

UNITED STATES SENTENCING COMMISSION

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August 4, 2022

Mr. Jon Sperl
Budget Analyst
Congressional Budget Office
441 D. Street SW
Washington, D.C. 20515

Re: S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021

Dear Mr. Sperl:

The Congressional Budget Office has requested the U.S. Sentencing Commission to assist it in its assessment of the budgetary impact of S. 601, the Prohibiting Punishment of Acquitted Conduct Act of 2021, were it to be enacted. That bill would amend section 3661 of title 18 of the United States Code, which is the provision that governs the information judges may consider when imposing a sentence on persons who have been convicted of a federal offense.

The bill would amend section 3661 to prohibit judges from considering conduct relating to an act for which a person was criminally charged and adjudicated not guilty after trial in a federal, state, military, or tribal court, or which was the subject of a motion for acquittal granted under federal or state rules of criminal procedure. Further, the bill specifically provides that a court also may not consider this conduct for the purposes of determining the appropriate sentencing range pursuant to the sentencing guidelines or whether to sentence a person outside of the sentencing range, except for the purpose of mitigation.

The Commission does not regularly collect information on the specific conduct underlying a charge on which an offender was acquitted in federal court. However, the Commission recently undertook a special coding project to study this issue, in part to assist CBO in its analysis of S. 601. Even so, the information we have is limited.

In fiscal year 2021, the most recent year for which information is available, 57,287 offenders were sentenced for a federal felony or Class A misdemeanor offense. Of that group, 56,324 offenders (98.3% of all offenders) were convicted through a guilty plea on one or more of

the charges against them. In those 56,324 cases, the offender was not acquitted of any charge. The remaining 963 offenders (1.7% of all offenders sentenced that year) were convicted and sentenced after a trial on one or more of the counts for which they were charged. We have determined that of the 963 offenders convicted after a trial, 157 had at least one charge acquitted. These 157 offenders represent only 0.3% of all offenders sentenced in fiscal year 2021 (and 16.3% of offenders who went to trial).

The crime type for these 157 offenders is listed on Attachment A to this letter. Of these offenders, 152 (96.8%) were sentenced to imprisonment. The average length of imprisonment imposed on these offenders was 136 months (the median was 90 months). Five of the offenders were sentenced to life imprisonment.

We are unable to determine definitively how often the courts used the conduct underlying an acquitted count in those 157 cases to impose the sentence, to determine the place within the guideline range to sentence the offender, or to sentence the offender above the guideline range. Without question, however, we can say that that this did not occur often. Also, when the court did use acquitted conduct at sentencing, it is difficult to determine the extent to which the sentence was increased. For example, in some of the cases we reviewed the acquitted conduct supported the application of a specific offense characteristic in the sentencing guidelines, which often involves a two-level increase (or about a 25% increase in the sentencing range). In other cases, however, the acquitted conduct was used to establish the base offense level, which could result in a more substantial increase. In other cases, the court may have considered the acquitted conduct to determine where within the applicable guideline range to impose the sentence, or to support a sentence above the applicable guideline range as an upward variance.

In order to provide some basis on which CBO could estimate how S. 601 would affect these 157 cases, we are providing two analyses using two different assumptions, representing a lower and upper bound of sorts. The first analysis assumes that the court considered acquitted conduct and as a result increased the sentence imposed by approximately 25 percent. Therefore, reducing the average sentence actually imposed in those cases by 20 percent (because a number increased by 25% must be reduced by 20% to return it to the starting point) would produce an average length of imprisonment of 109 months. That number provides an approximation of what the sentence would have been without consideration of the acquitted conduct in those cases. The second analysis assumes that the court considered acquitted conduct and as a result increased the sentence imposed by approximately 50 percent. Therefore, reducing the average sentence actually imposed by 33 percent (because a number increased by 50% must be reduced by 33% to return it to the starting point) would produce an average sentence length of imprisonment of 91 months. That number provides an approximation of what the sentence would have been without consideration of the acquitted conduct in those cases.

Under either scenario, the overall impact on the size of the Federal Bureau of Prisons prison population would be negligible because, based on the Commission's review of fiscal year 2021 cases, at most only 157 cases per year could be affected by enactment of S. 601, a tiny fraction of the overall federal caseload. In addition, any change in sentence in the cases would only reduce the total length of incarceration. Therefore, were S. 601 to be enacted, the impact on

incarceration would not be recognized on average until more than seven years after enactment in some cases and possibly not until more than nine years after enactment in others.

If you have any questions about our analysis, we would be happy to discuss it with you further.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn R. Schmitt". The signature is fluid and cursive, with a long horizontal stroke at the end.

Glenn R. Schmitt
Director
Office of Research and Data

**FEDERAL OFFENDERS WITH AT LEAST ONE ACQUITTED COUNT
BY TYPE OF CRIME
Fiscal Year 2021**

TYPE OF CRIME	Fiscal Year 2021	
	N	%
TOTAL	157	100.0
Administration of Justice	6	3.8
Antitrust	0	0.0
Arson	0	0.0
Assault	6	3.8
Bribery/Corruption	9	5.7
Burglary/Trespass	0	0.0
Child Pornography	2	1.3
Commercialized Vice	1	0.6
Drug Possession	1	0.6
Drug Trafficking	34	21.7
Environmental	0	0.0
Extortion/Racketeering	3	1.9
Firearms	14	9.0
Food and Drug	2	1.3
Forgery/Counter/Copyright	0	0.0
Fraud/Theft/Embezzlement	22	14.0
Immigration	5	3.2
Individual Rights	3	1.9
Kidnapping	2	1.3
Manslaughter	1	0.6
Money Laundering	13	8.3
Murder	6	3.8
National Defense	2	1.3
Obscenity/Other Sex Offenses	0	0.0
Prison Offenses	1	0.6
Robbery	8	5.1
Sexual Abuse	10	6.4
Stalking/Harassing	0	0.0
Tax	5	3.2
Other	1	0.6

SOURCE: U.S. Sentencing Commission, 2021 Datafile, USSCFY21.