

UNITED STATES SENTENCING COMMISSION
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August 7, 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Re: Rising Prison Costs: Restricting Budgets and Crime Prevention Options

Dear Chairman Leahy and Ranking Member Grassley:

The United States Sentencing Commission (Commission) commends you and the Judiciary Committee for holding a hearing on the costs of incarceration in this country. Under the Sentencing Reform Act of 1984,¹ the Commission is responsible for promulgating sentencing guidelines that reflect the seriousness of the offense, deter criminal conduct, protect the public from further crimes by the defendant, and provide the defendant with needed educational training, medical care, or other correctional treatment.² Furthermore, in promulgating sentencing guidelines, the Commission is required to take into account the capacity of the penal, correctional, and other facilities and services available.³ Accordingly, the Commission understands the importance of the issues raised in this hearing.

The Commission's October 2011 report to Congress on mandatory minimum penalties documented the tripling of the federal prison population from 71,608 inmates on December 31, 1991 to 208,188 on December 31, 2009, which resulted in a corresponding dramatic increase in the federal prison appropriations from \$1.36 billion for fiscal year 1991 to \$6.09 billion for fiscal year 2010.⁴ At a Commission hearing in February 2012, Bureau of Prisons (BOP) director

¹ Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

² 28 U.S.C. § 991(b)(1); 18 U.S.C. 3553(a)(2).

³ 28 U.S.C. § 994(g).

⁴ USSC, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011) ("Mandatory Minimum Report"), at 76, 83.

Charles Samuels informed the Commission that federal prisons are 38 percent over rated capacity, and the rate of overcrowding is 53 percent in high security facilities.⁵ The BOP releases about 61,000 inmates annually, but it takes in about 67,000 inmates every year.⁶

The Commission's mandatory minimum report discussed some of the factors that have contributed to the increased number of inmates in the custody of BOP, perhaps the most significant of which are changes in the size and composition of the federal criminal docket. The total number of federal cases, like the prison population, has also almost tripled from 29,011 in fiscal year 1990 to 83,946 in fiscal year 2010.⁷ Furthermore, immigration offenses – which are generally ineligible for sentences of alternatives to incarceration – now constitute the largest percentage of the federal criminal docket, 34.4 percent in fiscal year 2010, compared to only 7.0 percent in fiscal year 1991.⁸ And the number of federal offenders convicted of violating a statute carrying a mandatory minimum penalty has increased from 6,685 cases in fiscal year 1990 to 19,896 in fiscal year 2010.⁹

In the report, the Commission makes several recommendations that may assist Congress in focusing increasingly strained resources on the offenders who commit the most serious offenses. Among them, the Commission recommends that Congress request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending criminal penalties.¹⁰

The Commission also recommends that Congress study and consider a number of statutory changes. The Commission recommends that Congress consider whether to marginally expand the statutory “safety valve” provision at 18 U.S.C. § 3553(f) for certain low-level, non-violent drug trafficking offenders to include such offenders who receive two, or perhaps three, criminal history points under the guidelines, as well as consider whether similar provisions may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.¹¹ Although further study would be needed before considering any specific proposals (for example, study of the type of prior offenses committed by offenders who receive two and three criminal history points), the Commission's review of available data for fiscal year 2010 indicates that 1,127 offenders would have been eligible for the

⁵ Testimony of Charles Samuels, Director, Bureau of Prisons, at the USSC Public Hearing on Federal Sentencing Options after Booker (Feb. 16, 2012).

⁶ *Id.*

⁷ Mandatory Minimum Report at 66.

⁸ *Id.* at 68.

⁹ *Id.* at 66.

¹⁰ *Id.* at 348-49.

¹¹ *Id.* at 368.

safety valve if it had included non-violent drug offenders with up to three criminal history points.¹²

In addition, the Commission recommends that Congress reassess the severity and scope of the recidivist provisions at 21 U.S.C. §§ 841 and 960. The mandatory minimum penalties provided in these provisions are doubled (from five to ten years of imprisonment, and from ten to 20 years of imprisonment) if the offender has a prior conviction for a “felony drug offense.” An offender with two or more prior drug felonies is subject to a mandatory minimum term of life imprisonment. These penalty increases are sometimes viewed in individual cases as excessively severe, far exceed the more graduated, proportional increases provided by the guidelines for such prior conduct, and are inconsistently applied.¹³

With respect to firearms offenses, the Commission recommends that Congress consider amending 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, and consider amending the penalties for such offenses to lesser terms. In addition, Congress should eliminate the “stacking” requirement for 18 U.S.C. § 924(c) offenses to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other.¹⁴ Unlike other statutes and sentencing enhancements that apply based on an offender’s prior convictions, section 924(c) requires the “stacking” of its mandatory minimum penalties based on multiple offenses charged in the same indictment. Thus, an offender convicted of an underlying offense and two counts of an offense under section 924(c) and will receive consecutive mandatory minimum penalties of at least 5 years and 25 years of imprisonment, in addition to any term of imprisonment imposed for the underlying offense and other counts of conviction. An offender charged with three counts of an offense under section 924(c) will face another consecutive 25-year mandatory minimum penalty, even if the offender has no prior record. While only 147 cases sentenced in fiscal year 2010 involved multiple violations of section 924(c), many stakeholders agree that the stacking of section 924(c) penalties produces excessive penalties in some cases and, as a result, the penalties are inconsistently applied.¹⁵

In addition to these statutory recommendations, the Commission is undertaking a number of initiatives that in the future may assist Congress in its effort to conserve increasingly strained prison resources. A Commission priority for the 2012-13 amendment cycle is to begin a comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and (C) consideration of any amendments to the Guidelines Manual that may be

¹² *Id.* at 355-56.

¹³ *Id.* at 356.

¹⁴ *Id.* at 368.

¹⁵ *Id.* at 359-62.

appropriate in light of the information obtained from such study.¹⁶ The Commission also hopes to begin a new effort in collecting supervised release and modification data. Recidivism statistics can assist Congress's ongoing assessment of the federal criminal justice system to perhaps improve the allocation of scarce resources.

The Commission again commends you and your committee for holding this hearing and looks forward to working with Congress and other stakeholders on this important topic.

Sincerely,

A handwritten signature in cursive script that reads "Patti B Saris". The signature is written in black ink and is positioned above the printed name and title.

Patti B. Saris
Chair

¹⁶ The Commission recently published a report on recidivism, available at www.ussc.gov, that found that crack cocaine offenders who benefitted from the retroactive application of the Commission's 2007 crack cocaine guidelines amendment were no more likely to recidivate than similarly situated offender who served their full original sentence.