Senate Committee on the Judiciary
Questions for the Record from Senator Grassley
To Sally Q. Yates
Deputy Attorney General, Department of Justice

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1. Retroactivity

The Sentencing Reform and Corrections Act reforms and refocuses the enhanced statutory mandatory minimums in 21 U.S.C. §§ 841 and 960 (for offenders with prior drug felony convictions), 18 U.S.C. § 924(c) (for offenders with prior firearm convictions), and 18 U.S.C § 924(e) (for offenders with prior convictions for crimes of violence) and applies these reforms retroactively. Does the Department of Justice support the retroactive application of these reforms? If so, why?

The Sentencing Commission has estimated that a total of seven thousand inmates may be eligible for re-sentencing. Opponents of the Sentencing Reform and Corrections Act have suggested that all of these inmates will be released immediately following these resentencing. Is that true? Won't these inmates still be subject to the revised enhanced mandatory minimums under the Sentencing Reform and Corrections Act? Won't an inmate only be eligible for release if they have successfully completed a significant term of imprisonment measuring of no less than 10 years? And won't a sentencing court be required to evaluate all the traditional sentencing factors and additional factors like the inmate's prison conduct and any danger to the community? And won't a local federal Assistant U.S. Attorney be able to present arguments and evidence in support of a more severe sentence where appropriate? Please explain why the resentencing process will ensure that violent and dangerous inmates will not be immediately released based on the provisions of the Sentencing Reform and Corrections Act.

Response:

We applaud the bipartisan effort that led to the Sentencing Reform and Corrections Act and we strongly support sentencing reform. The Sentencing Commission's estimate of the impact of retroactivity identifies the number of inmates who will *be eligible to apply for a sentence reduction*. These inmates will be subject to the revised mandatory minimum penalties under the Act, which, as we read the Act, will be no less than 10 years for Armed Career Criminals and those convicted of recidivist enhancements for prior serious drug felony convictions. In addition, before any reduction in sentence, Assistant U.S. Attorneys will carefully review all cases of eligible offenders who might be eligible for early release, and will oppose the resentencing of those who pose a danger to the community. They also will be able to present arguments and evidence in support of a sentence that is higher than the revised enhanced mandatory minimum, where appropriate. Before reducing any sentence, moreover, federal judges will be required to evaluate all the traditional sentencing factors, including an inmate's prison conduct and any danger the prisoner might pose to the community.

We appreciate the Chairman's manager's amendment that was approved at the markup of the legislation. We think it improved the legislation. We always remain open to talking with you about any further improvements or amendments you may wish to make.

Although we support the retroactive application of the Act in most cases, in some cases applying the Act retroactively would be unconstitutional. The Act reduces statutory mandatory minimum sentences in many cases, but for certain individuals with prior convictions for a "serious violent felony," the Act would actually increase the statutory mandatory minimum sentence they face. Under the retroactivity rule in section 101(c)(1), these enhanced sentences would apply to individuals who committed offenses prior to the date of enactment of the Act. With respect to those individuals, retroactive application of the enhanced mandatory minimums would violate the Ex Post Facto Clause in Article I, Section 9, of the U.S. Constitution. We believe a simple amendment to section 101(c)(1) would address this concern, and we look forward to working with you and the other members of the Senate on this issue.

2. Amendments to the Armed Career Offender Act

In June 2015, the Supreme Court in *Johnson v. United States* held that the "residual clause" of the enhanced mandatory minimum sentence in 18 U.S.C. § 924(e) (the Armed Career Criminal Act) was unconstitutional. This decision significantly narrows the scope of that enhancement going forward. Many commentators also predict that the Supreme Court will apply this decision retroactively and that thousands of convicted criminals will be eligible for re-sentencing. Finally, other commentators believe that the Supreme Court will strike down the entire provision as unconstitutional because a majority of the Supreme Court no longer supports *Almendarez-Torres*'s "prior conviction" exception to the *Apprendi* rule. As you know, the Sentencing Reform and Corrections Act makes reforms to this area of the criminal law by increasing the penalty in 18 U.S.C. § 924(a) for the underlying offense in 18 U.S.C. § 922(g) to 15 years and by decreasing the mandatory minimum in 18 U.S.C. § 924(e) to 10 years. Do you agree that the Supreme Court's decision in *Johnson* significantly narrows the scope and applicability of the sentencing enhancement under 924(e)? Is the Department of Justice concerned that the Supreme Court will further narrow or eliminate the sentencing enhancement? Does the Department of Justice believe that the reforms in the Sentencing Reform and Corrections Act take positive and constructive steps to address those concerns and to preserve this sentencing enhancement in appropriate cases?

Response:

The Supreme Court's decision in *Johnson* significantly narrowed the applicability of the sentencing enhancement under the Armed Career Criminal Act. The Department believes that the reforms in the Sentencing Reform and Corrections Act take reasonable first steps to preserve this sentencing enhancement in appropriate cases. We would like to work with you and the

Committee to develop a fuller statutory response to *Johnson* that will help keep our communities safe from repeat violent offenders.

3. Increases in Crime

Ms. Yates, as you know, many cities have seen serious spikes this year in their murder rates and those of other violent crimes. Opponents of the Sentencing Reform and CORRECTIONS Act have argued that in light of that increase in crime, we should not reduce sentences for the individuals convicted of the crimes that would be affected by the bill. What is your reaction to that argument?

Response:

As the President stated recently in a speech to the International Association of Chiefs of Police, the available data shows that overall, violent crime rates across the nation appear to be nearly as low as they were last year and significantly lower than they were in previous decades. While it is true that in some cities, homicides and gun violence rose last year from historic lows, we support sentencing reform because we believe it will more effectively reduce violent crime and improve public safety. This is what we have seen in a number of states that have implemented significant reform. The Sentencing Reform and Corrections Act will allow us to focus federal prison resources on the most dangerous offenders, reduce wastefully long prison sentences on low-level, non-violent drug offenders, and reinvest some of the savings into hiring more prosecutors and agents, support of state and local law enforcement, crime prevention, and reentry and victims' services. Furthermore, it should be noted that federal judges are required to thoroughly review all cases before any sentence is imposed and to consider sentencing guidelines that mandate appropriately severe sentences for dangerous offenders.

4. Special Assistant United States Attorneys

Ms. Yates, your prepared testimony stated that one reason the Department of Justice supports sentencing reform legislation is to shift resources to other pressing needs such as law enforcement. However, it appears that even without potential new funding sources, the Department is hiring new Assistant United States Attorneys around the country. The Department's advertising for these positions makes clear that no additional funding is necessary, since the positions are unpaid.

1. Are unpaid Assistant United States Attorneys subject to the Fair Labor Standards Act? Should they be?

Response:

All Assistant United States Attorneys at the Department, including uncompensated Special Assistant United States Attorneys, are exempt from the

minimum wage and overtime provisions of the Fair Labor Standards Act pursuant to the professional exemption at 29 U.S.C. 213(a)(1).

2. Why is the Department of Justice hiring Assistant United States Attorneys to work without compensation?

Response:

The Department of Justice employs uncompensated Special Assistant United States Attorneys on a temporary basis to support the handling of a high volume of federal cases in a United States Attorney's Office. This is possible because 28 U.S.C. § 548 prescribes a maximum salary, but no minimum salary for Special Assistant United States Attorneys. The U.S. Attorney community utilized the uncompensated Special Assistant United States Attorneys—some of whom were retirees and/or individuals with expertise in a particular subject matter— as a limited hiring tool when there were Department-wide hiring constraints. However, since the Department-wide hiring freeze was lifted in early 2014 – the number of uncompensated Special Assistant United States Attorneys has been reduced by over half (from 119 in February 2013, to 43 as of November 9, 2015.).

3. Does the placement of unpaid Assistant United States Attorneys within the Department raise the risk that such uncompensated individuals might be more susceptible to corruption, such as by taking bribes, than those who are paid at historic civil service rates?

Response:

Uncompensated Special Assistant United States Attorneys are subject to the same background checks and ethics requirements as all Department attorneys. Moreover, a growing number of the more recent law school graduates hired under this authority participate in programs through their law schools that provide fellowships to recent graduates who do public service or public sector work, and receive some compensation through such fellowship programs.

4. Does the practice of not paying Assistant United States Attorneys send a message to those who are paid in that position that they should not question any decision made in the United States Attorney's office, with respect to the conduct of a case, or policy, or in situations of waste, fraud, or abuse, because they can be replaced with someone who will work for nothing?

Response:

Uncompensated Special Assistant United States Attorneys serve on temporary appointments and are not a substitute for career Assistant United States Attorneys. In addition, career attorneys are subject to removal based only on performance or misconduct.

5. Are you concerned that only attorneys who graduate from law school with little or no debt will be able to serve as unpaid Assistant United States Attorneys?

Response:

We do not have sufficient information to comment on the financial status or student loan debt of uncompensated Special Assistant United States Attorneys.

SEN. DAVID VITTER--QUESTIONS FOR THE RECORD
Senate Judiciary Committee on S. 2123, Sentencing Reform and Corrections Act of 2015
Hearing, October 19, 2015

Questions As Addressed to Particular Witnesses:

1.) Sally Quillian Yates (Deputy Attorney General – Department of Justice)

- **Background:** Sec. 109 (b) states, "Report on Criminal Statutory Offenses- Not later than 1 year after the date of enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report, which shall include-- (1) a list of all criminal statutory offenses, including a list of the elements for each criminal statutory offense; and (2) for each criminal statutory offense listed under paragraph (1)-- (A) the potential criminal penalty for the criminal statutory offense; (B) the number of prosecutions for the criminal statutory offense brought by the Department of Justice each year for the 15-year period preceding the date of enactment of this Act; and (C) the mens rea requirement for the criminal statutory offense."

  - **Do you believe it is possible for the Attorney General's staff, with the resources currently allotted to the Department of Justice, to prepare the requested report required by S.2123, Sec. 109, within one year?**

    Yes.

  - **What priorities will you place on hold to accomplish this report?**

    We believe we can accomplish this directive without placing on hold any priorities.

  - **What benefits do you see this reporting providing?**

    We believe that the report will be of value to Congress and the public by setting out clearly in a single document pertinent information on the current state of federal criminal liability.

  - **How will the Attorney General highlight statutes that do not specify a mens rea requirement in this report?**

    If this directive becomes law, we will include in the report a list of the elements for each criminal statutory offense as required by the directive. This will specify any *mens rea* element – or lack thereof – in federal criminal offenses.