

ARTICLES

A GENERATIONAL SHIFT FOR FEDERAL DRUG SENTENCES*

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It has been a generation since the laws governing federal drug sentences were put into place. Since the 1980s, our society, our attitudes, and our criminal justice system have evolved. The Supreme Court case law, the statutes and United States Sentencing Guidelines (“Guidelines”), and the realities on the ground have changed significantly. With the benefit of experience and new thought, many are considering whether a change—a generational shift—in our approach to federal drug sentences is appropriate.

I have had the privilege of serving as a federal district court judge for twenty years now and over that time have gained a greater understanding of the federal criminal justice system. The past three years serving as chair of the United States Sentencing Commission have provided me with an opportunity to understand better the impact of the sentencing laws in the federal system. I have appreciated being part of this discussion as chair of the Commission at a time when we as a society have returned to the debate on sentencing policies from a very different perspective than we had a generation ago.

This article focuses on policies regarding drug offenders and drug penalties as one means to effect change in the federal prison populations and costs. Drug offenders make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the federal Bureau of Prisons,¹ so they are in many ways the key to the size and nature of the federal prison population. This article has four parts: Part I explores the history of the current mandatory

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1. U.S. SENTENCING COMM’N, ANALYSIS OF DRUG TRAFFICKING OFFENDERS AND GUIDELINES tbl.1 (2014), *available at* <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140109/Data-Presentation.pdf>; *see also* E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 242467, PRISONERS IN 2012—ADVANCE COUNTS, at 2 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/p12ac.pdf> (finding that the total Bureau of Prisons population has increased).

minimum drug penalties, the Sentencing Commission, and the federal drug sentencing guidelines; Part II examines criminal justice system shifts over the past thirty years; Part III identifies what changes can be made by Congress and elsewhere to address the burgeoning federal prison population; and Part IV explains the Commission's significant amendments in 2014 to reduce drug guideline sentences.

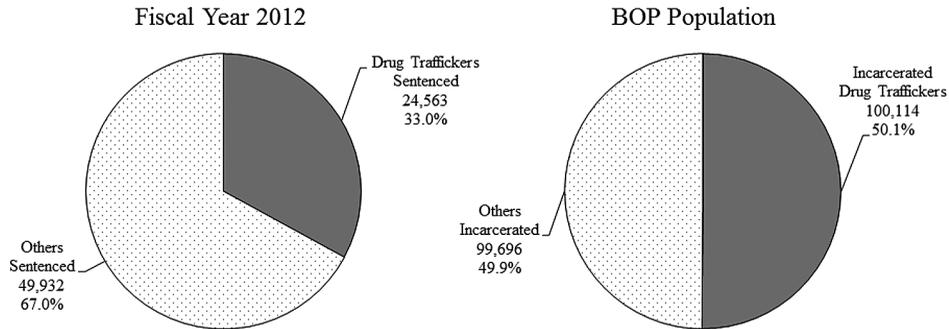


Figure 1. Proportion of drug trafficking offenders sentenced in a single year and drug traffickers incarcerated in Bureau of Prisons facilities. *Only cases with complete guideline application information were included in this analysis. Drug Trafficking offenders include offenders sentenced under U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), § 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), § 2D1.8 (Rent/Manage Drug Establishment), § 2D1.10 (Endangering Human Life) or § 2D1.14 (Narco-Terrorism). Data retrieved from U.S. SENTENCING COMM'N, 2012 DATAFILE USSCFY12 (2012), available at <http://www.ussc.gov/research-and-publications/commission-datafiles>; Statistics, FED. BUREAU OF PRISONS, <http://www.bop.gov/about/statistics/> (last visited Nov. 18, 2013).*

I. HISTORY

The United States Sentencing Commission was created as an independent bipartisan Commission within the judiciary thirty years ago to eliminate unwarranted disparities² in federal sentencing.³ Previously, judges had almost unlimited discretion to sentence defendants as they saw fit.⁴ That meant that two similarly situated defendants who had committed the same crime might receive very different sentences depending on what district they were in or what judge they

2. Unwarranted sentencing disparity generally refers to a situation where similarly situated offenders received different sentences. See 18 U.S.C. § 3553(a)(6) (2012) (referring to “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

3. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scatter sections of 18 and 28 U.S.C.).

4. See U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 12 (2012) (discussing the discretion of judges).

were before.⁵ The Sentencing Commission was tasked with developing proportionate sentencing guidelines assigning sentencing ranges based on an offender's conduct and criminal history.⁶ Thirty years later, the Commission continues to amend the Guidelines as new laws are passed, as circumstances change, and as we learn more about what sentences work best and are most appropriate.

A. *Drug Sentences in Statutes and the Guidelines*

The laws and Guidelines governing federal drug sentencing were put into place in the late 1980s and early 1990s. We have now had a generation to study the effects of these laws and policies. In the 1980s, rates of violent crime in America, particularly in cities, were high, and the public saw increasing drug use and the drug trade as major contributors to the violence. High profile tragedies, most notably the death from a cocaine overdose of Len Bias, a University of Maryland basketball star and the first draft pick of the Boston Celtics, convinced many on both sides of the aisle in Congress that America faced a drug crisis.⁷ There was a sense that our communities were veering out of control, and new approaches were needed. Congress passed, quickly and with overwhelming bipartisan support, the Anti-Drug Abuse Act of 1986,⁸ which imposed new, harsh mandatory minimum penalties for drug trafficking—essentially the statutory penalty scheme we still have today.⁹

Floor statements delivered by members in support of the 1986 Act and a committee report on a predecessor bill suggest that Congress intended to create a two-tiered penalty structure for discrete categories of drug traffickers.¹⁰ Specifically, Congress intended to link the five-year mandatory minimum penalties to

5. See H.R. REP. NO. 98-1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

6. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2014) (explaining Congress's goals of honesty, uniformity, and proportionality); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING AND POLICY STATEMENTS 13 (1987) (describing the goal of proportionality).

7. See, e.g., 132 CONG. REC. 26,436 (1986) (statement of Sen. Hawkins) (“Drugs pose a clear and present danger to America's national security. If for no other reason we should be addressing this on an emergency basis.”).

8. H.R. 5484, 99th Cong. (1986) (enacted), which became the Anti-Drug Abuse Act of 1986, was widely popular. It had 301 co-sponsors in the House of Representatives across both parties and passed the Senate on a voice vote. For more information on the history of drug sentencing policies, see William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 316 (1993). Congress held no committee hearings and produced no reports related to the 1986 Act (although there were seventeen related reports on various issues). U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 5–6 (2002) [hereinafter COCAINE AND FEDERAL SENTENCING POLICY].

9. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -5 (1986) (amending 28 U.S.C. § 841(b)(1)).

10. See, e.g., H.R. REP. NO. 99-845, pt. 1, at 12 (1986) (“The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.”); 132 CONG. REC. 26,447 (1986) (statement of Sen. Chiles referring to the serious and major offenders with regard to crack cocaine quantities) (“Those who possess 5 or more grams of cocaine freebase will be treated as serious offenders. Those apprehended with 50 or more grams of cocaine freebase will be treated as major offenders.”).

what some called “serious” traffickers and the ten-year mandatory minimum penalties to “major” traffickers. Drug quantity would serve as a proxy for identifying the type of trafficker.¹¹ There was a sense that efforts toward rehabilitation of offenders had failed and that harsh punishments were needed.¹²

At the same time, the Sentencing Commission, pursuant to the Sentencing Reform Act of 1984 (“SRA”), was putting together the initial sentencing guidelines.¹³ The SRA responded to an emerging consensus that the pre-Guidelines federal sentencing system resulted in such “glaring disparities” that it was in need of major reform.¹⁴ Prior to the SRA, judges possessed almost unlimited and unguided authority to fashion an appropriate sentence.¹⁵ Criminal statutes set broad ranges of minimum and maximum punishments. As a result, each judge was left to decide “the various goals of sentencing, the relevant aggravating and mitigating circumstances, and the way in which those factors would be combined in determining a specific sentence.”¹⁶ Neither party had any meaningful right of appellate review because sentences were limited only by statutory minimums and maximums.¹⁷

Studies at the time revealed that judges at different ends of the spectrum held widely divergent views on the purposes of sentencing, with some judges emphasizing rehabilitation and others emphasizing “just deserts.”¹⁸ Average sentences varied across the nation for many federal offenses, sometimes by a number of years.¹⁹ Sentencing prior to the SRA also lacked transparency and certainty. No statute required judges to explain the time defendants would actually serve in

11. See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 8, at 6 (discussing the legislative history of congressional intent to punish “serious” and “major” traffickers with five- and ten-year mandatory minimum penalties). The Commission’s 2002 Crack Cocaine Report cites extensively to the Congressional Record and floor statements. Specifically of note was the statement of Senator Robert Byrd who spoke about “kingpins” and “middle-level dealers.” *Id.* at 6–7 (quoting 132 CONG. REC. 27, 193–94 (1986)).

12. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (1991) (discussing a shift from away from a rehabilitative model toward controlling crime using “more certain, less disparate, and more appropriately punitive” sentences).

13. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scatter sections of 18 and 28 U.S.C.).

14. See S. REP. NO. 97-307, at 956 (1981) (“[G]laring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence.”); H.R. REP. NO. 98-1017, at 34 (1984) (“The absence of Congressional guidance to the judiciary has all but guaranteed that . . . similarly situated offenders . . . will receive different sentences.”).

15. See U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 2 (2006) (“Because each judge was ‘left to apply his own notions of the purposes of sentencing,’ the federal sentencing system exhibited ‘an unjustifiably wide range of sentences to offenders convicted of similar crimes.’” (quoting S. REP. NO. 97-307, at 5 (1981))).

16. *Id.* (internal quotation marks and citation omitted).

17. S. REP. NO. 98-225, at 38–40 (1983).

18. *Id.* at 41 n.18 (citing INSLAW/YANKOLOVICH, SKELLY & WHITE, INC., FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS III-4 (1981)).

19. *Id.* at 41. A study of district court judges in the Second Circuit given identical files based on actual cases and asked how they would sentence the defendants revealed “astounding” variations in the sentences imposed. *Id.* at 41. The sentences imposed on the same bank robber ranged from five to eighteen years in prison. Sentences in a

prison.²⁰ Instead, after the defendant began serving the sentence, the United States Parole Commission decided when the defendant would be released based largely on its judgment about when an offender's rehabilitation was complete.²¹

B. Drug Mandatory Minimums and the Guidelines

In the SRA, Congress charged the Commission with promulgating guidelines that are "consistent with all pertinent provisions" of federal law²² and with providing sentencing ranges that are "consistent with all pertinent provisions of title 18, United States Code."²³ To that end, the original Commission incorporated mandatory minimum penalties into the Guidelines at their inception.²⁴

The Commission has adjusted its approach to setting guidelines and to incorporating mandatory minimum penalties over time, with the benefit of the Commission's "continuing research, experience, and analysis."²⁵ Historically, the Commission established guideline ranges slightly above mandatory minimum penalties by setting a base offense level for Criminal History Category I offenders²⁶ that

case of filing a false tax return ranged from three *months* in prison, plus a \$5,000 fine, to three *years* in prison plus a \$5,000 fine. *Id.* at 42–43.

20. *See id.* at 39 (finding that no federal laws meet the goal of assuring that the offender is certain about the sentence and the reasons for it).

21. *Id.* at 38. The release of offenders based on inconsistent ideas among parole hearing officers regarding the potential for rehabilitation exacerbated the lack of uniformity in sentencing. *See* U.S. SENTENCING COMM'N, COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM 9 (1991) [hereinafter COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM] (citing *United States v. Grayson*, 438 U.S. 41, 46 (1978)).

22. 28 U.S.C. § 994(a) (2012).

23. 28 U.S.C. § 994(b)(1) (2012).

24. Incorporating mandatory minimum penalties into the guidelines posed a "substantial challenge" to the drafting of initial sentencing guidelines:

The drafting of guidelines for offenses having a mandatory minimum sentence requires a determination as to the intended "heartland" covered by the mandatory minimum statute. . . . If the "heartland" . . . is viewed as applying to the more culpable defendants, and the guidelines are drafted in accord with this view, the question arises as to how the guidelines should address less culpable defendants. If lower guidelines are drafted to cover defendants with lesser roles, guidelines technically will be incompatible with the mandatory minimum sentences that literally apply to such conduct If, on the other hand, the guidelines are drafted so that the guideline range associated with the mandatory minimum sentence is set for the least culpable first offender who could be prosecuted under the statute, the concern for proportionality can only be met by substantially escalating the penalties for more culpable defendants

COMMISSION REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM, *supra* note 21, at 29.

25. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2014) ("The Commission . . . views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress."); *id.* § 1A2 ("[The Commission's] mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.").

26. Category I is the lowest Criminal History Category; Category VI is the highest. *Id.* § 4A1.1, § 5A (Sentencing Table).

corresponds to the first guideline range on the sentencing table with a minimum guideline range in excess of the mandatory minimum. Therefore, the base offense level, before any enhancements, adjustments, or consideration of criminal history, produces a guideline range that is slightly above the applicable mandatory minimum penalty. The Commission originally set the base offense levels at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities.²⁷

The drug guidelines incorporated the statutory mandatory minimum penalties for drug offenses initially in exactly this way. The Drug Quantity Table for drug offenses at § 2D1.1 continued to be structured this way until November 1, 2014.²⁸ The November 2014 changes will be discussed *infra*.

The statutes applicable to drug trafficking offenses carry mandatory minimum penalties, usually five or ten years in length, based on the type and quantity of drugs involved in the offense. Similarly, the Drug Quantity Table at § 2D1.1(c) of the Guidelines establishes base offense levels for drug trafficking offenders using the quantity and type of drugs involved in the offense.²⁹ The Commission developed the initial Drug Quantity Table to ensure that the quantities triggering a mandatory minimum penalty carry a base offense level equal to the first range on the sentencing table that exceeds the mandatory minimum (i.e., levels 26 and 32, respectively, for the commonly applied five- and ten-year mandatory minimums).

The Guidelines range for more serious drug offenders can be increased based on a variety of factors besides drug quantity, including possession of a weapon, use of violence, an aggravating role in the offense, and the offender's criminal history. Factors like acceptance of responsibility and a mitigating role in the offense (for example, for mules and couriers) can reduce an offender's guideline range. Cooperation with the government, or meeting certain "safety valve"³⁰ requirements as a low-level nonviolent offender can now lead to a sentence below the mandatory minimum penalty for some offenders.

C. Continued Importance of Commission Post-Booker

In 2005, the Supreme Court's two-part decision in *United States v. Booker* began yet another era of federal sentencing by rendering the Guidelines "effectively advisory."³¹ Nonetheless, the Commission and the Guidelines continue to be "the

27. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 148 (1995); see 28 U.S.C. § 994(n) (2012).

28. See Sentencing Table, U.S. SENTENCING GUIDELINES MANUAL § 5A (2013).

29. *Id.* § 2D1.1(c) (2013).

30. The Commission's safety valve guideline is discussed *infra* Part IV. See also 18 U.S.C. § 3553(e) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2014).

31. 543 U.S. 220, 245 (2005).

lodestone of sentencing,” as the Supreme Court wrote last year.³² While there has been a significant increase in the number of offenders sentenced below the guideline range through both government-sponsored and non-government-sponsored departures and variances, the Guidelines continue to serve as an anchor with a significant impact on the sentences given.³³ The Commission continues to promulgate sentencing guidelines that courts must properly determine and consider in all federal criminal cases.³⁴ In 2013, and consistent with its Congressional mandate to ensure that the Guidelines are “formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons,”³⁵ the Commission focused on addressing the significant overcapacity and costs of the Federal Bureau of Prisons.³⁶ Drug offenders serve long sentences and represent a majority of the prisoners serving in the federal Bureau of Prisons.³⁷ The Commission determined that the way the Guidelines incorporate the mandatory minimum penalties for drug offenders offered an opportunity for tangible reform. As such, the Commission’s careful attention to reducing prison populations has focused on drug penalties as an area where the Commission can make meaningful contributions, as discussed more fully below.

II. CHANGES IN CRIMINAL JUSTICE OVER THE PAST GENERATION

A. *Crime Rates and Incarceration*

Much has changed in the generation since the current federal statutory and guideline sentencing scheme was put into place. As a starting point, crime rates have fallen dramatically. Violent crime rates in the last few years have been at their lowest point.³⁸ In many major cities, homicide rates are a small fraction of what

32. *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013).

33. U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 5–6 (2012). Even before *Booker*, the guidelines allowed for departures from the applicable guideline range (downward and upward) under certain conditions. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2014) (permitting a downward departure based on a defendant’s “diminished capacity”). Such guideline departures could not go below the statutory minimum or above the statutory maximum. *See, e.g.*, *United States v. Phillips*, 382 F.3d 489, 498–99 (5th Cir. 2004) (limiting district court judge’s discretion to downward depart from a minimum to circumstances explicitly stated in statute).

34. *See generally* 18 U.S.C. § 3553(a)(4) (2012); 28 U.S.C. § 994 (2012); *Peugh*, 133 S. Ct. at 2087 (“District courts must begin their sentencing analysis with the Guidelines . . . and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court’s discretion and the appellate review process . . .”).

35. 28 U.S.C. § 994(g) (2012).

36. *See* Notice of Final Priorities, 78 Fed. Reg. 51,820 (Aug. 21, 2013).

37. CARSON & GOLINELLI, *supra* note 1, at 10; U.S. SENTENCING COMM’N, ANALYSIS OF DRUG TRAFFICKING OFFENDERS AND GUIDELINES 4 tbl.2 (2014), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140109/Data-Presentation.pdf>.

38. FBI, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES: CRIME IN THE UNITED STATES, 2012 (2013), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violentcrimemain.pdf>.

they were in the early 1990s.³⁹

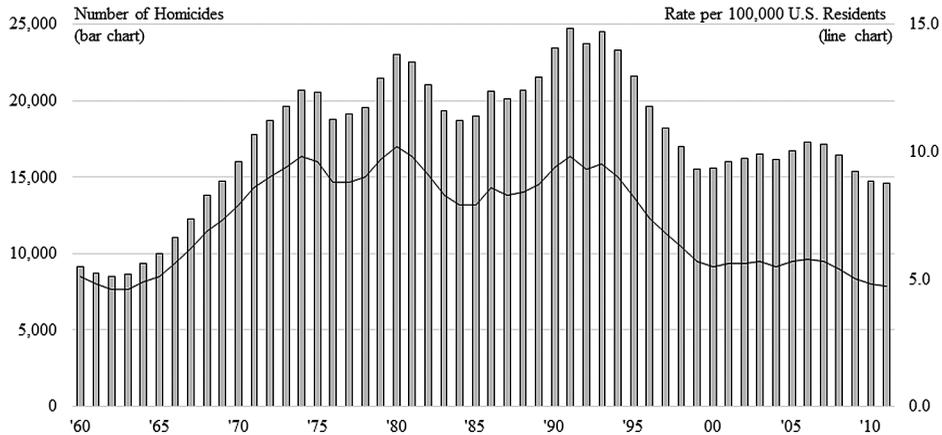


Figure 2. Number and rate of homicides in the United States, 1960 through 2011. Includes murder and nonnegligent manslaughter only. Information from ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236018, *HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008*, at 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

There is no consensus as to why this dramatic reduction in crime rates has occurred. Some have attributed this fall in crime rates to tough state and federal sentences for drug crime and violent crime put into place in the 1980s and 1990s and rigorous enforcement of those laws. The National District Attorneys Association, in testimony before the Sentencing Commission in March 2014, emphasized the progress in reducing crime in recent years and recommended against changing drug sentences.⁴⁰ Some criminologists recognize that more enforcement and longer sentences may have contributed to reductions in crime, but see a variety of other factors as having played at least as large a role—economic and demographic changes, better policing methods, and changes in culture and attitudes, among other factors.⁴¹

39. ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236018, *HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008*, at 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

40. *Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines: Hearing Before the U.S. Sentencing Comm'n* 134–40 (2014) [hereinafter *Hearing*], available at <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/transcript.pdf> (statement of Raymond F. Morrogh, Dir. at Large, National District Attorneys Association).

41. See, e.g., NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 4–5 (2014) (concluding that any reduction in crime caused by increased incarceration was likely small and that lengthy sentences are an inefficient approach to preventing crime); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2 ANN. REV. L. SOC. SCI. 125, 126 (2006) (examining a wide variety

While crime was decreasing, prison populations and costs were skyrocketing. The federal prison population is more than three times what it was in 1989.⁴² Federal prisons are roughly thirty-two percent over capacity,⁴³ and federal prison spending exceeds six billion dollars a year, making up more than a quarter of the budget of the entire Department of Justice.⁴⁴ The Department of Justice budget includes not just federal prosecutors, but also the Federal Bureau of Investigation, the Drug Enforcement Administration, and a significant number of programs to help victims of crime and support state and local law enforcement.⁴⁵

This increasing utilization of resources for federal prison populations has occurred during a mounting budget crisis.⁴⁶ As the Department of Justice's budget has flattened and even decreased, a consistent increase in prison costs has meant less money for federal law enforcement and prosecutors, for services to victims, for aid to state and local law enforcement, for crime prevention programs, and for many other priorities.⁴⁷ Just recently, the Federal Bureau of Prisons has seen a decline in its population for the first time in recent history, likely due in part to the fact that the Department of Justice, facing budget constraints, is prosecuting fewer cases.⁴⁸

of explanations for the reduction in crime); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 Soc. SCI. Q. 531, 531 (2010) (finding cities with the largest increases in immigration between 1990 and 2000 experienced the largest decreases in homicide and robbery during the same time period); James Q. Wilson, *Hard Times, Fewer Crimes*, WALL STREET J. (May 28, 2011, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052702304066504576345553135009870> (attributing a reduction in crime to a variety of reasons, including increased incarceration, improved policing methods, increased vigilance by potential victims, medical reasons, and reduction in recreational drug use, all of which translate to a cultural shift in the United States).

42. In 1989, the federal prison population was around 58,000. *Historical Information*, FED. BUREAU OF PRISONS, <http://www.bop.gov/about/history/> (last visited Sept. 1, 2014). On September 18, 2014, it was over 214,000. *Statistics*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Sept. 18, 2014).

43. *Hearing*, *supra* note 40, at 47 (statement of Charles Samuels, Dir., Fed. Bureau of Prisons).

44. See U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, FY 2014 BUDGET REQUEST AT A GLANCE 1 (2013), available at <http://www.justice.gov/jmd/2014summary/pdf/bop.pdf> (showing a fiscal year 2014 budget request of \$6,936 million); U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, FY 2013 BUDGET REQUEST AT A GLANCE 1 (2012), available at <http://www.justice.gov/jmd/2013summary/pdf/fy13-bop-bud-summary.pdf> (showing a fiscal year 2013 budget request of \$6,919 million); see also Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti B. Saris, U.S. Sentencing Comm'n 7 (July 11, 2013), available at http://www.uscc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf (explaining that the trend in increased prison and detention spending has been accompanied by decreased spending on other criminal justice programs).

45. See U.S. DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE OVERVIEW (2013), available at <http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf> (detailing the various Department of Justice components and their responsibilities and programs).

46. See Letter from Jonathan Wroblewski, *supra* note 44, at 16 ("The federal prison and detention budget has been increasing steadily, while other critical public safety spending has been shortchanged.").

47. *Id.* at 16 ("This pattern of funneling more resources into prisons and away from other crucial justice investments, such as investigators and prosecutors and support for victims and reentry programming, has persistently impacted the allocation of funding among the Department's various resources.").

48. *Hearing*, *supra* note 40, at 75 (statement of Charles Samuels, Dir., Fed. Bureau of Prisons).

The rise in state prison populations was even more rapid.⁴⁹ In the states, prisons are often one of the largest budget items.⁵⁰ That means that, in times of budget austerity, both as states have received less federal support and as their prisons continued to consume ever-increasing resources, they have less money for education, roads, and other services. Spurred on by these budget constraints and also by new research and new ideas, many states have begun to try new approaches, including lowering penalties for drug crimes and other street offenses. Rehabilitation, dismissed as a failure in the 1980s, has returned as a major emphasis.⁵¹

Finally, mass incarceration of drug offenders has had a particularly severe impact on some communities in the past thirty years. Inner-city communities and racial and ethnic minorities have borne the brunt of our emphasis on incarceration. Sentencing Commission data shows that Black and Hispanic offenders make up a large majority of federal drug offenders, more than two thirds of offenders in federal prison, and about eighty percent of those drug offenders subject to a mandatory minimum penalty at sentencing.⁵² In some communities, large segments of a generation of people have spent a significant amount of time in prison. While estimates vary, it appears that Black and Hispanic individuals are disproportionately under correctional control nationwide as compared to population demo-

49. State prison admissions for new offenses increased from 137,315 in 1978 to a high of 689,536 in 2006. CARSON & GOLINELLI, *supra* note 1, at 3 tbl.1. The number of admissions for new offenses began to decrease in 2007, in part due to efforts to reduce state prison population. *Id.* at 1, 4–5. The number of new admissions was down to 553,843 in 2012. *Id.* at 3.

50. Since 2003, states have spent between 2.5% and 2.9% of their budgets on corrections costs. TRACY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239672, STATE CORRECTIONS EXPENDITURES, FY 1982–2010, at 1 (2014), available at <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>. This is much less than spending on schools (29% to 33%), or highways (5.7% to 8.6%), but still a significant expense at an average of \$48.5 billion a year and larger than most other budget items. *Id.*

51. A return to a focus on rehabilitation can be seen in the growth of drug courts in the United States. See Erik Eckholm, *Courts Give Addicts a Chance to Straighten Out*, N.Y. TIMES (Oct. 14, 2008), <http://www.nytimes.com/2008/10/15/us/15drugs.html> (noting the spread of drug courts to every state in the U.S.) for academic writing on rehabilitation, see, e.g., Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 305–07 (2013) (suggesting policy changes to make rehabilitation more popular); Mary Fan, *Street Diversion & Decarceration*, 50 AM. CRIM. L. REV. 165, 170–83 (2013) (discussing a shift toward rehabilitative policing). Research demonstrating American attitudes toward rehabilitation are generally in line with countries relying on a rehabilitative focus in criminal justice. See Matthew B. Kugler et al., *Differences in Punitiveness Across Three Cultures: A Test of American Exceptionalism in Justice Attitudes*, 103 J. CRIM. L. & CRIMINOLOGY 1071, 1097–98 (2013).

52. See U.S. SENTENCING COMM'N, FY 2013 SOURCEBOOK tbl.34 (2013), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table34.pdf> (finding that of 22,846 drug offenders sentenced in fiscal year 2013, 22.4% were White, 26.5% were Black, and 47.9% were Hispanic); U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 78, 154 tbl.8-1 (2011) [hereinafter MANDATORY MINIMUM REPORT], available at <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system> (reporting that in 2010, 35.2% of federal prisoners were Black, and 33.5% were Hispanic; 40.4% of federal drug offenders subject to a mandatory minimum penalty at sentencing were Black, and 39.6% were Hispanic).

graphics.⁵³ This damages the economy and morale of communities and families as well as the respect of some for the criminal justice system.

B. *Lessons from Research*

So what have we learned about drug sentencing policy in the generation since these federal sentences and the Guidelines were put into place? At the state level, we have seen that many states have been able to reduce their prison populations and save money without seeing an increase in crime rates. Michigan, New York, and Rhode Island all significantly decreased drug sentences, with Michigan and Rhode Island rolling back mandatory minimum penalties for drug offenses, and all three states saw positive results.⁵⁴ South Carolina eliminated mandatory minimum penalties for drug possession and some drug trafficking offenses and increased available alternatives to incarceration for drug offenses.⁵⁵ It too has seen reductions in its prison population and a drop in crime rates.⁵⁶ Other traditionally conservative states like Texas, Georgia, and South Dakota have shifted their

53. See, e.g., PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009), available at <http://www.convictcriminology.org/pdf/pew/onein31.pdf> (reporting that Black adults are more than four times as likely as White adults, and nearly two-and-one-half times as likely as Hispanic adults, to be under corrections control).

54. See generally PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 39–47 (2012), available at http://www.pewtrusts.org//media/legacy/uploadedfiles/pes_assets/2012/PewTimeServedreportpdf.pdf (discussing the effect of long prison terms on prison populations and costs). Michigan reduced its prison population by 14.5% between 2006 and 2010, and the rate of violent crime dropped 2.7% between 2009 and 2010. RAM SUBRAMANIAN & REBECCA TUBLITZ, VERA INST. OF JUSTICE, REALIGNING JUSTICE RESOURCES: A REVIEW OF POPULATION AND SPENDING SHIFTS IN PRISON & COMMUNITY CORRECTIONS 11 (2012), available at <http://www.vera.org/files/Full%20Report.pdf>. Following changes to New York's mandatory minimum drug penalties, the number of drug offenders in state custody decreased by more than 43%. See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, 2009 DRUG LAW REFORM UPDATE 2 (2013), available at <http://dcjs.ny.gov/drug-law-reform/documents/drug-law-reform-presentation-june2013.pdf> (showing a 43% reduction in the number of drug offenders in custody since 2008). At the same time, New York's trend of dropping crime continued as crime decreased by 13.9% between 2004 and 2013. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., CRIMINAL JUSTICE STATISTICS, INDEX CRIMES REPORTED TO POLICE BY REGION: 2004–2013, at 1 (2014), available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/indexcrimes/Regions.pdf>. Rhode Island decreased its prison population by 16.0% between 2006 and 2010. SUBRAMANIAN & TUBLITZ, *supra*, at 31.

55. In 2009, South Carolina studied criminal justice spending and found that since 1978, the corrections population had tripled, prison spending had increased by more than 500%, and the state would need to spend over \$300 million in new prison construction to house predicted growth. S.C. SENTENCING REFORM COMM'N, REPORT TO THE GENERAL ASSEMBLY 3, 8 (2010), available at <http://www.scstatehouse.gov/archives/citizensinterestpage/SentencingReformCommission/CombinedFinalReport020110SigPage.pdf>. In response, the General Assembly made major reforms intended to reduce corrections population growth and reduce spending. See Omnibus Crime Reduction and Sentencing Reform Act, 2010 S.C. Acts 1937. South Carolina reported over \$4 million in savings in its first year following these changes as a result. S.C. SENTENCING REFORM OVERSIGHT COMM., STATE EXPENDITURE SAVINGS REPORT 6 (2011), available at <http://www.ncsl.org/Documents/cj/SCSROreport.pdf>.

56. South Carolina reported a decrease in violent crime of 2.2% from 2010 to 2011. STATE LAW ENFORCEMENT DIV. & S.C. DEP'T PUB. SAFETY, CRIME IN SOUTH CAROLINA 2011, at 4 (2011), available at <http://www.sled.sc.gov/documents/CrimeReporting/SCCrimeBooks/2011/2011%20Crime%20in%20South%20Carolina.pdf>.

emphasis from harsh punishment of drug offenses to a greater focus on alternative approaches, without seeing an increase in crime rates.⁵⁷

This real-life experience in the states, together with new academic research, has begun to indicate that drug sentences may now be longer than needed to advance the purposes for which we have prison sentences, including public safety, justice, and deterrence. Some prominent scholars have written that lengthy periods of incarceration are unlikely to have a deterrent effect and that even the incapacitation effect—keeping dangerous people off the streets—becomes less significant as prisoners get older.⁵⁸

The Commission has been working on this issue for several years. In a large-scale study of federal mandatory minimum penalties in 2011, it concluded that many federal mandatory minimum penalties for drug offenses are too severe and apply too broadly.⁵⁹ The Commission found that when mandatory minimum penalties are perceived by many throughout the criminal justice system as excessive, disparate sentencing practices result. For certain particularly severe penalty provisions, like the procedure detailed in 21 U.S.C. § 851 that doubles the mandatory minimum if there is a prior conviction, the Commission found that in some districts, prosecutors use them regularly, while in others, prosecutors do not use them at all.⁶⁰

The Commission found that mandatory minimum penalties sweep more broadly than Congress likely intended.⁶¹ Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations.⁶² Yet the Commission found that mandatory minimum penalties currently apply in large numbers to every function in a drug organization, from couriers and mules who transport drugs often at the lowest levels of a drug organization all the way up to high-level suppliers and importers who bring large quantities of drugs

57. TONY FABELO, DIR. OF RESEARCH, COUNCIL ON STATE GOV'TS JUSTICE CTR., TEXAS JUSTICE REINVESTMENT: OUTCOMES, CHALLENGES AND POLICY OPTIONS TO CONSIDER 11–23 (2011), available at <http://csgjusticecenter.org/wp-content/uploads/2012/12/TXJRStateReport32011v2.pdf>; PEW CHARITABLE TRUSTS, PUBLIC SAFETY PERFORMANCE PROJECT, 2012 GEORGIA PUBLIC SAFETY REFORM 7–9 (2012), available at http://www.pewtrusts.org//media/legacy/uploadedfiles/pes_assets/2012/PewGeorgiaSafetyReformpdf.pdf; PEW CHARITABLE TRUSTS, PUBLIC SAFETY PERFORMANCE PROJECT: SOUTH DAKOTA'S 2013 CRIMINAL JUSTICE INITIATIVE 8 (2013), available at http://www.pewtrusts.org//media/legacy/uploadedfiles/pes_assets/2013/PSPPSD2013CriminalJusticeInitiativepdf.pdf.

58. See, e.g., Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 38 (2011) (finding that “lengthy” periods of incarceration are unlikely to serve a deterrent effect and that incapacitation effect is negated as prisoners get older).

59. MANDATORY MINIMUM REPORT, *supra* note 52, at 345.

60. *Id.* at 111–13.

61. See COCAINE AND FEDERAL SENTENCING POLICY, *supra* note 8, at 97–103.

62. See *id.* at 6; see also 132 CONG. REC. 27,193–94 (1986) (statement of Sen. Byrd (“For the kingpins . . . the minimum term is 10 years . . . [F]or the middle-level dealers . . . a minimum of 5 years.”)); 132 CONG. REC. 22,993 (1986) (statement of Rep. LaFalce (“[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.”); *supra* Part I.A (discussing legislative history of drug mandatory minimums).

into the United States.⁶³ In fact, the Commission found that twenty-three percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these were charged with offenses carrying mandatory minimum penalties, though many ultimately obtained relief from the mandatory minimum penalties.⁶⁴ The category of offenders most often subject to mandatory minimum penalties at the time of sentencing were street-level dealers—many levels down from kingpins and organizers.⁶⁵

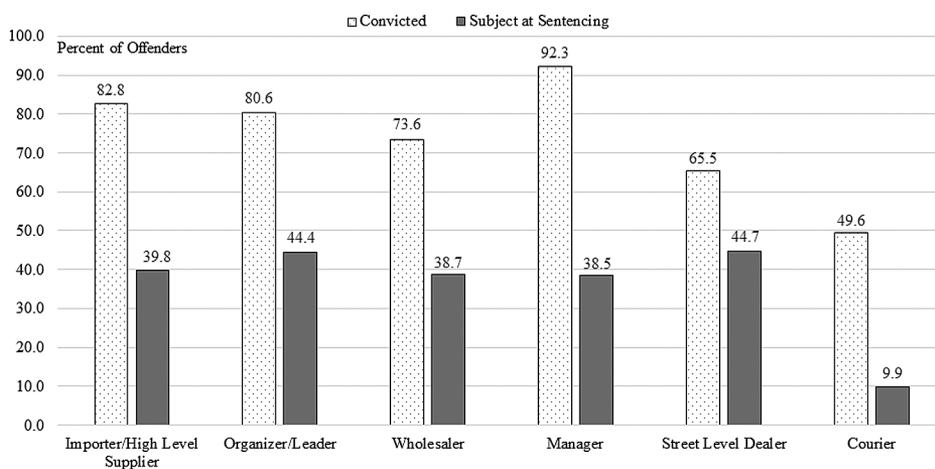


Figure 3. Drug trafficking offenders convicted of an offense carrying a mandatory minimum penalty and subject to that penalty at sentencing. *Data from U.S. SENTENCING COMM'N, 2009 FUNCTION DATAFILE (2009) available at <http://www.ussc.gov/research-and-publications/commission-datafiles>.*

In the last several years, the Commission has been able to see and measure the real world effect of modest reductions in federal drug sentences. In 2007, the Commission reduced sentences by on average twenty-seven months, or two guideline levels, for offenders convicted of trafficking crack cocaine, three years before Congress acted to reduce the disparity in sentences between crack and

63. To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special analysis project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the Presentence Report. The Commission assigned each offender to one of twenty-one separate function categories based on his or her most serious conduct as described in the Presentence Report and not rejected by the court on the Statement of Reasons form. See MANDATORY MINIMUM REPORT, *supra* note 52, at 165–66.

64. *Id.* at 167–68, fig. 8–9.

65. *Id.* at 166–40.

powder cocaine offenders.⁶⁶ The Commission compared those offenders whose sentences were reduced with a similarly situated group of offenders previously released after serving their full sentences. Over a period of five years, there was no statistically significant difference between the groups in their rates of recidivism.⁶⁷ Similarly, the Commission found that the plea rates for crack offenders remained virtually unchanged after sentences were lowered.⁶⁸ So reducing sentences for crack offenders did not make those offenders more likely to commit new crimes or less likely to cooperate with law enforcement.

C. Political and Policy Landscape

At the same time, there have been significant changes in the political landscape. In the last two-and-one-half years, budget concerns, as well as new ideas about fairness, justice, and effective sentencing policy, have led leaders from across the political spectrum and in all branches of government to rethink approaches to sentencing. For several decades, the push from Congress and from the executive branch had been toward steadily increasing federal sentences. As recently as a few years ago, when I became chair of the Commission, many in Congress were still vocally advocating for tougher sentencing.⁶⁹

Recently, though, federal stakeholders have begun to change their perspective. As mentioned, the action, first by the Commission in 2007 and then by Congress with the Fair Sentencing Act in 2010,⁷⁰ to reduce the disparity in sentences between crack and powder cocaine received bipartisan support, and the reduction does not appear to have harmed public safety.

In the past eighteen months, following on this success, several major pieces of legislation aiming to reduce sentences have received broad bipartisan support.⁷¹

66. U.S. SENTENCING GUIDELINES MANUAL app. C, amends. 706 & 711 (2014). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

67. KIM STEVEN HUNT & ANDREW PETERSON, U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 3 (2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf. The offenders released slightly earlier pursuant to retroactive application of the crack cocaine had recidivism rate of 43.3%. The comparison group of offenders who did not have their sentences reduced had a recidivism rate of 47.3%. The difference was not statistically significant. *Id.* at 3.

68. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (2014).

69. In spite of the notable recent instance of congressional action to reduce penalties in the Fair Sentencing Act (*see* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 748 (2014)), congressional directives to the Commission have very often resulted in increased base offense levels or new specific offense characteristics that increase offenders' potential sentences. *See generally* U.S. SENTENCING GUIDELINES MANUAL app. C (2014).

70. 124 Stat. at 2373.

71. In 2013, Senators Dick Durbin (D-IL), Mike Lee (R-UT), and Patrick Leahy (D-VT) introduced the bipartisan Smarter Sentencing Act of 2014. S. 1410, 113th Cong. (2013). The Smarter Sentencing Act has twenty-four cosponsors including six Republicans: Senators Rand Paul, Ted Cruz, Jeff Flake, Johnny Isakson, and Ron Johnson, in addition to Senator Mike Lee. *Id.* Similarly, Representative Raul Labrador (R-ID) introduced the

Prominent liberal Democrats like Senators Dick Durbin and Patrick Leahy and Congressman Bobby Scott have introduced and strongly supported legislation reducing sentences.⁷² But so have prominent conservative Republicans like Senators Mike Lee, Rand Paul, Jeff Flake, and Ted Cruz, and Congressmen Raul Labrador and Paul Ryan.⁷³ Two different pieces of bipartisan sentencing reform legislation have moved through the Senate Judiciary Committee this year,⁷⁴ and the House Judiciary Committee has created a bipartisan Over-Criminalization Task Force, which is considering sentencing reform among other issues.⁷⁵

Attitudes from outside advocates and thinkers have shifted over the past generation as well. At a Commission hearing in March 2014, a witness from the Texas Public Policy Foundation's Right on Crime Initiative made a strong conservative case for reducing drug sentences.⁷⁶ The Heritage Foundation has been active on this issue as well.⁷⁷ Other traditionally more liberal organizations like the American Civil Liberties Union and Families Against Mandatory Minimums have also been active.⁷⁸

companion legislation in the House. Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. (2013). The bill has thirty-three co-sponsors, including twelve Republicans. *Id.*

72. *See, e.g.*, S. 1410; Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013); Fairness in Cocaine Sentencing Act of 2013, H.R. 2372, 113th Cong. (2013); Firearm Recidivist Sentencing Act of 2013, H.R. 2405, 113th Cong. (2013).

73. *See, e.g.*, S. 1410; S. 619; H.R. 3382.

74. The Smarter Sentencing Act was reported by the Senate Judiciary Committee on January 30, 2014, with a bipartisan vote of thirteen to five. *See* S. Judiciary Comm., Results of Executive Business Meeting (Jan. 30, 2014), available at http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults_20140130.pdf. On March 6, 2014, the Senate Judiciary Committee reported the Recidivism Reduction and Public Safety Act of 2014, sponsored by Senators Sheldon Whitehouse (D-RI) and John Cornyn (R-TX), which provided for credits for qualifying prisoners who participate in recidivism reduction programs, by a bipartisan vote of fifteen to two. *See* S. Judiciary Comm., Results of Executive Business Meeting (Mar. 6, 2014), available at <http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-03-06-2014.pdf>.

75. Press Release, House Judiciary Comm., House Judiciary Committee Reauthorizes Bipartisan Over-Criminalization Task Force (Feb. 5, 2014), available at <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force> (noting the task force is intended "to assess . . . current federal criminal statutes and make recommendations for improvements").

76. *Hearing, supra* note 40, at 126–34 (testimony of Vikrant Reddy, Senior Policy Analyst, Right on Crime & Tex. Pub. Policy Inst.).

77. *See, e.g.*, Evan Bernick & Paul J. Larkin, Jr., *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, LEGAL MEMORANDUM (Heritage Found., D.C.), Feb. 10, 2014, at 7, available at <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms> (arguing that the Justice Safety Valve Act and the Smarter Sentencing Act could "ameliorate some of the extremely harsh sentences that district courts have imposed without taking a bite out of the efforts . . . to improve public safety"); *see also* Evan Bernick, *Time to Reconsider Mandatory Minimum Sentences*, DAILY SIGNAL (Jan. 31, 2014), <http://dailysignal.com/2014/01/31/time-reconsider-mandatory-minimum-sentences> ("Too many mandatory minimums for nonviolent drug offenses committed by low-level offenders do not serve the ends of justice and leave no room for mercy."); Israel Ortega, *Can We Get Some Americans Out of Jail?*, DAILY SIGNAL (Apr. 5, 2014), <http://dailysignal.com/2014/04/05/sentencing-reform-can-we-get-some-americans-out-of-jail> (supporting the "unlikely alliance . . . forming between conservatives and liberals" on this issue).

78. *See, e.g.*, Press Release, ACLU, Major Sentencing Reform Bill Moves to Senate Floor (Jan. 30, 2014), available at <http://www.aclu.org/criminal-law-reform/major-sentencing-reform-bill-moves-senate-floor> ("The

III. PROPOSED LEGISLATIVE CHANGES

So the ground seems to be ripe for a generational shift in federal sentencing policy. The question then is what kinds of changes are needed?

The Sentencing Commission has advocated for a set of legislative changes to address mandatory minimum drug penalties. Those mandatory minimum penalties are written into the law, so only Congress can change them. The Commission, which has members from across the country and the political spectrum, has unanimously endorsed a set of important legislative proposals. While commissioners approach criminal justice issues from a variety of philosophies and backgrounds, all of us are committed to addressing budget and overcrowding concerns and improving the fairness, justice, and effectiveness of drug sentences. And all of us are strongly informed by the findings of Commission researchers, detailed in part II.B above, identifying major disparities and concerns resulting from the current mandatory minimum drug laws.

The Commission, first in the 2011 Mandatory Minimum Report to Congress and then in a written statement and a letter to the Senate Judiciary Committee last year, recommended a series of changes to the drug sentencing laws. Specifically, the Commission recommended that Congress:

- Reduce the current mandatory minimum penalties for drug offenders;
- Consider expanding the “safety valve,” which allows sentences below mandatory minimum penalties for non-violent, low-level drug offenders, to offenders with slightly greater criminal histories; and
- Make the Fair Sentencing Act of 2010, which reduced the disparity in treatment of crack and powder cocaine, retroactive.⁷⁹

In February 2014, the Senate Judiciary Committee passed legislation that corresponded to all of those recommendations with bipartisan support.⁸⁰ However, that legislation has not reached the Senate floor and is unlikely to pass during this Congress.⁸¹ Passing major legislation, especially in a politically delicate area like

Smarter Sentencing Act is the most significant piece of criminal justice reform to make it to the Senate floor in several years.” (quoting Laura Murphy, Dir. ACLU’s D.C. Legislative Office)); *Senate Judiciary Committee Advances Sentencing Reform Overhaul*, FAMM (Jan. 30, 2014), <http://famm.org/senate-judiciary-committee-advances-sentencing-reform-overhaul> (“The interest is there, and the time is right—this is something that Congress could actually do this year.” (quoting Julie Stewart, President of FAMM)).

79. *Hearing on Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences Before the S. Comm. on the Judiciary*, 113th Cong. 7–12 (2013), available at <http://www.judiciary.senate.gov/imo/media/doc/091813RecordSub-Leahy.pdf> (statement of Patti B. Saris, Chair, U.S. Sentencing Comm’n). For more specific discussion of each recommendation, see MANDATORY MINIMUM REPORT, *supra* note 52, at 348–69.

80. Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (2013) (voted out of Committee and placed on the Senate Legislative Calendar under General Orders No. 320 on Mar. 11, 2014).

81. There are two reasons further action during this session of this Congress is unlikely. The first is that observers have suggested that the momentum for sentencing reform in Congress has cooled. See, e.g., Editorial, *Sentencing Reform Runs Aground: Bipartisan Push to Reform Sentencing Stalls in Congress*, N.Y. TIMES (June 21, 2014), <http://www.nytimes.com/2014/06/22/opinion/sunday/bipartisan-push-to-reform-sentencing-stalls->

sentencing reform, can be a lengthy and difficult proposition. Nonetheless, the Commission maintains that comprehensive legislative reform, led by Congress, is a necessary step toward reducing disparities and alleviating overcrowding in the nation's prisons. The Commission will continue to work with Congress when the next session begins in 2015.

IV. COMMISSION'S 2014 AMENDMENT

The Commission believes that Congress is best situated to enact major sentencing reform, but the Commission is empowered to make amendments to the Guidelines consistent with its independent Congressional directive to appropriately effectuate the purposes of the SRA. Understanding that major legislative action may take time and believing that immediate steps were necessary, the Commission recently acted on its own authority to amend the Guidelines to modestly reduce drug sentences for many offenders in a way that is consistent with the existing statutory framework but will nonetheless begin to address many of the concerns set out above. In April 2014, the Commission unanimously approved an amendment, the 2014 Drug Amendment, that revises the Guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in § 2D1.1 of the Guidelines incorporate the statutory mandatory minimum penalties for such offenses.⁸² Because Congress did not act to disapprove this amendment, these changes went into effect on November 1, 2014.⁸³ The Commission has also elected to apply the 2014 Drug Amendment retroactively, with implementation to begin November 1, 2015.⁸⁴

A. 2014 Drug Amendment

The 2014 Drug Amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties.⁸⁵ Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense

in-congress.html (“[P]rogress on both bills has stalled, and congressional leaders who were once confident about their chances this year are now looking toward 2015, at the earliest.”). The second reason is there simply is not very much time remaining in this session of Congress, and Congress is unlikely to pass major legislation in the short period of time following the November elections.

82. Sentencing Guidelines for United States Courts, 79 Fed. Reg. 25,997 (May 6, 2014).

83. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (2014).

84. See *infra* Part IV.B.

85. See 28 U.S.C. § 994(b)(1) (2012) (providing that each sentencing range must be “consistent with all pertinent provisions of title 18, United States Code”); see also 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements “consistent with all pertinent provisions of any Federal statute”).

level of 24 (51–63 months at Criminal History Category I, which includes the five-year (60 months) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97–121 months at Criminal History Category I, which includes the ten-year (120 months) statutory minimum for such offenses).⁸⁶ Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types are retained, as are previously existing minimum and maximum base offense levels for particular drug types.⁸⁷

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve the purposes of sentencing. Previously, as discussed in Part I.B, the Commission had set base offense levels at guideline ranges slightly higher than the mandatory minimum levels to leave some room to adjust downward for defendants who plead guilty or otherwise cooperate. However, changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.⁸⁸

In 1994, after the initial selection of levels 26 and 32 in the Drug Quantity Table,⁸⁹ Congress enacted the “safety valve” provision, which applies to certain non-violent drug offenders and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant “has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.”⁹⁰ The Guidelines incorporate the “safety valve” at § 5C1.2 and, furthermore, provide a two-level reduction if the defendant meets the “safety valve” criteria.⁹¹ These statutory and guideline provisions provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the “safety valve” than if they do not. In fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6% if they qualified for the “safety valve” and a plea rate of 93.9% if they did not.⁹²

86. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (2014).

87. *Id.*

88. *See supra* note 58 and accompanying text.

89. *See supra* Part I.B.

90. *See* 18 U.S.C. § 3553(f) (2012).

91. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(16) (2014).

92. *Id.* app. C, amend. 782.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the 2014 Drug Amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. The Commission's 2007 amendment reducing guideline levels for crack offenses worked in the same fashion as the 2014 Drug Amendment so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32.⁹³

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1%.⁹⁴ In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2% and 94.0%, respectively.⁹⁵ For those same fiscal years, the overall rates at which crack cocaine offenders received departures under § 5K1.1 for providing substantial assistance to the government were 27.8% in the fiscal year before the 2007 amendment took effect and 25.3% and 25.6% in the two fiscal years after the 2007 amendment took effect.⁹⁶ This recent experience indicates that this year's amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to plead guilty or otherwise cooperate with authorities.

The amendment also reflects the fact that the Guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. The Guidelines have been amended many times—often in response to congressional directives—to provide a greater emphasis on the offender's conduct and role in the offense rather than on drug quantity. The version of § 2D1.1 in the original 1987 *Guidelines Manual* contained a single specific offense characteristic: a two-level enhancement if a firearm or other dangerous weapon was possessed. Guideline § 2D1.1 presently contains fourteen enhancements and three downward adjustments.⁹⁷ These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce somewhat the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders, and the amendment permits these adjustments to differentiate among offenders more effectively.

In response to these concerns, the Commission considered the 2014 Drug Amendment an appropriate step toward alleviating the overcapacity of the federal

93. *See id.* app. C, amend. 706 (2014). In 2010, in implementing the emergency directive in section 8 of the FSA, Pub. L. 111–220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32. *See id.* app. C, amend. 748 (2014); *Id.* app. C, amend. 750 (2014).

94. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (2014) (explaining the reason for amendment).

95. *Id.*

96. *Id.*

97. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2014).

prisons. Based on an analysis of the 24,968 offenders sentenced under § 2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457—or 69.9%—of drug trafficking offenders sentenced under § 2D1.1, and their average sentence will be reduced by eleven months—or 17.7%—from sixty-two months to fifty-one months.⁹⁸ The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.⁹⁹

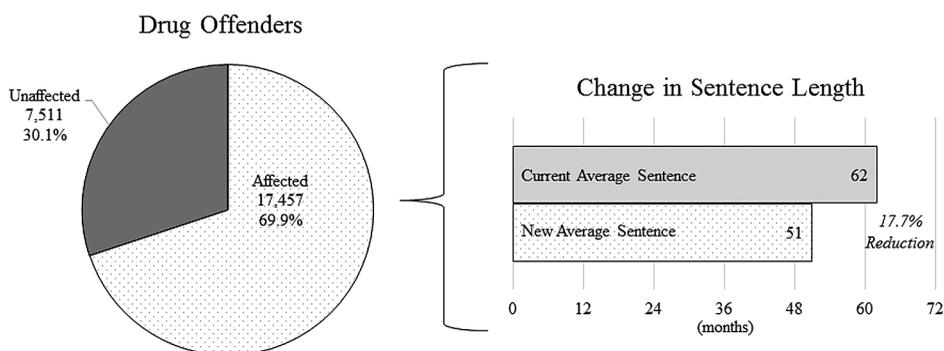


Figure 4. Estimated effect of 2014 Drug Amendment on sentencing and incarceration in year one (effective Nov. 1, 2014). *Drug offenders include those cases with a particular sentencing factor being analyzed. Affected offenders are those in which the sentence is estimated to change as a result of the sentencing factor being analyzed. Not all cases will change as a result of the application of the sentencing factor being analyzed. This data is from the U.S. SENTENCING COMM’N, Prison and Sentencing Impact Assessment Model, FY2012 DATAFILE (2012), available at <http://www.ussc.gov/research-and-publications/commission-datafiles>.*

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by the studies described in detail above that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission’s 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidi-

98. See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (2014).

99. *Id.*

Table 1. Estimated effect of 2014 Drug Amendment on sentencing and incarceration (effective Nov. 1, 2014)¹⁰⁰

Change in years of incarceration served for offenders sentences in a single fiscal year							
1 st year	2 nd year	3 rd year	4 th year	5 th year	10 th year	15 th year	Total
-894	-1,083	-1,667	-1,281	1,625	-634	-254	-13,938
Change in BOP population in future years							
1 st year after effective date	2 nd year after effective date	3 rd year after effective date	4 th year after effective date	5 th year after effective date			
-894	-1,977	-3,644	-4,925	-6,550			

ivism for the two groups of offenders over five years.¹⁰¹ This study suggests that modest reductions in drug penalties, such as those provided by the amendment, will not increase the risk of recidivism.

Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for offenders with the smallest quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the 2014 Drug Amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from the Department and other stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.¹⁰²

100. This data is from the U.S. SENTENCING COMM'N, *Prison and Sentencing Impact Assessment Model, FY2012 DATAFILE* (2012), available at <http://www.ussc.gov/research-and-publications/commission-datafiles>. The first half of this table represents the number of prison beds saved each year by a cohort of offenders sentenced in a single year. "Total" is the total number of prison beds that will be saved when all offenders who were sentenced in the same year are ultimately released from prison. The second half of the table depicts the annual number of prison beds saved as ongoing cohorts of offenders enter the Bureau of Prisons who have been sentenced under the changed guideline.

101. See HUNT & PETERSON, *supra* note 67, at 3.

102. See, e.g., *Hearing, supra* note 40, at 23–24, 36–39, 79–80 (testimony of Eric Holder, Jr., and Charles Samuels, Jr.).

B. Retroactivity of 2014 Drug Amendment

The Commission elected to make the amendment reducing drug guidelines retroactive, subject to a special instruction that reduced sentences do not take effect until November 1, 2015.¹⁰³ The Commission determined the same changes in the Guidelines and laws that made the lower guideline levels appropriate prospectively also made lower guideline levels appropriate for those offenders already in prison.¹⁰⁴

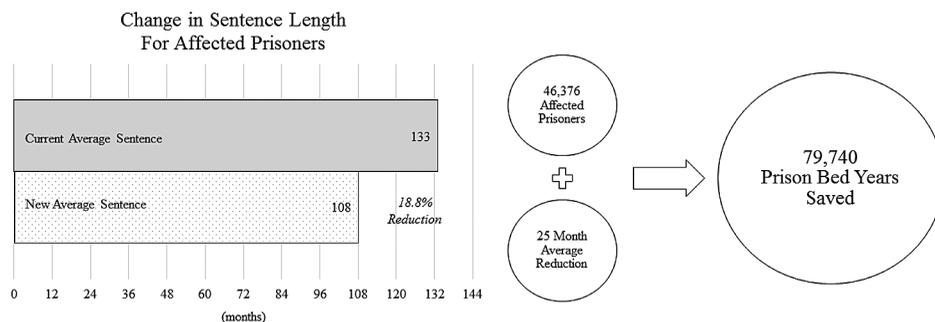


Figure 5. Estimated effect of retroactivity of 2014 Drug Amendment (effective Nov. 1, 2014 with implementation delayed to Nov. 1, 2015).

Retroactive application of the amendment is anticipated to have significant impact on reducing prison costs and overcapacity, and the impact will come much more quickly than from a prospective change alone. More than 46,000 offenders

103. When the Commission amends the Sentencing Guidelines in a way that reduces sentencing ranges, it is statutorily required to consider retroactivity. “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” 28 U.S.C. § 994(u) (2012). If the Commission makes an amendment retroactive, eligible offenders may seek a sentence reduction under § 3582(c)(2) of title 18 of the United States Code. Section 3582(c)(2) states:

The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2) (2012). Such a reduction is not a “full blown” resentencing and is bounded by the Commission’s amendment. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(3) (2014) (“[P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant”); *see also* *Dillon v. United States*, 130 S. Ct. 2683, 2691 (2010) (“Section 3582(c)(2)’s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.”).

104. *See infra* Part IV.A.

are estimated to be eligible for reduced sentences, and these offenders are eligible to have their sentences reduced by an average of twenty-five months or 18.8%.¹⁰⁵ This reduction is estimated to result over time in a savings of 79,740 prison bed years.¹⁰⁶

In evaluating whether to make the 2014 Drug Amendment retroactive, the Commission was informed by its study of recidivism following retroactive application of the 2007 crack amendment,¹⁰⁷ which suggests that reductions in drug penalties can be accomplished without an increase in recidivism. The fact that, as the Department of Justice has asserted, these reductions in penalties could allow more resources to be devoted to catching and punishing the most serious criminals and to other programs and initiatives that more effectively prevent crime further supports the Commission's determination that retroactive application will not significantly impact public safety.¹⁰⁸

In addition, the Commission sought and received comment and testimony from federal judges, members of Congress, advocacy organizations, religious leaders, legal practitioners, and interested members of the public.¹⁰⁹ These comments overwhelmingly supported retroactivity.¹¹⁰ Most comments argued that retroactivity leads to a fair and just result, it promotes public safety, and judges are well positioned to determine in which cases sentences should and should not be reduced.¹¹¹ The Commission also received comment and testimony from those opposed to retroactivity.¹¹² Some in the law enforcement community opposed retroactivity, arguing that it would have "an immediate and deleterious effect on public safety and the crime rates in our communities."¹¹³

The Commission was very much aware of the public safety concerns that sentence reductions for such a large group could raise. Our decision to delay

105. Memorandum from Office of Research and Data to Chair Saris, U.S. Sentencing Comm'n 2 (July 25, 2014), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf>.

106. *Id.*

107. *See supra* Part IV.A.

108. *See supra* Part IV.A.

109. The Commission makes as much public comment as practicable. To review comment on the retroactivity of the 2014 Drug Amendment, see *Letters Received in Response to Request for Public Comment on Whether to Make Amendment 3 Retroactive*, U.S. SENTENCING COMM'N, <http://www.ussc.gov/amendment-process/public-comment/public-comment-july-7-2014> (last visited Sept. 1, 2014).

110. *See id.*

111. *Id.*

112. *See, e.g.*, Letter from Dennis Boyd, Executive Director Nat'l Assoc. of Assistant U.S. Attorneys, to Hon. Patti B. Saris, U.S. Sentencing Comm'n (July 2, 2014), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20140711/NAAUSA_Comment.pdf; *Public Hearing on Retroactivity of 2014 Drug Amendment: Hearing Before the U.S. Sentencing Comm'n* 164, 219 (June 10, 2014), available at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140610/transcript.pdf> (testimony of Richard Fulginiti, Fraternal Order of Police, Bob Bushman, National Narcotic Officers' Associations Coalition & Kenneth W. Sukhia, Sukhia Law Group).

113. *Public Hearing on Retroactivity of 2014 Drug Amendment*, *supra* note 112, at 166 (testimony of Richard Fulginiti, Fraternal Order of Police).

implementation of retroactivity was designed to address these concerns in three ways. First, it allows judges more time to consider the initial influx of motions for reduced sentences and carefully review every case to determine whether a reduction is appropriate. Second, the delayed implementation ensures that the Bureau of Prisons can give every offender the usual transitional services and opportunities, including halfway houses or home confinement, that help increase the chances of successful reentry into society. Third, the delay allows the Office of Probation and Pretrial Services adequate time to prepare so that released offenders can be effectively supervised.

The Commission believes that the 2014 Drug Amendment and its retroactive application are important first steps toward addressing prison costs and populations with proportionate guidelines, without negatively impacting public safety. The Commission believes that, just as the Commission's reduction of sentences for crack offenders laid the groundwork for broader Congressional action to reduce crack-powder sentencing disparities, our amendment this year reducing federal drug guidelines complements the legislative steps the Commission has recommended and will help pave the way for action by Congress in the future. Only Congress can make the systemic changes to mandatory minimum penalties that will fully address the problems detailed above.

V. CONCLUSION

With a generation gone by since the current federal sentencing structure was put into place, and much experience and data now to guide us, we are overdue as a society and as a federal criminal justice community to reconsider our approach to federal drug sentencing. The Sentencing Commission hopes to continue playing a leading role in this important discussion that can begin to move the country toward rational and necessary changes. The Commission looks forward to participation from law students, practitioners, and the public in this important national conversation going forward.