United States Sentencing Commission

Written Testimony

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I. Introduction

The Victims Advisory Group ("VAG") appreciates the opportunity to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim survivor professionals from around the country. These members work with a variety of victim survivors of crime in all levels of litigation and include: victim advocates, prosecutors, private attorneys, and legal scholars.

II. The First Step Act – Reduction in Terms of Imprisonment Under 18 U.S.C. §3582(c)(1)A)

The proposed amendments to this section are complex and address many aspects of extraordinary and compelling release.[1] While the VAG will address each of them individually, taken as a whole, the package of proposals is extremely concerning to the VAG because, if passed, they will have the effect of reversing two concepts which form the bedrock of the federal sentencing system. Concepts that are essential to victims of crime: finality and uniformity of sentences.

As a package these provisions create a broad pathway for offenders to obtain release from their sentences, given to them in open court – this is in essence a new parole system. However, what makes this extremely concerning is that this is more than just a return to a form of parole not authorized by Congress – it is a form of informal parole with no system in place to regulate it. Notably, Congress previously determined that the parole system failed at a time when it had clearer rules, standards, and procedures in place, such as scheduled parole hearings and notification obligations for victims, survivors, and family members. These proposals taken in their entirety have the effect of reinstating a parole-like pathway to indeterminate sentencing without any of the procedures and guardrails in place under the former parole system.

Doing so is particularly problematic legally because, among other reasons, it risks violating the separation of powers doctrine, as the following pages discuss. But as a threshold matter, the proposed amendments are specifically concerning to many crime victims and their families on a more personal and

[1] 18 U.S.C. § 3582(c)(1)(A) is often referred to as "compassionate release" despite the fact that this phrase is not used in the text of the code. This contributes to some of the current confusion and misapplication surrounding the proper use of § 3582(c)(1)(A) because such a label blurs the purpose of this section. Rather, this provision will be referred to as it is in the text and intent of the statute: the "extraordinary and compelling" provision unless quoting others.

practical level. These are the people who will be harmed again by a system that is changing over their objection with no provisions for their participation despite clear Congressional intent and federal court recognition that victims are now supposed to be independent participants in the system.[2] Victim survivors often experience trauma as a result of the initial criminal act. They then can also suffer secondary trauma by experiencing a criminal justice system with few provisions that protect them.

Since the mid-eighties, victims and their families fortunate enough to have their cases prosecuted have been told at sentencing that the sentence reflects "truth in sentencing" and, with some very narrow exceptions, the sentence that they observe handed down by the judge is the sentence on which they can rely. The firmness of this representation is often the first solid and reliable outcome of the criminal justice system victim survivors receive. Our members report that for many victims or family members, it represents a key step to healing – the assurance of the finality of that sentence and their ability to plan their future steps around that information. Finality of sentences is "essential to the operation of criminal justice systems."[3]

Yet, the trauma of so broadly circumventing the current law regarding release cannot be understated. Our members report countless examples of the suffering experienced by victims or families contacted about a motion for early release. Such events re-open the wounds of chapters they thought were long closed, cause extreme anxiety if they are fortunate enough to have some notice of a potential release, and instill unimaginable fear when they learn of an offender's unexpected release. While we turn to the legal issues surrounding these proposals, the VAG felt it essential to share with the Commission a mere fraction of the human toll such a disruption to finality and uniformity of sentencing causes.

Pursuing this broad course of action also is legally flawed. It is in direct contradiction to the general purposes of the Sentencing Reform Act of 1984, the concept of the extraordinary and compelling release provision, the First Step Act ("FSA") as it relates to § 3582(c)(1)(A), and the Crime Victims Rights Act. As such, these provisions raise some threshold separation of powers issues generally, and some of the specific provisions have very acute separation of powers violations embedded within them.

This memorandum will address the general issues first and then the specific provisions *seriatim*.

A. <u>The Proposed Amendments as a Whole Effectively Reinstate Parole Without Any of the Safeguards of the Parole System and Contradict the Main Purposes of the Sentencing Reform Act</u>

[2] In the twelve pages of this proposed amendment the word "victim" is never used except in relation to the offender being a victim.
[3] *E.g.*, Teague v. Lane, 489 U.S. 288, 309 (1989).

In enacting the Sentencing Reform Act of 1984, Congress made the intentional decision to transform the criminal justice system from an indeterminate to a determinate sentencing system. In so doing it eliminated the use of parole.[4] Congress took this step to eliminate significant problems in the sentencing system: unpredictable outcomes, a lack of certainty in sentencing, and the release of dangerous individuals.[5] "Nearly all federal prisoners throughout most of the twentieth century received sentences that included parole eligibility after serving just one third of the prison term imposed by the federal judges and served just one half of the sentence that the federal judges imposed."[6] Furthermore, there were wide discrepancies in sentencing and this "fundamental and widespread dissatisfaction with uncertainties and the disparities continued to be expressed."[7]

> [The Senate Report] observed that the indeterminate-sentencing system had two "unjustifi[ed]" and "shameful" consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison. Each was a serious impediment to an evenhanded and effective operation of the criminal justice system.[8]

Although the parole system has largely been considered unsuccessful in decreasing crime, and plagued with inconsistency and uncertainty, it was a system with procedures and rules. The rights of victims were part of a system and outlined in hearing procedures.[9] Indeed, the Parole Commission has an entire system of scheduling, notification, witness testimony, and services. "Hearings conducted by the Parole Commission rely greatly on the testimony of victims, witnesses and law enforcement."[10] These structures are important to victim survivors because they follow an expected schedule, they provide notice to victims and their families, and they enable victim witnesses to travel to participate in the hearings.[11]

Yet, these proposed amendments will likely have the effect of reinstating a form of informal parole and indeterminate sentencing which is in contradiction to the main purposes of the Sentencing Reform Act. In that Act Congress explicitly rejected the release of prisoners based on rehabilitation, requiring punishment serve retributive, educational, deterrent, and incapacitation goals.[12] The Act

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[4] United States v. Jenkins, 50 F.4th 1185, 1192 (D.C. Cir. 2022).
[5] S.Rep. No. 98-225 (1983); United States v. McCall, 56 F.4th 1048, 1052 (6th Cir. 2022).
[6] Douglas Berman, Reflecting on Parole's Abolition in the Federal Sentencing System, Federal Probation, Vol. 81, No.2 at 19 (Sept. 2017) (citing Department of Justice Bureau of Justice Statistics, Historical Correctional Statistics in the United States (1850-1984 (Dec. 1986)).
[7] Mistretta v. United States, 488 U.S. 361, 365 (1989); McCall, 56 F.4th at 1052.
[8] Mistretta, 488 U.S. at 366 (emphasis added) (internal citation omitted).
[9] *Victim Witness Program*, U.S. PAROLE COMM'N (Sept. 29, 2022), https://www.justice.gov/uspc/victim-witness-program#:~:text=The%20reasonable%20right%20to%20confer,the%20victim's%20dignity%20and%20privacy (last visited Feb. 10, 2023) (providing the Rights of a Victim or Witness in a U.S. Parole Commission Hearing).
[10] *Id.*
[11] The Department of Justice requires that victims or victims' next of kin "will receive notification . . . the victim has the opportunity to provide input to the Commission on this decision." *Id.*
[12] Mistretta, 488 U.S. at 367.

explicitly intended to make all sentences determinate. "A prisoner is to be released at the completion of its sentence reduced only by any credit earned by good behavior while in custody."[13]

Notwithstanding this recognition and abandonment of the parole system, some defendants abused extraordinary and compelling relief distorting it into a type of informal parole. "Courts have been skeptical of expanding the compassionate release system into essentially a discretionary parole system."[14] This "discretionary parole" effort is one without standard procedures. Although, the "compassionate release statute is not [supposed to be] a freewheeling opportunity for resentencing based on prospective changes in the sentencing policy or philosophy,"[15] these provisions transform them into one.

These wide-ranging proposed amendments contradict the goals of the Sentencing Reform Act. The effort to include changes in the law, or vague catch all provisions, reintroduces inconsistent sentencing to the criminal justice system. To use extraordinary and compelling relief for this purpose would undermine the finality of sentencing. "We doubt that the Sentencing Reform Act – which effected a profound shift from indeterminate to determinate sentencing – contained the seed of its own destruction."[16]

B. The Proposed Amendments Taken As a Whole Contravene the Very Purpose of Extraordinary and Compelling Release

As the name implies, Congress created extraordinary and compelling release for a very specific and narrow purpose - to provide a pathway to early release for offenders who were in extreme medical or familial need. "Congress created compassionate release as a way to free certain inmates, such as the terminally ill, when it became inequitable to keep them in prison any longer."[17] In 2016, the Commission established some guidance on the circumstances consistent with Congressional intent behind extraordinary and compelling release: extreme medical cases such as a terminal illness, advanced age impacting ability to self-care, or extraordinary family circumstances in which an offender's child was left without a caretaker due to the death of the other parent. The process that eventually developed was one in which the Bureau of Prisons ("BOP") was tasked with determining if an inmate meets this criteria and, if so, should file the motion for release. A court would then consider the motion along with the relevant sentencing factors of 18 U.S.C. § 3553 to determine if the offender is a risk to the public. Extraordinary

[13] *Id.* (citing 18 U.S.C. § 3624(a)–(b)).
[14] United States v. Crandall, 25 F. 4th 582, 584 (8th Cir. 2021) (noting that some courts found it "'paradoxical' and contrary to the intent of Congress to find extraordinary and compelling reasons based on a change in the law that Congress intentionally made inapplicable to a defendant.").
[15] *Id.* at 586.
[16] United States v. Jenkins, 50 F.4th 1185, 1201 (D.C. Cir. 2022).
[17] Christie Thompson, *Old, Sick, and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018), https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles (last visited Feb. 10, 2023).

and compelling release, therefore, is not a prison population reduction effort. As former Attorney General Holder noted it is "not an appropriate vehicle for a broad reduction in the prison population."[18]

The reality, however, was that the BOP failed to do its duty and rarely filed the appropriate motion.[19] The BOP acknowledged that it only filed on average twenty-four motions a year under this statute.[20] In a four-year period it approved only six percent of requests, while 266 inmates died in jail awaiting a decision.[21]

The VAG agrees that the BOP seems to have abdicated its duty to very ill inmates. However, reinstating a form of unstructured parole is not responsive to the BOP errors. Indeed, the extraordinary and compelling release statute was never intended to be an alternative wide door to terminate a criminal sentence early. Its development was not a contradiction to the Sentencing Reform Act's intentional end of parole. Rather, it was designed for the narrow purpose of providing a small pathway from a lengthy incarceration for a person experiencing an extraordinary medical or familial crisis. To utilize it to provide alternative avenues of accessing indeterminate sentencing is misplaced and contrary to the intent behind this provision.

C. The Proposed Amendments Taken As a Whole Contravene the Very Purpose of The Relevant Component of the First Step Act

Although the First Step Act generally did address many aspects of incarceration, the provision implicating § 3582(c)(1)(A) was not an effort to decrease prison population. The amendment was strictly *procedural* in nature, not substantive.[22] The amendment was in response to the failure of BOP to file motions for release in appropriate cases. Consequently, the amendment simply allowed a defendant to file a motion on his own behalf, thus relieving the bottleneck for the petitions.

In the wake of the failure of the BOP to file appropriate motions regarding the terminally ill, Congress passed this very narrow amendment.[23] In 2013, the Inspector General found that the "existing Bureau of Prison compassionate release program has been poorly managed and implemented inconsistently" and specifically referenced the death of terminally ill inmates before their cases were

[18] *Id.*
[19] *E.g.*, United States v. Thacker, 4 F. 4th 569, 521 (7th Cir. 2021); Thompson, *supra* note 17.
[20] United States v. Elias, 984 F.3d 516, 518 (6th Cir. 2021).
[21] U.S. Dep't of Just., Evaluations & Inspections Div., The Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013), at 41.
[22] United States v. McCall, 56 F.4th 1048, 1053 (6th Cir. 2022) (citing United States v. King, 40 F.4th 594, 596 (7th Cir. 2022)) ("The amendment focused on process not substance.").
[23] Thompson, *supra* note 17.

decided.[24] Consequently, cases with merit were not being reached and Congress endeavored a procedural change to allow defendants to apply directly themselves under the same narrow substantive standard.

There can be little doubt that this amendment was procedural and not substantive. "The First Step Act added the procedure for prisoner-initiated motions while leaving the rest of the compassionate release framework unchanged."[25] As the Seventh Circuit recently noted, "[t]he First Step Act did not create or modify extraordinary and compelling release's threshold for eligibility, it just added prisoners to the list of persons who may file motions."[26]

Yet, in the wake of the COVID-19 pandemic, many defendants filed claims exceeding the parameters of the statute. These proposed amendments suggest that the Commission accepted these claims' suggestion that the FSA made a substantive change to extraordinary and compelling release. However, "the policy problem that the FSA aimed to solve was not the courts' inability to identify new grounds for relief; rather, the problem was that the BOP was not filing reduction motions for defendants who qualified under the already existing grounds for relief…"[27]

Not only are these proposed amendments contrary to the FSA's procedural goal of relieving the bottleneck for those with legitimate extraordinary and compelling claims, but they will also exacerbate the problem. This artificial expansion of extraordinary and compelling release will lead to a massive increase in applications, many of which are inappropriate efforts to circumvent current laws in place for direct appeal of sentences.[28] "Nothing in the 30 odd year history of compassionate release 'hints that the sort of legal developments routinely addressed by direct or collateral appellate review could qualify a person for compassionate release. And nothing in the First Step act of 2018 suggests Congress intended to change the substantive status quo with a process-oriented amendment."[29] Consequently, these claims will overwhelm an already inefficient system, causing a backlog and once again preventing the hearing of legitimately extraordinary and compelling release claims, in turn injuring the very people the FSA was attempting to assist.

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[24] U.S. Dep't of Just., Evaluations & Inspections Div., The Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013), at i, 11.

[25] *E.g.*, United States v. Andrews, 12 F.4th 255, 258 (3d. Cir. 2021); United States v. Jenkins, 50 F.4th 1185, 1196 (D.C. Cir. 2022) ("The Act's sole change to this section was to create this new procedural avenue for release. It did not undermine the Commission's interpretation of that standard."); McCall, 56 F.4th at 1052 (The First Step Act "modified only one aspect of the compassionate release statute.").

[26] King, 40 F. 4th at 596.

[27] United States v. Bryant, 996 F.3d 1243, 1264 (11th Cir.), cert. denied, 142 S. Ct. 583 (2021).

[28] *See, infra* Section I.F.

[29] McCall, 56 F.4th at 1052 (internal citations omitted).

D. The Proposed Amendments Taken As a Whole Contravene the Very Purpose of the Crime Victims Protection Act

In the most fundamental manner, the amendments contradict are in contravention to what courts have told victims for decades at sentencing hearings, and fail to consider victim survivors and their rights under federal law. Such a major shift in release of defendants prior to the completion of their sentence threatens a return to a criminal justice system that was once described as "appallingly out of balance," in which "victims of crime have been transformed into a group oppressed and burdened by a system designed to protect them."[30]

Crime victim rights are affected by each and every motion for a modification of imposed term of imprisonment filed pursuant to 18 U.S.C. § 3582(c), including motions for extraordinary and compelling release, pursuant to 18 U.S.C. § 3582(c)(1)(A). Extraordinary and compelling release motions challenge crime victim rights in three significant ways: (1) the finality of the court process because a sentence imposed is now removed; (2) the ability of the victim survivor to participate because of the length of time between sentencing and the filing of an extraordinary and compelling release motion may detrimentally affect the ability of Crime Victims to participate; and (3) the volume and breadth of extraordinary and compelling release motions is greatly increased by the FSA. The proposed amendments taken as a whole violate the Crime Victims Rights Act in significant ways. Opening up extraordinary and compelling release this broadly, and providing no provisions for victims to turn to, violates the most fundamental of victim rights - the right to be "treated with fairness and with respect for the victim's dignity and privacy."[31]

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[30] President's Task Force on Victims of Crime, v-vi, 114 (1982) (Task Force Report).

[31] 18 U.S.C. § 3771(a) reads:

> (a) RIGHTS OF CRIME VICTIMS.--A crime victim has the following rights:
> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
> (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
> (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided

Whether or not the Commission adopts any of the proposed amendments, the VAG asks the Commission to include language in its modification of § 1B1.13 that assures that crime victims are provided notice of, and an opportunity to be heard on all motions for extraordinary and compelling release pursuant to 18 U.S.C. § 3582(c)(1)(A), and that no defendant is released without a hearing.

Reasonable notice of, and the right to be heard at, federal court proceedings relating to release and sentencing are crime victim rights.[32] An extraordinary and compelling release motion to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) plainly involves the release or sentencing of a defendant.

Extraordinary and compelling release motions affect crime victims in three fundamental ways. First, one of the purposes of sentencing reform, and of the Guidelines themselves, was the finality and the uniformity of sentences. A motion to reduce a sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) dispenses with finality and undercuts uniformity by inviting a subjective inquiry into the personal health or life status of the offender after he/she is imprisoned. A federal criminal offense traumatizes a crime victim and marks the beginning of a series of events over which the crime victim has little control. The lack of control that a crime victim has over the proceedings, continuances, and limitations of trial contributes to the re-traumatizing of crime victims through the criminal court process. The legal right to address the court at sentencing, and the knowledge that upon sentencing the case is at an end, is extremely important to crime victims and their recovery. Even when the case does not end due to a subsequent filing of a motion to reduce sentence, such as extraordinary and compelling release, the crime victim's right to address the Court maintains a significant importance.[33]

Second, like finality, notice is a legal principle essential to all stakeholders in the criminal court process, and especially so for crime victims. Even when a final sentence is to be modified, including for extraordinary and compelling release, a crime victim's 18 U. S. C. § 3771(a) rights apply, and the crime victim must be given reasonable and timely notice of the court proceeding and the right to be heard. VAG members and their victim assistance professional colleagues report that receiving notice of an extraordinary and compelling release motion is often shocking and traumatizing for crime victims not expecting another criminal court process many years after sentencing. This is particularly true for the tens of thousands of victims that sentencing courts remind of the "truth in sentencing" and the permanence of

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contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

[32] "In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims." U.S.S.G. § 6A1.5, Crime Victims' Rights (Policy Statement).

[33] As an example of crime victims exercising their right to address the Court at a motion to reduce sentence thirty years after the offense, *see,* Paul Duggan, *As a Rapist Seeks Freedom, a Victim's Plea Moves a D.C. Judge to Tears*, WASH. POST (Feb. 3, 2023), https://www.washingtonpost.com/dc-md-va/2023/02/02/rapist-sentence-reduction-dc-judge/ (last accessed Feb. 13, 2023).

the sentences. Furthermore, although this reconnection causes trauma, it bears noting that, unlike when they are engaged in an active criminal case, these victim survivors often no longer have access to the services, protections, and the scaffolding of support present during the original case. They find themselves re-traumatized and in danger, but often lack access to now needed psychological and financial assistance to move or take steps to ensure their safety, and other tools to make other necessary adjustments to their lives.

Furthermore, keeping track of crime victims may also be difficult for the United States Attorney many years after the original sentencing date. Broadening the scope of this extraordinary and compelling release motion will put extreme pressures on already significantly taxed victim witness coordinators to locate victim survivors, pulling them from attending to the needs of current victims survivors in active cases. Yet that effort must be undertaken to provide reasonable notice to crime victims of an extraordinary and compelling release motion.[34]

Third, the 2018 amendment to 18 U.S.C. § 3582(c)(1)(A) extended the legal authority to file motions for extraordinary and compelling release from solely the Director of the BOP to include offenders; consequently, the number of motions filed greatly increased.[35] While the Commission's December 2022 Report includes the spike in filings due to the COVID-19 pandemic, each of the filings asked the court for extraordinary and compelling release. The average sentence reduction for extraordinary and compelling release motions granted was nearly five years for FY 2020.[36] With the number of extraordinary and compelling release motions increasing, and the length of incarcerated time reduced for granted motions, it is integral to the court process that crime victims receive reasonable notice of these motions, as well as an opportunity to be heard.

The VAG members and other victim service professionals report not only the procedural but the practical effect that the lack of notice has in court. They describe court hearings in which offenders – with the assistance of their attorneys- are able to not only file motions but to coordinate family members, letters, and documents at a courtroom for a hearing. By contrast, victim survivors often cannot be located and, if located are frequently re-traumatized when they receive such radically unexpected notification to appear in court. Victim survivors at this stage rarely have lawyers or even advocates to assist them in preparing for the hearing, let alone help them coordinate the support of family members and

[34] The United State District Court for the Southern District of Illinois specifically recognized the Crime Victim right to notice in Compassionate Release proceedings. *In re* Compassionate Release Provision of First Step Act of 2018, Admin. Ord. No. 265 (Aug. 14, 2020).
[35] U.S. Sentencing Comm'n Compassionate Release Data Report FY 2020-2022 (December 2022), Table 1, Figure 1.
[36] U.S. Sentencing Comm'n, Compassionate Release the Impact of the First Step Act and COVID-19 Pandemic, (March 2022), 5, 38.

others. Victim professionals report that the resulting asymmetry in court is palatable and often a victim's failure to appear is interpreted by a court as acquiescence, when in fact there is no such indication of that position but instead ay reflect self-preservation efforts under undertaken by the victim survivor. For example, a victim of child pornography is involved in often hundreds of cases in which her images have been distributed. With these amendments she will be physically unable to actualize her rights and this will always create an imbalance in courtroom.

The insight a victim survivor brings to the release decision is invaluable. A recent example of this was published in the Washington Post. A convicted rapist kidnapped and raped two college students in 1992 when he was sixteen. At age forty-seven he sought release under the District of Columbia's Incarceration Reduction Amendment Act. The victim survivors not only described in detail the horrors of the abductions, beatings, rape, and being forced to dig their own graves, but they also provided information regarding the lifelong effects of their victimization information obviously not available even to them at the time of the original sentencing. One survivor stated "I am depressed, I am sad! I have never married! I have no kids! I live alone! . . . I have tried to the best of my ability to live life. But I am empty….the young women that we would have been is gone….where is our resentencing? Who will speak for us?"[37] Victim survivors have the right to present this information to courts entertaining such motions. Moreover, judges can only benefit from the fullest picture of the effects of release to determine if the offender has met his burden of establishing extraordinary and compelling circumstances.

It is also essential for a court to assess the dangerousness of the defendant. Often the victim survivor has the keenest sense of the level of danger the defendant poses. Without the victim survivor in the courtroom the judge is certainly not presented such evidence from the offender. This can have tragic consequences. In another case reported in the media, a defendant sentenced to twenty-four years' incarceration for domestic violence convinced a judge to release him on extraordinary and compelling release grounds due to COVID, an eye injury, his age, and the promise to never contact his victim. The U.S. Attorney's Office stated that they opposed the motion and could not locate the victim survivor. The victim survivor was not present at the hearing and was later found murdered, with the offender next to her body. He was indicted for murder, and her family never knew he had been released.[38] Judges should not make this type of release decision without hearing from the victim survivors and their families in order to

[37] Duggan, *supra* note 32.
[38] Nathan Baca and Becca Knier, *'Failed by the System' I The Life and Death of DC Stalking Victim, Sylvia Matthews*, WUSA9 (Feb. 28, 2022), https://www.wusa9.com/article/news/investigations/sylvia-matthews-michael-garrett-stalking-murder-investigation/65-8342ecc3-84cb-43a5-af72-79dee8129e65 (last accessed Feb. 13, 2023) (documenting the murder of a stalking victim after the early release of her murderer originally sentenced to several years in prison).

have this information in making their decisions. No victim survivors should be robbed of their rights to be kept safe from the offenders.[39]

The VAG asks the Commission to require a hearing before granting any motion for extraordinary and compelling release. This would improve uniformity in the United States District Courts regarding crime victims' legal rights, pursuant to 18 U.S.C. § 3771(a), and this Commission's policy directive of U.S.S.G. § 6A1.5, as applied to proceedings pursuant to 18 U.S.C. § 3582(c)(1)). Furthermore, the Commission must include provisions addressing victim notification and rights at the hearing. To that end, the VAG suggests the Commission include Paragraph (d) which will include language such as the following:

(d) Victim Notice and Right to be Heard.—Consistent with the provisions of U.S.S.G. § 6A1.5:

(1) If the victim is not present at a proceeding on a motion filed pursuant to 18 U.S.C. § 3582(c)(1)(A) the United States Attorney shall state on the record that proceeding without the appearance of the victim is justified because:

(i) the victim, or victim's attorney, was provided reasonable notice by the United States Attorney and waived the right to attend the hearing; or

(ii) efforts were made to reasonably notify the victim, or victim's attorney, which efforts shall be specified, and, to the best knowledge and belief of United States Attorney, the victim, or victim's attorney, cannot be located.

(2) If the Court is not satisfied by the statement that proceeding without the appearance of the victim is justified, or, if no statement is made, the court shall postpone the hearing.

(3) If the Court proceeds without the presence of the victim, the Court may consider all prior victim impact statements that are part of the court record and may not infer that the absence of the victim indicates acquiescence.

With this requested addition to §1B1.13, the Commission will both clarify that it's U.S.S.G. § 6A1.5. Crime Victims' Rights (Policy Statement) is properly applied to extraordinary and compelling release motions filed pursuant to 18 U.S.C. § 3582(c)(1)(A) and will increase the likelihood for crime victims to be treated with fairness and respect, pursuant to 18 U.S.C. § 3771(a)(8).

E. <u>All of These Conflicts With Prior Laws Raise Significant Separation of Powers Issues.</u>

[39] 18 U.S.C. § 3771(a)(1).

.Congress alone has the power to fix the sentences for violation of federal crimes and the scope of judicial discretion is subject to Congressional control.[40] The development of a system that strays from Congress's explicit preference for determinate sentencing and an end to parole by so expanding a currently narrow provision to reintroduce indeterminate sentencing and a parole-like system risks violating the separation of powers. In *Mistretta v. United States*, the Supreme Court upheld the Sentencing Reform Act and the Commission's charge because Congress articulated in a legislative act – the Sentencing Reform Act – intelligible principles to which the Commission was directed to conform.[41] Through the Sentencing Reform Act, Congress "clearly delineated the general policy the public agency which is to apply it, and the boundaries of that authority."[42]

Mistretta found that the Commission acted within the policies articulated by Congress because Congress charged the Commission with providing "*certainty and fairness* . . . in sentencing and to *avoi[d]. . . disparities.*"[43] It further outlined Congress's principles around sentencing by stating that the purpose of sentencing was to reflect the seriousness of the offense, promote respect for the law, provide adequate deterrence, provide a just punishment, protect the public from offenders, and provide defendants with needed treatment.[44]

These amendments run afoul of the boundaries of this delegated authority. It would be an absurd result to suggest that Congress delegated the authority to develop sentencing policies that are opposed to Congress's stated sentencing goals. Reinstituting pathways to indeterminate sentencing does just that. For example, "considering the length of a statutorily mandated sentence as a reason for modifying a sentence infringes on Congress's authority to set penalties.[45] In short, offenders cannot use extraordinary and compelling release provisions to act as an "end-run" around Congress's sentencing decisions.[46]

Similarly, these provisions also raise separation of powers questions as they also act as an "end-run" around habeas proceedings.[47] The interpretation of § 3182(c)(1)(A) to confer the discretion to change a sentence that was lawful at the time it was announced "would allow the compassionate release statute to operate in a way that creates tension with the principal path and conditions Congress established for federal prisoners to challenge their sentence. That path is embodied in the specific statutory scheme

[40] Mistretta v. United States, 488 U.S. 361, 364 (1989); Gore v. United States, 357 U.S. 386, 393 (1958) (Questions regarding severity of punishment "are peculiarly questions of legislative policy.").
[41] *Id.* at 372 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).
[42] *Id.* at 372-373 (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).
[43] *Id.* at 374 (emphasis added).
[44] *Id*; 18 U.S.C. § 3553(a)(2).
[45] Andrews, 12 F.4th at 261.
[46] *E.g.*, McCall, 56 F.4th at 1059 (citing United States v. Tomes, 990 F.3d 500, 505 (6th Cir. 2021)).
[47] *E.g.,* McCall, 56 F.4th at 1059.

authorizing post-conviction relief in 18 U.S.C. § 2255 and accompanying provisions."[48] Consequently, by allowing extraordinary and compelling release provisions to be altered to allow for release based on changes in the law or catchall reasons, avoids the system already in place for defendants to challenge their incarceration: 18 U.S.C. § 2255. Congress consciously created narrow rules around revisiting sentences. These "do not raise doubts about the finality of determinate sentencing that the Sentencing Reform Act 'attempted to resolve.' But using compassionate release to correct sentence[es] . . . would blow open these carefully crafted limits."[49]

Habeas is the appropriate avenue to challenge the lawfulness of a sentence and extraordinary and compelling release cannot be used to create an end-run around those rules. To do so is to exceed the principles outlined in *Mistretta*.

F. Specific Proposed Provisions

In addition to the aforementioned general concerns, the VAG has additional comments on the specific proposed amendments.

1. Proposed § 1B1.13(b)(1)(C)

The VAG opposes this language as too vague and broad. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[50] Language such as "specialized medical care" or "risk of deterioration in health" is vague and risks abuse and disparate application. A prisoner suffering from obesity, skin conditions, anxiety, diabetes, or hypertension could file a motion for release under such a provision. This language could cover situations that are neither extraordinary nor compelling, allowing for the improper release of an offender based on a claim not narrowly tailored to the purpose of extraordinary or compelling release.[51]

2. Proposed § 1B1.13(b)(1)(D)

The VAG opposes this language as too vague and broad. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[52] The VAG recognizes the threat the COVID-19 pandemic posed to all people, and that those incarcerated were particularly at risk of infection.

[48] *E.g.*, Jenkins, 50 F.4th at 1200-1201.
[49] *Id.* at 1201-1202.
[50] 28 U.S.C. § 994(t).
[51] *C.f.*, Thacker, 4 F.4th at 572.
[52] 28 U.S.C. § 994(t).

The VAG further agrees that it is the duty of the BOP to respond to the unique needs of those incarcerated to protect them by the provision of appropriate protocols, vaccinations, and other measures incumbent upon a prison system responsible for the safety of its inmates.

However, extraordinary and compelling release is not the mechanism to address needed responses to prison shortfalls. Those serious flaws must be addressed as a basic requirement of operating a prison system. The solution to systemic management problems is not the manipulation of a narrow provision to inappropriately release offenders, but rather to address the actual problem of which they complain.[53] Furthermore, language such as being "at risk of being affected by an ongoing outbreak of an infectious disease" is far too broad.[54] Such language is not limited to those infected, but those "at risk" and encompasses every person in a congregant living situation. Similarly, being at "increased risk" of a severe medical complication also could be interpreted to encompass everyone exposed to pneumonia, COVID, or influenza.[55] People with chronic conditions such as asthma, obesity, depression would always meet this standard so the breadth of this language fails to fit within the narrow scope of extraordinary and compelling release.

3. Proposed § 1B1.13(b)(3)(A) and (C)

The VAG has no objection to this provision when the parent is actually incapacitated and there is no other caretaker.[56]

4. Proposed § 1B1.13(b)(3)(D)

[53] *E.g.,* Pub.L. No 116-136, § 12003(b)(2), 134 Stat. 281, 516 (allowing the BOP to lengthen the maximum amount of time prisoners are placed on home confinement if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau).

[54] *See,* United States v. Nelson, No. 1:08-CR-068, 2023 WL 171145 (S.D. Ohio Jan 12, 2023)(the difficult conditions faced by many, if not all prisoners do not constitute an extraordinary and compelling reason for release); United States v. Lischewski, No. 18-CR-00203-EMC-1, 2020 WL 6562311 (N.D. Cal. Nov. 9, 2020) (the basis for a motion must be extraordinary and compelling, which is reasonable given that the relief requested is release or at least a reduction of sentence. Conditions of confinement that are not extraordinary and compelling do not warrant § 3582(c) relief, particularly as there are, *e.g.*, civil remedies available to a defendant (*e.g.*, a *Bivens* suit).") (citing United States v. Steven*s*, 459 F.Supp.3d 478, 487 (W.D.N.Y. 2020) (finding that conditions of confinement alleged – including lack of visitation, threats, and the unavailability of a proper diabetic diet – do not constitute extraordinary or compelling reasons for a sentence reduction, "nor is a motion for reduction the proper avenue to challenge those alleged conditions")).

[55] The CDC estimates that flu has resulted in 9 million – 41 million illnesses, 140,000 – 710,000 hospitalizations and 12,000 – 52,000 deaths annually between 2010 and 2020." Over 100,000 people died of salmonella and pneumonia in 2019. Burden of the Flu, *Centers for Disease Control and Prevention*, https://www.cdc.gov/flu/about/burden/index.html (last visited Feb. 10, 2023).

[56] The VAG notes that such a situation is distinct from having aging or ill parents as courts have noted "[m]any if not all inmates, have aging and sick parents." United States v. Ingraham, No. 2:14-cr-40, 2019 WL 3162305, at *2 (S.D. Ohio July 16, 2019).

The VAG opposes this language as too vague and broad. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[57] This section fails to do so. The VAG recognizes that families can be dynamic structures in a contemporary world. However, allowing release from incarceration for conditions regarding "any other immediate family member or "in a relationship "similar in kind to that of an immediate family member" is far too vague. To allow a convicted person to be released from incarceration because a friend or relative of any kind is in need of care simply is inapposite to the desire for determinate and consistent sentencing with deterrence as a reason for punishment. Such a broad provision is an exception swallowing a rule.

5. Proposed § 1B1.13(b)(4)

The VAG recognizes the complete trauma of sexual assault – a harm that is further compounded when a victim survivor is vulnerable due to an imbalance of power. The VAG further believes that such victim survivors have the right under the law to protection from harm, prosecution of offenders and all those who facilitate abuse or failed to protect them from abuse, and the full scaffolding of support needed for victim survivors of such crimes. Such measures can include immediate transfer, medical and psychiatric care, immediate appointment of a representative, mandatory notice to counsel, and confidential whistleblower provisions, among others. However, subsequent victimization after criminal activity does not change the impact of the original crime the offender committed on their victim, the lifelong suffering, or the promise of truth in sentencing at the time of sentencing of the defendant. That original victim does not lose their rights to protection, to be informed, to restitution, and to be treated fairly because their offender has also suffered harm.

§ 3582(c)(1)(A) is a very narrowly tailored mechanism to address a specific need. It is not the vehicle to address problems caused by the Bureau of Prisons. Congress should fund the prison system with the necessary funds to be able to function in a manner which serves the purposes outlined in the Sentencing Reform Act. These challenges are systemic problems which must receive systemic solutions. To respond to these challenges through extraordinary and compelling release actually diverts attention away from a more comprehensive and systemic solution that prevents harm and, when prevention fails, provides accountability for problems inherent in institutional punishment.

6. Proposed § 1B1.13(b)(5)

[57] 28 U.S.C. § 994(t).

The VAG opposes this language as too vague and one that risks raising separation of powers issues. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[58] This section fails to do so. To allow a court to change a previous sentence based on a change in the law – especially when Congress has indicated the change is not retroactive - clearly impinges upon Congressional power. To allow a court to do so grounded only in the label that the court feels "it is inequitable" offers no guidelines at all and invites the inconsistent indeterminate sentences the federal system has ended. Such an about face in sentencing will be extremely damaging to victim survivors who will now have no guarantees of truth in sentencing and no guidance as to the risk of continued litigation.

In addition to the lack of moorings to this proposal, this risks violating *Mistretta*. Such broad language is not only inconsistent with finality and uniformity of sentences, it is in affront to it. Since offenders have been able to file for release, applications have dramatically increased and been granted at a remarkable rate, based on grounds often not before used.[59] To adopt such broad language will only invite significantly more claims based far afield of what is extraordinary and compelling.

Generally, Congress does not give administrative agencies authority to create rules with retroactive effect.[60] Similarly, much jurisprudence in this area does not favor retroactivity.[61] The ordinary practice in federal sentencing is to apply new sentencing penalties to defendants who have not yet been sentenced and withhold the changes from defendants already sentenced.[62] Such a policy is even more clear when Congress explicitly makes a change in penalty not retroactive. Yet, this proposed language suggests that a judge can engage in such a practice. Clearly *Mistretta* does not stand for the idea that an agency can receive delegated powers from Congress to use that authority to do the opposite of what Congress states in legislation to do. Such an action would fall outside of *Mistretta*'s guidelines and much closer to Justice Scalia's concerns outlined in his dissent that the Commission is engaged in making law – a power reserved for Congress.[63]

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[58] 28 U.S.C. § 994(t).
[59] *E.g.,* U.S. Sentencing Comm'n, Compassionate Release the Impact of the First Step Act and COVID-19 Pandemic (March 2022), at 16 ("The number of offenders granted compassionate release substantially increased compared to previous years, as a direct result of the COVID-19 pandemic and aided by the First Step Act's changes to Section 3582(c)(1)(A)); Id. at 31.
[60] *See* Patterson v. McLean Credit Union, 784 F.Supp. 268, 274 (M.D.N.C. 1992).
[61] *See*, *e.g.*, Criger v. Becton, 902 F.2d 1348 (8th Cir. 1990).
[62] *See* Dorsey v. United States, 567 U.S. 260, 280 (2012).
[63] Mistretta, 488 U.S. at 422 (Scalia, J. dissenting); Id. at 427 (describing the Commission as a junior varsity Congress).

When Congress explicitly states a change in the law is not retroactive, it is a violation of the separation of powers to allow a court to apply that law retroactively. This proposal risks just that, allowing an end-run around Congress.

> These distinctions matter, and they are ones reserved for Congress to make. [Doing otherwise] would unwind and disregard Congress's clear direction that an amendment apply prospectively…to conclude otherwise would allow a federal prisoner to invoke a more general § 3582(c) to upend the clear and precise limitation Congress imposed on the effective date of the Fair Sentencing Act's amendment to § 924(c).[64]

It would "usurp these quintessentially legislative judgements if [courts] used compassionate release as a vehicle for applying the amendment retroactively, to previously sentenced defendants who would not otherwise qualify under compassionate release."[65]

Additionally, changes in the law are not "extraordinary and compelling" as required by the language of the statute. "Extraordinary" has been understood as "most unusual; far from common; and having little or no precedent."[66] Many courts have noted that "there is nothing extraordinary about new statutes or case law; these are the ordinary course of business of the legal system and their consequences should be addressed by direct appeal or review under 28 U.S.C. § 2255."[67] A court imposing a sentence that was both permissible and statutorily required at the time of trial "is neither an extraordinary or compelling reason to now decrease a sentence."[68]

7. Proposed § 1B1.13(b)(6)

The VAG opposes this language as too vague and at risk of violating the separation of powers doctrine. Congress requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific

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[64] Thacker, 4 F.4th at 573 (describing the attempt to allow extraordinary and compelling release for an explicitly retroactive amendment as an "end-run around Congress's decision in the Fair Sentencing Act to give only prospective effect to its amendment of § 924(c)'s sentencing scheme").
[65] Jenkins, 50 F.4th at 1199; *see also* McCall, 56 F.4th at 1054 (citing United States v. McKinnie, 24 F.4th 583, 586 (6th Cir. 2022)).
[66] Jenkins, 50 F.4th at 1197 (citing United States v. Hunter, 12 F.4th 555, 562 (6th Cir. 2021) and United States v. Canalas Ramos, 19 F.4th 561, 567 (1st Cir. at 2021)).
[67] Jenkins, 50 F.4th at 1201 (citing King, 40 F.4th at 595); Thacker, 4 F.4th at 574 ("there is nothing extraordinary about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for specific violations of a statute").
[68] Jenkins, 50 F.4th at 1198 ("there is nothing remotely extraordinary about statutes applying prospectively. In fact, there is a strong presumption against statutory retroactivity which is deeply rooted in our jurisprudence and embodies a legal doctrine older than our Republic") (quoting Langraf v. USI Film Prods., 511 U.S. 244, 265 (1994)); *see also* McCall, 56 F.4th at 1056 ("we find little compelling about the duration of a lawfully imposed sentence. This is because such a sentence represents 'the exact penalt[y] that Congress prescribed and that a district court imposed for [a] particular violation[ ] of a statute'") (quoting Thacker, 4 F.4th at 547.).

examples."[69] This language not only fails to do so, but is so broad it is almost limitless in its application. creating an affront to *Mistretta*'s principles as well as the Sentencing Reform Act, the purpose of extraordinary and compelling release, and importantly, the crime victims' right to finality and truth in sentencing.

The VAG recognizes that the current language of § 1B1.13's application notes provides for the BOP to file such a motion for "an extraordinary or compelling reason other than, or in combination with the reasons described in subdivisions (A) through (C)."[70] That language provided the needed flexibility the Commission presumably sought to allow for appropriate ***BOP*** motions. However, by limiting them to the BOP they were limited to one central office uniformly applying the language, thus less threatening to concepts of finality and uniformity of sentences. To then allow such a broad catchall for use by thousands of federal prisoners, will open the floodgates and continue the wildly inconsistent outcomes of extraordinary and compelling reasons to seek relief. Given the amount of new litigation since the procedural amendment allowing defendants to file their own motions that has emerged without this extremely general catchall language, there can be no question the litigation will increase exponentially and likely continue with claims that are neither extraordinary nor compelling – but available.

All of the options proposed are extremely vague and unworkable. Option 1's "any other circumstance similar in nature" has almost no limiting principle. Option 2's term "changes in the defendant's circumstances" is even worse. It simply invites a new unofficial parole system. Option 3 has no qualifying language in it other than "extraordinary and compelling" which has been the source of litigation as to its meaning. Such a system is without a process guidelines, rules, and uniformity that at least existed in the formerly utilized parole system. The VAG strongly states these provisions are all extremely unwise and will retraumatize victims and their families with no notice or Congressional authorization to do so.

[69] 28 U.S.C. § 994(t).
[70] United States Sentencing Commission, *Guidelines Manual*, § 1B1.13, App. n.1D (2021).