



The Honorable Lindsey Graham
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, DC 20510

March 29, 2019

RE: Coalition Urges Next Steps in Sentencing Reform

Dear Chairman Graham and Ranking Member Feinstein:

The Judiciary Committees of the House of Representatives and Senate have demonstrated a bipartisan commitment to collaborating, sponsoring and advancing important criminal justice reforms for over a decade. Thank you for your work thus far. The undersigned organizations of the Justice Roundtable believe much work lies ahead for Congress to overcome mass incarceration in the United States which has harmed families, destabilized communities, exacerbated racial disparities and diverted limited vital resources without a proportional impact on public safety. We therefore have endorsed the following list of sentencing reforms for which we seek your support and would like to meet with you to discuss how to advance these priorities in Congress.

Many of the below priority issues help to ameliorate problems emanating from the 1994 Violent Crime Control and Law Enforcement Act. The 1994 Crime Bill significantly contributed to mass incarceration, and destabilized many African American communities. Your attention to these priority areas will help to repair some of the damage wrought over the past 25 years by harmful and ineffective crime control policies.

Sentencing Retroactivity

With enactment of the First Step Act in 2018, over 2,600 people serving crack cocaine sentences that predated passage of the Fair Sentencing Act of 2010 will have an opportunity for retroactive sentencing reductions. Previous retroactive amendments to the Sentencing Guidelines by the U.S. Sentencing Commission revealed that people who benefited from reduced prison terms for crack cocaine offenses did not have higher recidivism rates than their counterparts who had served longer sentences.¹ Additional sentencing reforms incorporated in the First Step Act will help to limit other mandatory minimum sentences in the future. Unfortunately, these changes are not retroactive and thousands of people in federal prisons today serving sentences under now reformed statutes will not benefit, including many

¹ United States Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, (May 2014), available at https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf.

people who will die in prison without retroactivity. Congress must not delay applying retroactivity to the First Step Act's other new sentencing reforms.

Mandatory Minimums

Mandatory minimum sentences are criminal penalties requiring the imposition of a specified minimum term of imprisonment upon conviction. In 2017, drug trafficking offenses accounted for almost two-thirds of the offenses carrying a mandatory minimum penalty in the federal system.² The extraordinary federal incarceration levels are driven largely by these harsh sentencing policies, which favor incarceration over community-based alternatives or rehabilitative responses. In order to address some of the most problematic aspects of federal criminal law Congress should pass legislation eliminating mandatory minimum sentences for drug offenses and apply those changes retroactively.

Second Look at Sentencing

The abolition of federal parole served to severely lengthen time served in federal prison and has contributed to a 630% increase in the prison population since 1980.³ The congressionally mandated bipartisan Charles Colson Task Force on Federal Corrections recommended in 2016 the implementation of a "Second Look" process, which would permit a board or judge to review an incarcerated person's sentence after a term of years had been served. A sentence review is an opportunity to assess an individual's progress during incarceration, account for rehabilitation and consider the continued appropriateness of their sentence. We urge Congress to establish a Second Look process that would allow anyone who has served 10 years or more to apply for resentencing before a decision-making body. If the request is denied, the person's right to reapply for sentence modification shall recur at intervals not to exceed two years. An independent decision-making body should be created so that Second Look reviews do not add to the caseloads of current federal district court judges.

Limit Life Sentences

The First Step Act included sentencing reforms that provided some limits to federal life sentences. As people age out of their crime prone years, the excessiveness and counterproductive nature of life sentences becomes clear. We urge Congress to further limit these sentences. The Bureau of Prisons reported in 2016 that 6,720 people in federal prisons were serving a life sentence; of these nearly 60% were serving life without an opportunity for release. Among those serving life without parole sentences, half (49%) were convicted of a drug crime.⁴ The distinctly draconian nature of federal life sentences warrants special attention. We recommend ending mandatory life without parole sentences and, as

² U.S. Sentencing Commission, *Quick Facts: Mandatory minimum penalties*, (2018), available at <https://www.ussc.gov/research/quick-facts/mandatory-minimum-penalties>.

³ Federal Bureau of Prisons, *Population statistics*, (2019), available at https://www.bop.gov/about/statistics/population_statistics.jsp (last updated Feb. 21, 2019).

⁴ Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project, (May 3, 2017), available at <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>.

discussed above, the implementation of a second look process to review all sentences after a specified period of time has been served.

Eliminate Juvenile Life without Parole

There is a growing national consensus against sentencing children to die in prison and the federal government should continue this momentum by ensuring that no child is sentenced to life without the possibility of release or its functional equivalent. Today, in a number of instances involving drugs or violence, federal law permits the trial of juveniles as adults in federal court. Depending on the circumstance of the offense, the laws permit a child as young as 13 to be prosecuted in the federal system. Though considered earlier in some case proceedings, at the point of sentencing youth is generally not considered as a mitigating factor in deciding whether a sentence should be outside the range of the sentencing guidelines, which ignores several recent U.S. Supreme Court cases.⁵ We support legislation that would end juvenile life without parole in the federal system by allowing children to petition the original sentencing court for review of their sentence after they have served a set term of their sentence.

Effectively Confront Fentanyl

We are very concerned by the dangers presented by drugs like fentanyl and other synthetic analogues, with an alarming number of overdose deaths attributed to these types of substances. However, proposals in the last Congress to expand and increase penalties for crimes involving synthetic drugs or increase mandatory minimums for fentanyl distribution make the flawed assumption that we can enforce and incarcerate our way out of the overdose crisis.⁶ Many of these proposals are sweeping expansions of our already broken and racially-biased criminal justice system. While they may claim to target “kingpins,” experience shows that these harsh penalties often fall on the shoulders of people who play a small role in the drug trafficking business and are typically from communities of color.⁷ Congress has passed important overdose and criminal justice reform legislation in recent years on a bipartisan basis, such as the CARA Act. The push to increase penalties on fentanyl and other synthetic drugs undercuts all this good work and should be opposed.

Fix the Trial Penalty

The ‘trial penalty’ refers to the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial. This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. After a 50 year decline, fewer than 3% of federal criminal cases result in a trial.⁸ Defendants who go to trial face exponentially higher sentences than those

⁵ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010); *Miller v. Alabama* 1325 S. Ct. 2455 (2012).

⁶ Colby Itkowitz, *The Health 202: Obscure provision in House opioids’ bill could restart war on drugs*, The Washington Post, (Sept. 19 2018), available at https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/09/19/the-health-202-obs-cure-provision-in-house-opioids-bill-could-restart-war-on-drugs/5ba155e41b326b47ec9596e2/?utm_term=.730d6eaa329d.

⁷ Brian Stauffer, *Every 25 Seconds*, Human Rights Watch, (2016), available at <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states#>.

⁸ Rick Jones, et. al., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, National Association of Criminal Defense Lawyers, (2018), <https://www.nacdl.org/trialpenaltyreport/>.

who plead guilty – a differential so great that innocent defendants sometimes plead guilty in order to avoid the risk of a substantially greater prison term if they go to trial.⁹ To avoid the trial penalty, accused persons must surrender many other fundamental rights that are essential to a fair justice system, including the right to appeal. Possible reforms include repeal of mandatory minimums, modifying aspects of the Sentencing Guidelines that discourage trials, pre-plea disclosure requirements, a second look process for lengthy sentences, prohibitions against surrendering appeal rights, and judicial oversight of plea discussions.¹⁰ In sentencing defendants who exercise their right to trial, the law might require that judges take into consideration the original plea offer and/or the sentences imposed on guilty-pleading co-defendants.

Conspiracy Charges

The offense of conspiracy – basically an agreement to commit a crime – lacks clear definitions and limitations and too often misrepresents or overstates the culpability of the accused. Overused by federal prosecutors, this form of criminal liability has been widely criticized for producing overbroad charges, dangerously lax evidentiary standards, and unnecessarily harsh sentences.¹¹ In charging or proving a conspiracy, prosecutors can rely solely on circumstantial evidence, including hearsay from alleged co-conspirators, and the agreement can be inferred from statements or actions.¹² Not every federal statute requires an overt act in furtherance of the conspiracy and, even when required, the act can be quite minor and totally legal. After becoming part of a conspiracy, a person becomes liable for the actions of co-conspirators, even if performed before their participation began.¹³ Minor participants, frequently women, swept into the conspiracy net can be held responsible for the most serious crimes committed while the actual perpetrators of those crimes receive reduced sentences in return for providing information to the government.¹⁴ Reforms that should be considered include requiring meaningful overt acts to be held liable as a co-conspirator, raising the bar for the type of evidence necessary to establish conspiracy, and limiting liability for conduct that a co-conspirator did not actually commit.¹⁵

Fines and Fees

Exorbitant criminal sanction fees and fines violate the rights of vulnerable people and exacerbate poverty. Even a fine for a minor offense, if unpaid, can result in an arrest warrant and/or jail time. The Supreme Court has repeatedly held that penalizing someone for inability to pay violates the Constitution.¹⁶ Nevertheless courts coerce payment from those who live at, or below, the poverty line – driving them

⁹ Jamie Fellner, *An Offer you Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, Human Rights Watch, (2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#> (finding that defendants convicted of drug offenses with mandatory minimum sentences who went to trial received sentences on average 11 years longer than those who pled guilty).

¹⁰ National Association of Criminal Defense Lawyers, *supra* note 8, at 59-60; Human Rights Watch, *supra* note 9, at 13-14.

¹¹ Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1 (1992).

¹² Charles Doyle, *Federal Conspiracy Law: A Brief Overview*, Congressional Research Service (Jan. 20, 2016).

¹³ 21 U.S.C. § 846; *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

¹⁴ Vera Institute for Justice, *Overlooked: Women and Jails in an Era of Reform* (2016), 27.

¹⁵ Ellen C. Brotman, et. al., *Criminal Conspiracy: Position Paper and Proposals for Reform*, National Association of Criminal Defense Lawyers, (2015), available at <http://www.nacdl.org/ConspiracyPositionPaper/>.

¹⁶ See, e.g., *Bearden v. Georgia*, 461 US 660 (1983).

deeper into poverty. People transitioning back into society from federal prison are assigned to a halfway house and have to pay at least 25% of their income to the government while there.¹⁷ Even worse, sometimes their wages are garnished even when they are allowed to finish their sentences in home confinement, although the garnishment is ostensibly rent for staying at a halfway house.

Congress should take steps to ensure that criminal sanction fees and fines do not exacerbate poverty by establishing national standards that enforce the Supreme Court's requirement that fines and fees account for a defendant's ability to pay.¹⁸ Criminal debt collection practices must be curbed for low-income individuals, and fees and fines must not be used to fund criminal justice systems. Congress should also expand the authority of the Department of Justice to investigate court practices and authorize an examination of the impact of criminal justice debt. Technical assistance and resources should be made available through the Bureau of Justice Assistance so that state and local court systems can end "offender-funded" criminal justice systems.

Confidential Informants

Within the criminal justice system the widespread use of confidential informants has led to wrongful imprisonment, perverse incentives and has put members of the public in danger. Their use in drug investigations and prosecutions is especially troubling. Confidential informants have been used to encourage and facilitate criminal acts, acted as the sole witness in cases without corroboration, been placed in dangerous situations by law enforcement, and received financial incentives to "find" cases.¹⁹ The lack of oversight and regulation of this area of the criminal justice system calls out for Congress' attention to this issue. Reform proposals include creation of an informant registry, requiring corroborating evidence for warrants and convictions based on informant testimony, reliability hearings, and enhanced disclosure requirements.²⁰

Community Sanctions

Congress should more closely examine supervision practices and sex and other public conviction registries. Overreliance on these community sanctions drive incarceration because of the overly punitive nature of supervisory and registry requirements. The U.S. Sentencing Commission recently analyzed supervised release revocations, finding that 35% of federal prisoners had at least one conviction and one revocation. Of these, 60% received additional criminal history points and more than 50% of those individuals received a higher criminal history category leading to an increased sentence and security classification in the BOP because of at least one revocation.²¹ However, the Sentencing Commission could not accurately determine

¹⁷ 18 USC § 3624; 28 CFR §§ 570.20-570.22; BOP, Community Corrections Manual, 7900.09 at 5.13.1.

¹⁸ See, e.g., *Tate v. Short*, 401 U.S. 395 (1971); *Turner v. Rogers*, 564 U.S. 431 (2011).

¹⁹ Prof. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, Loyola Law School, (Nov. 2004), available at <https://www.aclu.org/other/snitching-institutional-and-communal-consequences-professor-alexandra-natapoff>.

²⁰ See, e.g., American Legislative Exchange Council, *Jailhouse Informant Regulations* (2018 model bill), available at <https://www.alec.org/model-policy/jailhouse-informant-regulations-2/>.

²¹ Tracey Kyckelhahn & S. Alexander Maisel, *Revocations Among Federal Offenders*, United States Sentencing Commission, (Jan. 2019), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf.

the percentage of people receiving higher criminal history categories for a “new crime” revocation versus a “technical or crimeless” revocation, due to the lack of accurate information from supervising jurisdictions.²² Congress should require better data collection from judicial districts and curb excessive responses to technical violations of supervision.

Additionally, sex offense and other public conviction registries carry with them complicated and technical requirements for compliance that can trigger sanctions if not followed and ultimately lead to incarceration.²³ These sanctions are typically new felony prosecutions for failing to comply, as opposed to sanctions for breaching a condition of supervision.²⁴ If not repealed, penalties for these administrative offenses should be drastically reduced and should require a specific intent to not comply, and registries should impose fewer obligations.²⁵

Decriminalize Migration

Criminal prosecution of migrants has become a serious human rights crisis. Prior to 2005, unauthorized entry to the U.S. was primarily handled as a civil matter. Since then, two federal criminal charges — 8 USC 1325 (improper entry) and 8 USC 1326 (reentry after removal) have swamped the federal court docket. In FY2018 they comprised 57 percent of all federal criminal case filings nationwide.²⁶ The DOJ’s “zero tolerance” criminal prosecution policy was at the heart of the family separation disaster from April to June 2018. Family separation continues although the practice has been dialed back. “Zero tolerance” prosecutions have not been curtailed. 8,457 people were prosecuted for crossing or re-crossing the border last December (the most recent month for which filing data are available).²⁷ Criminal sanctions on entry and reentry should be repealed.

The 116th Congress presents the opportunity to build upon a legacy of bipartisan leadership toward a more humane justice system that supports true public safety and justice for all. We look forward to working with you to enact these more effective and proportional sentencing policies, and wish to schedule a time to meet with you in the coming weeks.

If you have any questions regarding our policy priorities and wish to schedule a meeting, please contact the Justice Roundtable’s Sentencing Reform Working Group chairs: Jesselyn McCurdy (jmccurdy@aclu.org), Nkechi Taifa (Nkechi@thetaifagroup.com) and Kara Gotsch (kgotsch@sentencingproject.org).

Sincerely,

²² *Id.*

²³ Elizabeth J. Letourneau, et. al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women*, Medical University of South Carolina, (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf>; Charles Doyle, Cong. Research Serv., R42692, SORNA: A Legal Analysis of 18 U.S.C. §2250 (Failure to Register as a Sex Offender) (2017), 12-14.

²⁴ *Id.*

²⁵ Sarah Tofte, *No Easy Answers: Sex Offender Laws in the US*, Human Rights Watch, (2007), available at <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us#page>; Letourneau, *supra* note 23, at 52-55.

²⁶ TRACFED/Transactional Records Access Clearinghouse at Syracuse University, at <https://tracfed.syr.edu>

²⁷ *Id.*

Aleph Institute
American Civil Liberties Union
Bread for the World
Campaign for Youth Justice
Christian Reformed Office of Social Justice
CLASP
Crack Open the Door
Criminal Justice Policy Foundation
CURE (Citizens United for Rehabilitation of Errants)
The Daniel Initiative
Defending Rights & Dissent
Detention Watch Network
Drug Policy Alliance
Friends Committee on National Legislation
From Prison Cells to PhD
Human Rights Watch
Jewish Council for Public Affairs
Justice Innovations
Justice Strategies
JustLeadership USA
Kemba Smith Foundation
The Leadership Conference on Civil and Human Rights
Life for Pot
Mommieactivist and Sons
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Action Network
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National Association of Criminal Defense Lawyers
National Association of Social Workers
National Center for Lesbian Rights
The National Council for Incarcerated and Formerly Incarcerated Women and Girls
National Council of Churches
National Council on Independent Living (NCIL)
National Immigration Project of the National Lawyers Guild
NETWORK Lobby for Catholic Social Justice
The Sentencing Project
The Southern Poverty Law Center
StoptheDrugWar.org
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Treatment Communities of America
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Cc: Judiciary Committee Members of the U.S. Senate and House of Representatives