



**Officers**  
**Interim Chairperson**  
Judith L. Lichtman  
National Partnership for Women  
& Families  
**Vice Chairperson**  
Karen K. Narasaki  
Asian American Justice Center  
**Secretary**  
Barry Rand  
AARP  
**Treasurer**  
Lee A. Saunders  
American Federation of State,  
County & Municipal Employees

**Executive Committee**  
Barbara Arnwine  
Lawyer's Committee For  
Civil Rights Under Law  
Arlene Holt Baker  
AFL-CIO  
Marcia Greenberger  
National Women's Law Center  
Linda D. Hallman  
American Association of  
University Women  
Mary Kay Henry  
Service Employees  
International Union  
Andrew J. Imparato  
American Association of People  
with Disabilities  
Benjamin Jealous  
NAACP  
Michael B. Keegan  
People For The American Way  
Floyd Mori  
Japanese American Citizens  
League  
Marc H. Morial  
National Urban League  
Janet Murguia  
National Council of La Raza  
Debra Ness  
National Partnership for Women  
And Families  
Terry O'Neill  
National Organization for Women  
Jacqueline Johnson Pata  
National Congress of  
American Indians  
John Payton  
NAACP Legal Defense and  
Educational Fund, Inc.  
Dennis Van Roekel  
National Education Association  
Anthony Romero  
American Civil Liberties Union  
Thomas A. Saenz  
Mexican American Legal Defense  
& Educational Fund  
David Saperstein  
Religious Action Center for  
Reform Judaism  
Shanna L. Smith  
National Fair Housing Alliance  
Joe Solmonese  
Human Rights Campaign  
Randi Weingarten  
American Federation of Teachers  
Mary G. Wilson  
League of Women Voters  
Sara Najjar-Wilson  
American-Arab Anti-  
Discrimination Committee

**Compliance/Enforcement  
Committee Chairperson**  
Karen K. Narasaki  
Asian American Justice Center  
**President & CEO**  
Wade J. Henderson  
**Executive Vice President & COO**  
Karen McGill Lawson

March 21, 2011

The Honorable Patti B. Saris, Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 20002-8002  
Attention: Public Affairs

**RE: Request for Public Comment on Re-Promulgation of the Fair Sentencing Act of 2010**

Dear Judge Saris:

The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, writes to provide comments on the amendment promulgated pursuant to Section 8 of the Fair Sentencing Act of 2010 (the "Act" or "FSA"). The Leadership Conference strongly urges the United States Sentencing Commission ("Commission") to return the base offense levels for crack cocaine to 24 and 30 ("level 24"), because Congress did not intend for the guidelines to be increased when it passed the Act. In addition, it is essential to make these levels retroactive in order to avoid excessive sentences for low-level offenders.

The Leadership Conference fought for the passage of the FSA as a significant step toward greater fairness in the criminal justice system and a more rational approach to dealing with our nation's drug laws. The Act was the culmination of years of tireless advocacy by affected families, civil rights and law enforcement groups, researchers, and members of Congress. Its aims include reducing the sentencing disparity between crack and powder cocaine, imposing more equitable sentences on low-level crack offenders, reducing the rate of over-incarceration of those offenders, and restoring confidence in the criminal justice system.

The Leadership Conference and other allies were surprised and disappointed by the Commission's decision in October 2010 to promulgate a temporary, emergency amendment to the federal sentencing guidelines that unnecessarily raised the base



offense levels for crack cocaine to 26 and 32 (“level 26”) from level 24.<sup>1</sup> Nothing in the Act requires raising the base offense levels, and doing so only exacerbates a problem that Congress was trying to resolve. The Leadership Conference strongly recommends: (1) returning the base offense level for crack cocaine to level 24; and (2) making those changes retroactive. Doing both would better effectuate the true intent of Congress to alleviate the problem of over-incarceration of low-level offenders, especially African Americans, and help restore faith in our criminal justice system among people of all races.

While some Commissioners may have believed that the ratio between crack and powder cocaine was the determining factor in the bill’s passage and that Congress wanted to ensure the 18-to-1 ratio,<sup>2</sup> this interpretation is at odds with the intent of the drafters, as well as the plain language and legislative history surrounding the Act. In fact, the 18-to-1 ratio was a calculation arrived at only after the bill drafters had agreed on the weight of crack necessary to trigger a mandatory minimum. Thus, it was the weight of 28 grams, or one ounce, and not the ratio, which was the determinative factor. As Senator Dick Durbin (D-IL) noted in a letter to the Commission in October 2010, the “text of the Fair Sentencing Act does not refer to an 18-to-1 ratio, but rather changes the quantity of crack cocaine that triggers the mandatory minimum.”<sup>3</sup> The letter goes on to state that “while some members referred to sentencing ratios as short hand while debating the Fair Sentencing Act, they were referring to the statutory penalty ratio not the base level ratio and Congress was clearly most concerned with raising the thresholds for crack mandatory minimum sentences.”<sup>4</sup> Senator Jeff Sessions (R-AL), one of the FSA’s champions, noted that by changing “the thresholds in mandatory minimums sentences we will be able to achieve fairness.”<sup>5</sup>

In fact, in 2007, the Commission lowered the guideline ranges to level 24 for crack offenders with the adoption of Amendment 706.<sup>6</sup> While Congress explicitly directed the Commission to raise the offense levels by two for sections of the Act pertaining to violence and a defendant’s role in drug trafficking or due to certain aggravating factors,<sup>7</sup> no such directive was included in sections pertaining to reducing the sentencing disparity. As Ruben Castillo, former Vice Chair of the Commission and federal prosecutor, and current federal judge in Illinois, noted, the FSA

---

<sup>1</sup> U.S. Sentencing Commission News Release, *United States Sentencing Commission Promulgates Amendment To Implement Fair Sentencing Act of 2010*, October 15, 2010, available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20101015\\_Press\\_Release.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20101015_Press_Release.pdf)

<sup>2</sup> United States Sentencing Commission, Public Meeting Notes, (October 15, 2010) (See comments of Commissioners Howell and Jackson) on pages 5-7, available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20101015/20101015\\_Minutes.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20101015/20101015_Minutes.pdf).

<sup>3</sup> Letter from Senator Dick Durbin to U.S. Sentencing Commission (October 8, 2010).

<sup>4</sup> *Ibid.*

<sup>5</sup> “Hatch and Sessions Commend Bipartisan Compromise on Drug Sentencing,” Senator Orin Hatch, press release (March 11, 2010) available at [http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=4f0ae266-1b78-be3e-e063-0a0209acf940&Month=3&Year=2010](http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=4f0ae266-1b78-be3e-e063-0a0209acf940&Month=3&Year=2010).

<sup>6</sup> United States Sentencing Commission, *2007 Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007).

<sup>7</sup> Public Law 111-220, S. 1789, see sections 5 and 6.

did not contain any discernible congressional intent to increase the base offense levels.<sup>8</sup> If Congress believed those guidelines should be adjusted back to their pre-2007 levels, it could have overturned the Commission's decision when it overwhelmingly passed the FSA. As Senator Durbin's letter states, "I am not aware that the Commission has ever indicated to Congress that it planned to revert to levels of 26 and 32 if and when Congress reduced the crack-powder disparity. In fact, it has been my understanding from the Commission that the base offense levels will not change."<sup>9</sup>

Among the chief concerns of federal lawmakers in passing the FSA was reducing racial disparities in cocaine sentencing. While only comprising about a third of all crack users, African Americans make up better than 80 percent of all convicted federal crack defendants. By increasing the amount of crack cocaine that would trigger mandatory minimums, Congress signaled its intent to limit the number of low-level offenders subjected to excessive penalties and reduce the problem of over-incarceration, particularly for African Americans. According to the Commission's own estimates, 85 percent of the more than 15,000 people who would be eligible for a sentence reduction are African-American.<sup>10</sup> Concerns about stark racial inequality within the criminal justice system were also echoed by Senate Judiciary Committee Chairman Patrick Leahy who 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 core values of justice."<sup>11</sup>

Reduction of the prison population was another expressed goal of the FSA. As the Commission has noted, 55 percent of federal cocaine defendants are low-level offenders, and only 1.8 percent are high level suppliers.<sup>12</sup> Representative James Clyburn (D-S.C.) noted that, "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."<sup>13</sup> According to the Commission's own data, if the level 24 option were pursued, nearly 5,900 beds would be saved within a decade compared to the level 26 option, where 3,826 beds would be saved.<sup>14</sup> In short, the level 24 option would go a long way toward reducing the over-incarceration rates of low-level offenders and relieving some of the racial inequities in the system.

We strongly urge the Commission not only to lower the base offense level to 24, but also to make that amendment retroactive. It would be unconscionable for those currently serving

---

<sup>8</sup> See footnote 4, page 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> USSC FY2009 Crack Cocaine Sentencing Impact Analysis at 1.

<sup>11</sup> 155 Cong. Rec. S10,492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

<sup>12</sup> The Sentencing Project, Federal Crack Cocaine Sentencing, October 2010, (using data from U.S. Sentencing Commission 2005, Drug Sample).

<sup>13</sup> 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (Statement of Rep. James Clyburn) and The Pew Center on the States, *One in 31: The Long Reach of American Corrections*, (March 2009).

<sup>14</sup> See footnote 12.

unreasonably long sentences to be excluded from the adjustment simply because they had the misfortune of being charged during the period that the temporary amendment was in effect. Failing to make the amendment retroactive would only exacerbate the problem of over-incarceration which, according to the Federal Bureau of Prisons, is already operating at 35 percent above capacity.<sup>15</sup> If the outlays at for federal prisons remain at current levels, restoring the level 24 option will generate \$42 million in taxpayer savings whereas the level 26 will likely lead to an increase in spending.<sup>16</sup>

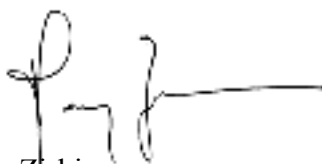
As the Commission makes its determination, it should consider its own history and leadership in encouraging reform of federal cocaine laws, as well as the overall remedial aims of the Act, and the problems of over-incarceration of low-level nonviolent drug offenders. In determining how to implement the FSA, the Commission should honor the intent of Congress to create greater equity within, and restore confidence to the criminal justice system by returning to the just and fair base offense level of 24 and applying the guidelines retroactively.

Thank you for your attention to our concerns. If you have any questions, please contact Lisa Bornstein, Senior Counsel, at [Bornstein@civilrights.org](mailto:Bornstein@civilrights.org) or (202) 263-2856.

Sincerely,



Wade Henderson  
President & CEO



Nancy Zirkin  
Executive Vice President

---

<sup>15</sup> Lappin, Harley G., Director, US Bureau of Prisons, Statement to the House, Subcommittee on Commerce, Justice, Science and Related Agencies of Committee on Appropriations, Budget Hearing, March 15, 2011.

<sup>16</sup> Derived using Bureau of Justice showing the annual cost of incarceration one person amounts to \$22,650. Bureau of Justice Statistics, Expenditures /Employment, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tid=16#datacollections>