rec. S1,683 (daily ed. Mar. 17, 2010) (statement of Sen. Patrick Leahy).
[12] 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).
[13] USSC FY2009 Crack Cocaine Sentencing Impact Analysis at 1.
[14] *Id*. at 2.

2. **Maintaining the base offense levels at 24 and 30 would most effectively assist in correcting the problem of over-incarceration.**

By increasing the crack cocaine quantities that trigger mandatory minimums and thereby reducing the number of lower-level offenders subject to overbroad penalties, the FSA also sought to reduce the problem of over-incarceration. In introductory remarks to the bill, several Members of Congress noted both the enormous growth in the prison population and the contribution of drug sentencing policy to that problem. Representative James Clyburn noted that "[e]qually troubling is the tremendous increase in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans. This is unjust and runs contrary to our fundamental principles of equal protection under the law."[15] Similarly, Senator Durbin noted that "more than 2.3 million people are imprisoned in America today. That is the most prisoners and the highest per capita rate of prisoners of any country in the world, and it is largely due to the incarceration of nonviolent drug offenders in America."[16]

The FSA was passed to help alleviate this sharp growth in the prison population by reducing the number of lower-level offenders receiving significant penalties.[17] According to the USSG Prison Impact Model FY2009 data, if the level 24 option remained in effect, an estimated total of 5,874 prison beds would be saved within 10 years after the effective date.[18] In contrast, under the level 26 option, a total of 3,826 prison beds would be saved within the same time period.[19] Given the Congressional intent to reduce the over-incarceration caused by crack cocaine sentencing policy, the base offense level should be set at the level 24 option so as to produce the most pronounced reductions in the prison population.

3. **Maintaining the base offense levels for crack cocaine at 24 and 30 would create more equity in the system by having a greater impact on penalties for minorities and in doing so would increase the credibility of the drug enforcement system.**

The over-incarceration that has resulted from disproportionate crack cocaine sentencing has had the greatest effect on African American inmates and communities. According to the 2007 Commission Report, 81.8% of crack cocaine offenders in 2006 were African American.[20] However, as Senator Durbin noted in his introductory comments to the FSA, "while African Americans constitute less than 30% of crack users, they make up 82% of those convicted of

[15] 156 Cong. Rec. H6,198 (daily ed. July 28, 2010) (statement of Rep. James Clyburn).
[16] 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Dick Durbin).
[17] "For over 20 years, the 'crack-powder' disparity in the law has contributed to swelling prison populations without focusing on the drug kingpins. We must be smarter in our Federal drug policy." 155 Cong. Rec. S10,492 (Oct. 15, 2009) (statement of Sen. Patrick Leahy).
[18] USSC FY2009 Crack Cocaine Prison Impact Analysis at 1.
[19] *Id*. at 2.
[20] 2007 Commission Report at 15.

Federal crack offenses."[21] And as both Representative Daniel Lungren and Senator Arlen Specter noted in expressing their support for the FSA, these racial disparities in crack cocaine sentencing are in complete contradiction to the purpose of the Anti-Drug Abuse Act of 1986.[22] Moreover, as other Members of Congress have pointed out, this racial disparity has resulted in distrust of the criminal justice system, particularly in African American communities. In his introductory remarks, Senator Durbin referred to comments made during Senate Judiciary Committee hearings by Judge Reggie B. Walton, Former Administrator of the Drug Enforcement Administration Asa Hutchinson, and Attorney General Eric Holder to illustrate how the current disparity undermines the credibility of the entire drug enforcement system, causes jurors to refuse to convict young African American men for crack cocaine offenses in the face of overwhelming evidence of guilt, and has made the job of those in law enforcement more difficult.[23]

A primary goal of the FSA was to address the stark racial inequality resulting from the cocaine sentencing inconsistency. As Senator Leahy stated, "I hope that this legislation will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity, as well as to make our drug laws more fair, more rational, and more consistent with our core values of justice."[24] African Americans would be the group most significantly affected by the greater proportionality in crack cocaine sentences and the pronounced reductions in over-incarceration that would result from use of the level 24 option. Therefore, the level 24 option should be pursued so as to best achieve the Congressional goal of reducing racial disparity and distrust in the criminal justice system.

B. Neither the FSA nor the Sentencing Guidelines themselves require the base offense levels to be set at 26 and 32, and keeping the base offense levels for crack cocaine at the distinct level of 24 and 30 is necessary given the equity and credibility issues that have resulted from crack cocaine sentencing policy.

Although maintaining the level 24 option creates base offense levels for crack cocaine that are different from those of other drugs, that distinction is appropriate (indeed, it is necessary) to address the ways in which crack cocaine has been treated historically under drug sentencing policy. In the first place, nothing in the text of the FSA requires the Commission to maintain the 18-to-1 ratio by pursuing the level 26 option. If maintaining such a ratio were the primary intent of the FSA, Congress would have mandated that the ratio appear across all base offense levels

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[21] 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Dick Durbin).
[22] 156 Cong. Rec. H6,202 (daily ed. July 28, 2010) ("Certainly one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of the issue. When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes.") (statement of Rep. Daniel Lungren); 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) ("I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.") (statement of Sen. Arlen Specter).
[23] 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Dick Durbin).
[24] 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

rather than remain silent on the issue. Congress is presumed to address major issues explicitly in the text of the legislation.[25] Since the question of whether the 18-to-1 ratio must be maintained across base offense levels is fundamental to how the Commission should extrapolate upwards and downwards from the statutory mandatory minimum sentences to set sentencing ranges for all quantities, Congress would have explicitly mandated such a requirement if it were a priority.

As described above, the quantity triggers for the mandatory minimum sentences associated with crack cocaine were set low because of assumptions about the addictive quality of the drug and its connection to violent crime—assumptions which have been proven false. As a result, the penalties for crack cocaine have swept too broadly and resulted in many lower-level offenders receiving significant sentences instead of the serious and major traffickers the Anti-Drug Abuse Act of 1986 was intended to target. With African Americans composing close to 82% of all convicted federal offenders, the sentencing policy has resulted in enormous inequities and has bred distrust in the criminal justice system within both minority communities and the nation at large. To address these significant problems, promoting proportionality of cocaine sentencing and decreasing over-incarceration must be done to the greatest extent possible under the terms of the FSA. Given that the level 24 option would be the most effective means of producing extensive results in both of those areas, it is the option that must be adopted.

II. THE PORTIONS OF THE FSA CALLING FOR SENTENCING ENHANCEMENTS FOR OFFENSES INVOLVING CERTAIN FACTORS SHOULD NOT "DOUBLE" ENHANCEMENTS FOR THOSE OFFENSES.

In enacting the FSA, Congress directed the Commission to ensure that the Guidelines provide for an increase in the offense level for certain drug trafficking activities. Because the activities set out in the FSA are treated differently in the Guidelines, the FSA raises the question of whether those activities addressed in both the FSA and the Guidelines should be counted twice in selecting the offense level. The answer should be "no." Based on widely-accepted canons of construction as well as the clear policy mandates referred to in Part I above, the Commission should not promulgate amendments to the Guidelines that would create "double enhancements" for certain types of activity.

Section 6 of the FSA mandates sentencing enhancements for drug trafficking offenses involving one of three factors: (i) being a leader of drug trafficking activity; (ii) maintaining an establishment for drug manufacture or distribution; or (iii) bribing a law enforcement official in connection with a drug trafficking offense. All of these factors are already addressed in the current Guidelines, but they are treated differently. Sections 6(1) and 6(3) of the FSA

[25] As Justice Scalia noted in *Whitman v. American Trucking Associations*, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), *accord FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 159-60 (2000); *MCI Telecomms. v. AT&T* , 512 U.S. 218, 231 (1994); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

substantively exist in the Guidelines as enhancements under §§ 3C1.1 ("Obstructing or Impeding the Administration of Justice") for bribing a law enforcement official in connection with a drug trafficking offense and 3B1.1 ("Aggravating Role") for being a leader of drug trafficking activity, respectively. In contrast, section 6(2) of the FSA substantively exists in the Guidelines as a base level offense under § 2D1.8 ("Renting or Managing a Drug Establishment; Attempt or Conspiracy") for maintaining an establishment for drug manufacture or distribution.[26] The FSA therefore is ambiguous on how these Section 6 enhancements relate to the current Guidelines.

Despite that ambiguity, it would be inappropriate to construe Section 6 as providing a set of additional enhancements that should provide additional increases beyond existing Guidelines requirements. Such an interpretation would be inconsistent with both established rules of statutory construction and the underlying policy objectives of the FSA. Accordingly, construing Section 6 as simply clarifying that certain activities warrant sentencing enhancements in the context of drug trafficking represents a sound and logical interpretation of the provision.

A. **According to well-settled rules of statutory construction, the FSA should not be read to endorse double enhancements.**

According to two basic canons of construction, the Plain Language Rule and the Rule of Lenity, the FSA should not be interpreted to dictate double enhancements. To begin, nowhere in the FSA is there any explicit statement mandating that individuals convicted of drug trafficking offenses involving any of the activities described in Section 6 of the FSA should be subjected to a double enhancement.[27] The cardinal rule when interpreting statutes is to "presume that [Congress] says in a statute what it means and means in a statute what it says there."[28] Furthermore, it is well-settled that statutory language should be read according to the plain meaning of the words therein.[29] The FSA plainly and unambiguously directs the Commission "***to ensure*** an additional increase of at least 2 offense levels" if one of the three types of activities were present during a drug trafficking offense.[30] By its own definition, to ensure means at most "to make sure, certain, or safe: guarantee."[31] Sections 3B1.1 and 3C1.1 do just that. By contrast, Congress did not explicitly require *additional* enhancements. Accordingly, the language of the FSA must be understood only to preserve certain harsher sentences.

Similarly, the Rule of Lenity counsels that the Commission should not introduce double enhancements when implementing the FSA. While the FSA does not mandate a double

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[26] Under the FSA, "maintain[ing] an establishment for the manufacture or distribution of a controlled substance" is defined in accordance with 21 U.S.C. § 856 ("Maintaining drug-involved premises").

[27] For example, under the current guidelines, where an individual is convicted of a drug trafficking offense and is found to have been an "organizer, leader, manager, or supervisor" in the commission of that offense, the offense level is increased by 2 levels. U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(c) (2009). If the Commission were to interpret the FSA as instructing it to create an *additional* enhancement per section 6(3), the offense level for an individual in a leadership role would be in effect increased by 4 levels.

[28] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

[29] *See, e.g.*, Carcieri v. Salazar, 129 S. Ct. 1058, 1063-64 (2009).

[30] Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 6, 124 Stat. 2372 (2010) (emphasis added).

[31] MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ensure (last visited Oct. 3, 2010).

enhancement for certain factors, it does not prohibit double enhancement either. The question then becomes whether the Commission in its own discretion wishes to doubly enhance sentences when certain factors accompany a conviction for drug trafficking. To the extent that there is any ambiguity whether the Commission may (or should) choose to doubly enhance sentences, the Rule of Lenity would counsel against such an action.[32] Under that rule, ambiguous criminal laws must "be interpreted in favor of the defendants subjected to them." In this case, where an individual is convicted of a crack cocaine drug trafficking offense that involves one of the three additional circumstances enumerated in Section 6 of the FSA, a 2-level sentencing enhancement is warranted but no more. This is the more favorable of the two possible interpretations of the FSA, and it is wholly consistent with accepted statutory canons of construction.

B. The policy goals of the FSA strongly advise against introducing double enhancements into the Guidelines.

In addition to analyzing the language of the statute itself, ambiguous statutes like the FSA should be construed in light of their general policy and purpose.[33] As described above in Part I, the legislative history of the FSA shows that the statute's goals are: (1) ensuring greater proportionality between the nature of the crime and the imposed sentence; (2) reducing the over-incarceration of lower-level offenders; and (3) creating greater equity within and greater credibility for the criminal justice system. Interpreting Section 6 of the FSA to allow for double enhancements would be inconsistent with each of these objectives, while interpreting Section 6 as simply clarifying that certain activities warrant sentencing enhancements in the context of drug trafficking would be consistent. Accordingly, the latter interpretation represents the more appropriate construction.

First, this interpretation of the FSA ensures a severe, but proportional, punishment. While the FSA converts the base offense level for two of the three drug trafficking activities in Section 6 of the FSA,[34] to the extent that the FSA could be construed to apply double enhancements to any offense—especially bribing a law enforcement official in connection with drug trafficking or having a leadership position in a drug trafficking activity—or to the extent that the FSA could be construed to warrant a cumulative application of sentencing enhancements, the Commission should not adopt that interpretation.[35]

Second, this interpretation of the FSA maintains the distinction between high-level and lower-level offenders that Congress intended. Congress intended that the FSA ensure an increase in offense levels for three specific types of drug trafficking activities: being a leader of drug trafficking activity; maintaining an establishment for drug manufacture or distribution; or

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[32] *See* United States v. Santos, 553 U.S. 507, 514 (2008).
[33] *See* Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens ex rel. Mergens, 496 U.S. 226, 238-40 (1990); *see also id.* at 271 ("[B]ecause this concept is ambiguous, the statute must be interpreted by reference to its general purpose, as revealed by its overall structure and by the legislative history.") (Stevens, J., dissenting).
[34] Senator Leahy clearly described that the FSA does in fact ***increase*** certain penalties: "[T]he Federal penalties for drug crimes remain very tough. This bill toughens some of those penalties." 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009).
[35] A 2-level sentencing enhancement translates into 12 to 15 more months of imprisonment.

bribing a law enforcement official in connection with a drug trafficking offense. The Guidelines currently include a variety of such factors as warranting sentencing enhancements. Under 28 U.S.C. § 994, it is typically within the Commission's purview to determine what factors merit enhancements. In passing the FSA, Congress merely intended that the three activities in Section 6 always be treated more severely than other drug trafficking activities by law. This interpretation recognizes this objective in a fair and sensible approach.

Third, this interpretation of the FSA lends greater credibility to the criminal justice system. Interpreting Section 6 as creating a scheme of additional enhancements undermines the overall congressional goal of treating crack cocaine offenses less harshly. The alternative interpretation that Congress instead intended that the three drug trafficking offenses be treated similarly—and relatively more severely than other offenses—is not just reasonable, but preferable. Indeed, one of the very reasons for the existence of the Guidelines is to provide some consistency in the sentencing practices of the criminal justice system. Treating the offenses in Section 6 of the FSA similarly by assessing a 2-level enhancement and no more would do just that.

III. THE AMENDMENT TO THE SENTENCING GUIDELINES SHOULD BE MADE RETROACTIVE.

Although not listed as an issue for comment, The Sentencing Project and allied organizations ask that the Proposed Emergency Amendment issued in response to the FSA be made retroactive. The Commission has the ability to make the Amendment retroactive under its Section 21(a) of the Sentencing Act of 1987 emergency authority, especially since the retroactivity factors enumerated in the U.S.S.G. § 1B1.10 policy guidance make the Amendment a good candidate to be re-promulgated as a permanent retroactive amendment during the regular amendment cycle. Moreover, because the problems the FSA addresses are currently present in the sentencing system, failing to make the Amendment retroactive now would reduce its ability to restore trust in the criminal justice system and properly fulfill the goals of the FSA.

The Commission has statutory authority to implement this much needed change. Section 8 of the FSA directs the Commission to invoke its emergency authority pursuant to Section 21(a) of the Sentencing Act of 1987 ("Section 21(a)") and to promulgate an amendment to the Guidelines Manual that is provided for by the legislation. Under its Section 21(a) authority, the Commission can promulgate and distribute to all courts of the United States and to the United States Probation System a temporary guideline or amendment to an existing guideline that will remain in effect until the Commission submits its next report to Congress of amendments to the Guidelines and modifications to previously submitted amendments that have not yet taken effect pursuant to 28 U.S.C. § 994(p).[36] Nothing in the text of Section 21(a) limits the ability of the Commission to promulgate retroactive amendments.[37] Therefore, no limitation on the ability of the Commission to promulgate a retroactive emergency amendment should be read into the

[36] *See* 28 U.S.C. § 994 note re Emergency Guidelines Promulgation Authority; 28 U.S.C. § 994(p).
[37] *See Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

Commission's 21(a) authority, particularly with respect to an amendment that is likely to be re-promulgated as a permanent retroactive amendment under 28 U.S.C. § 994(p).

The Amendment is a strong candidate for re-promulgation as a permanent retroactive amendment because all of the U.S.S.G. § 1B1.10 factors weigh in favor of retroactivity. The background notes of § 1B1.10 state that in selecting an amendment for retroactivity, the Commission should consider such factors as (1) the purpose of the amendment; (2) the magnitude of the change in the guideline range made by the amendment; and (3) the difficulty of applying the amendment retroactively to determine an amended guideline range.

First, the purpose of the Amendment certainly weighs in favor of retroactivity given that the Commission has for many years stressed the importance of Congressional action to increase the five-year and ten-year statutory mandatory minimum threshold quantities for crack cocaine offenses to ease the harsh treatment of lower-level crack offenders and focus the penalties more closely on serious and major traffickers. The FSA was enacted in response to these concerns. Since the problems targeted by the legislation are currently present in the system, refusing to make the Amendment retroactive would reduce its ability to address the concerns circumscribed by the legislation. For instance, failing to make the Amendment retroactive would exacerbate the problem of over-incarceration.[38] Moreover, failing to make the Amendment retroactive would also intensify the racial inequalities associated with crack cocaine sentencing policy since 85% of the offenders eligible for retroactive application of the Amendment are African American.[39]

Second, the Amendment is likely to be found to have a significant effect on prisoners because it is expected to reduce the average sentence for currently imprisoned eligible crack cocaine defendants by 48 months under the level 24 option and 37 months under the level 26 option.[40] Given that the Commission has only declined to make retroactive those amendments that "generally reduce the maximum of the guideline range by less than six months"[41] based on this factor, the magnitude of the change produced by the Amendment also weighs in favor of retroactivity.

Third, retroactive application of the Amendment would not be difficult to administer because district courts would be able to use the modified Drug Quantity Table to derive a new sentence using the same facts as those already developed in the record. Moreover, the caseload resulting from the retroactive application would not pose an unreasonable burden on

[38] *See* Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses and Corresponding Guidelines Amendment of the Guideline Amendment Were Applied Retroactivity at 29, 55. For example, under the level 24 option, in the first year 4,562 offenders would be eligible to be released if the Amendment were made retroactive as opposed to 1,106 if it were not, and under the level 26 option, 3,104 offenders would be eligible to be released as opposed to 948 if the Amendment were not made retroactive.
[39] *Id*. at 18, 44.
[40] *Id*. at 53, 27.
[41] *See* 18 U.S.C. app. § 1B1.10 cmt. background.

judicial resources.[42] In addition, the 2007 Guideline Amendment change for crack cocaine offenses was implemented retroactively without any significant burdens to the system.[43]

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The Sentencing Project and allied organizations support the Commission's decision to revise the Drug Quantity Table and to modify sentencing ranges for all crack cocaine drug quantities in light of the Fair Sentencing Act. In doing so, we believe that the Commission should choose the level 24 option so that the true intent of Congress in passing the FSA—namely, ensuring greater proportionality between the crime and the imposed sentence, reducing the over-incarceration of lower-level offenders, and creating greater equity within and credibility for the criminal justice system—is effectuated. In addition, the Commission should not interpret the FSA as mandating "double" enhancements in cases where the three sentencing enhancements for drug trafficking offenses set out in Section 6 of the FSA duplicate an enhancement or offense level already provided in the Guidelines. Finally, the Amendment should be made retroactive at this time, which the Commission has the ability to do under its emergency authority.

[42] *See* Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses and Corresponding Guidelines Amendment of the Guideline Amendment Were Applied Retroactivity at 31-34 and 57-60. Only six district courts would be presented with 100 defendants or more that are eligible for release in the first five years under the level 24 option and only one district court would be presented with 100 or more defendants eligible for release in the first five years under the level 26 option.

[43] During the 28 months after the Commission voted to make the 2007 Guideline Amendment retroactive, about 24,000 applications were processed, of which 16,000 benefitted from a sentence reduction. *See* USSC Preliminary Crack Cocaine Retroactivity Data Report (July 2010).

We appreciate the opportunity to provide comment on the Commission's Proposed Emergency Amendment: Fair Sentencing Act of 2010 and respectfully request that the Commission gives consideration to these thoughts in making its decision. Please do not hesitate to contact Marc Mauer at (202) 628-0871 if you have any questions or comments.

Sincerely,

Marc Mauer, Executive Director
The Sentencing Project

Charles Ogletree, Executive Director
Charles Hamilton Houston Institute for Race and Justice
Harvard Law School

Ethan Nadelmann, Executive Director
Drug Policy Alliance

Barbara Arnwine, Executive Director
Lawyers' Committee for Civil Rights Under Law

Wade Henderson, President and CEO
Leadership Conference on Civil and Human Rights

Hilary O. Shelton, Director, Washington Bureau and Senior Vice-President for Advocacy and Policy
NAACP

John Payton, President and Director-Counsel
NAACP Legal Defense and Educational Fund

Ronald Hampton, President
International Leadership Institute
National Black Police Association

Stephen Rickard, Executive Director
Open Society Policy Center

Bill Mefford
Director of Civil and Human Rights
Global Board of Church and Society
United Methodist Church