

Written Statement by
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Hearing on
“The Sentencing Reform and Corrections Act of 2015”
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Chairman Grassley, Ranking Member Leahy, and Members of the Committee, thank you for the opportunity to address you today. I am the president of the National Association of Assistant United States Attorneys, a professional association representing the interests of Assistant United States Attorneys employed by the Department of Justice. Assistant United States Attorneys are the career-level attorneys in the 94 United States Attorney Offices responsible for federal criminal prosecutions and civil cases involving the United States Government.

One of the most important prosecutorial responsibilities that we as AUSAs fulfill involves enforcement of the nation’s violent crime, drug trafficking, and firearm laws. I am grateful to the Committee for the opportunity to share a federal prosecutor’s perspective on how the prosecution of the nation’s laws would be changed by the proposals contained in the Sentencing Reform and Corrections Act, S. 2123. By way of background, I began my career in law enforcement in 1978 as a police officer where I served in corrections, patrol, traffic accident investigations, crime analysis, and planning and research. During those seven years I earned my undergraduate degree and law degree, graduating from the University of Tennessee College of Law with high honors. At the conclusion of law school I served as a law clerk to a Sixth Circuit Court of Appeals judge. For the last 29 years I have served as an Assistant United States Attorney in the Eastern District of Tennessee and have been assigned to the Organized Crime Drug Enforcement Task Force; the General Crimes Section handling white collar crime, fraud, and public corruption; and as the Narcotics and Violent Crime Section Deputy Criminal Chief. For the past seven years I have served as the Chief of the Criminal Division. It is important for me to emphasize, however, that the views expressed herein and in my anticipated testimony are mine and those of the National Association of Assistant United States Attorneys, not of the U.S. Department of Justice.

Our Criminal Justice System Is Not Broken

There is a common refrain among some advocacy groups: “the federal criminal justice system is broken.” That refrain is tired, and it is false. The fundamental responsibility of government is to protect its citizens from foreign and domestic threats. On the domestic side, that responsibility is shouldered primarily by the criminal justice system. The government’s responsibility is to act within the boundaries of the law to protect good and honest citizens from the murderers, rapists, robbers, drug traffickers, fraudsters, and other criminals who would, if given the opportunity, prey on them at will.

Our federal criminal justice system, although weakened by a series of decisions by the Supreme Court, the Sentencing Commission, and the Administration, continues to perform that responsibility exceptionally well. For evidence of that fact, one need look no further than the historically low crime rates that we have enjoyed in recent years. Streets that were once plagued by violence have been made safer. The Sentencing Reform and Corrections Act of 2015, however, threatens to reverse many of the gains we have made by making thousands of convicted and imprisoned armed career criminals, serial violent criminals, and high-level drug traffickers eligible for early release. Further, it would seriously weaken the very tools that federal prosecutors, working with our federal, state, and local law enforcement partners, have used to keep our communities safe.

In order to understand where we are today, it is necessary to remember where we have been. Go back in time with me to the mid-1980s when crime was skyrocketing (violent crime had more than tripled in the previous two-and-a-half decades) and when crack dealers were ruling the streets of many large and mid-sized cities. The law-abiding citizens throughout the country watched their communities being destroyed by crime, and they demanded change. And, Congress appropriately responded by passing legislation that gave the law enforcement community the tools needed to address the problem. That legislation took the form of statutes designed to incarcerate gun-toting violent criminals and drug traffickers. Congress also passed legislation that limited judicial discretion and ensured that all criminals were treated similarly nationwide. Many states followed suit with similar statutes. The theory underlying these legislative acts was simple: put criminals in jail and crime will go down.

To the surprise of no one, the approach worked. By 1991, as increasing numbers of criminals went to prison, the crime trend was reversed and crime rates actually began to drop. Over the next two decades violent criminals and drug traffickers went to prison in increasing numbers and crime rates went down every year. Indeed, by 2014 violent crime rates were half of what they once were. Murder, rape, robbery, and aggravated assault were reduced to levels not seen since the 1960s.

The laws that Congress passed worked—they reduced crime. They also, of course, increased the prison population. An increased prison population has necessarily led to an increase in correctional spending. And, now that the streets are no longer riddled with crime to the degree they were in the 1980s, sentencing “reform” has become a hot-topic in Congress and in the states. It is good to have a debate about these issues. It is healthy for a country to revisit decisions of the past to make sure those decisions are still right in the present. We must make sure, however, that in the interest of “reform” we do not try to fix what is not broken. And the federal criminal justice system, while imperfect, is not broken.

Significant Sentencing Reform Is Already Underway

As the Committee considers the Sentencing Reform and Corrections Act, it is important to remember that the federal system has undergone and continues to undergo significant sentencing “reform.” More specifically, three waves of sentence reductions beginning in 2007 made over 70,000 federally convicted drug traffickers eligible for early release.¹ In addition, two sweeping Supreme Court decisions continue to impact the sentencing landscape. The first decision was *United States v. Booker*, which struck down the mandatory sentencing guideline scheme devised by Congress.² As a result of *Booker*, substantial and broad sentencing discretion has been returned to judges. The second decision was *Johnson v. United States*, which earlier this year declared unconstitutional a portion of the Armed Career Criminal Act.³ As a result of *Johnson*, thousands of the most serious violent recidivists will have their sentencing hearings reopened.

In the wake of *Johnson*, the Sentencing Commission has proposed another sweeping amendment to the sentencing guidelines. The proposed amendment would weaken the guideline definition of “career offender,” which will affect an even broader group of repeat criminals who are currently incarcerated. More specifically, the Sentencing Commission’s proposed amendment would lower the probable sentence for offenders with serious prior criminal

¹ In 2007 the Sentencing Commission reduced the sentencing guidelines for crack dealers and made these changes retroactive to previously convicted traffickers already in prison. *As a result, 16,511 convicted crack dealers received reduced sentences.* In 2010 Congress reduced the penalties for trafficking in crack cocaine. The Sentencing Commission then implemented these reductions retroactively and *the sentences of another 7,748 convicted crack dealers were reduced.* In 2014 the Sentencing Commission reduced the sentencing guidelines *for all drug traffickers* (regardless of the type of drug they distributed, their criminal history or history of violence, ties to gangs, or drug cartels), and again made that change retroactive. *As a result, over 46,000 convicted drug traffickers became eligible for early release.* Between 6,000 and 8,000 of those offenders will be released nearly simultaneously on November 1, 2015, and another 8,000 will be released within twelve months of the first group.

² *United States v. Booker*, 543 U.S. 220 (2005).

³ *Johnson v. United States*, 135 S. Ct. 2551 (2015).

histories, including those with terms of imprisonment for a wide range of crimes including violent offenders (bank robbers, kidnappers, child molesters, human traffickers) and drug traffickers. If the amendment is made retroactive (like the drug reduction amendments), sentencing for thousands of the most serious repeat offenders will be reopened and many will be eligible for substantial reductions in their sentences.

Further, in a highly publicized act, former Attorney General Eric Holder directed all federal prosecutors to limit the use of congressionally mandated minimum sentences against drug traffickers, even when they are caught trafficking in quantities that would trigger application of those penalties. By 2013, there was nearly a 10 percent reduction in the number of drug traffickers prosecuted in the federal system.

At the same time, President Obama has dramatically changed the clemency process. Beginning in January 2013, the Department of Justice actively began soliciting clemency petitions from criminal defense attorneys and federal prisoners. The Clemency Project, assisted by lawyers and advocates (including the Federal Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the National Association of Criminal Defense Lawyers), is reportedly processing 30,000 petitions for clemency.

The initiatives described above, resulting in reduced prosecutions of drug traffickers and the early release of tens of thousands of previously convicted drug traffickers, have contributed to a rapid decline in the federal prison population. In FY 2014, the federal prison population dropped by 5,149 prisoners and in FY 2015 it dropped by another 8,426 prisoners. And the Bureau of Prisons predicts that the population will decline by another 12,000 inmates by the end of FY 2016. Thus, in a three-year period, the federal prison population will have dropped by 11 percent to 193,723 inmates. Moreover, it is important to note that claims of “mass incarceration” in America are based upon the conflation of the state and federal prison populations. The federal prison population represents a fraction (approximately one-tenth) of the total prison population in the United States.

Put simply, over the past several years the federal system has undergone substantial change that has resulted in the release of thousands of criminals. States have also instituted sentencing “reform” programs that have resulted in many more thousands of criminals being returned to the streets. The concern should be obvious: more criminals on the streets will result in more crime. As Professor Matt DeLisi testified before the Senate Judiciary Committee, “criminal justice research shows that releasing just 1 percent of the current [federal prison] population would result in approximately 32,850 additional murders, rapes, robberies,

aggravated assaults, burglaries, thefts, auto thefts, and incidents of arson.”⁴ That means the 11 percent drop in the federal prison population will result in another 361, 350 additional murders, rapes, robberies, and other serious crimes.

Predictably, we are already seeing signs that some of these “reforms” are endangering the American public. Crime appears to be rising in several key and related categories—violent crime, property crime, and drug crime. Homicides and other violent crimes are spiraling upward in cities across the country including Atlanta, Baltimore, Chicago, Dallas, Houston, Kansas City, Los Angeles, Milwaukee, Minneapolis, New Orleans, New York, Philadelphia, Sacramento, San Antonio, San Diego, San Francisco, St. Louis, and Washington, D.C.

And California, which, moved especially fast with criminal justice “reform” that reduced its prison population by 25 percent, has been hit especially hard. One news source has reported that in Los Angeles “violent and property crimes spiked by 12.7 percent, while violent crime rose over 20 percent overall in the first six months of the year.”⁵

Additionally, drug crime (particularly trafficking of opiate-based narcotics) is increasing at alarming rates. The trafficking of opiate-based narcotics has led to what *Time* magazine has described as “the worst addiction crisis the country has ever seen.” According to the Centers for Disease Control and Prevention, there were 43,983 drug overdose deaths in 2013. In East Tennessee Children’s Hospital, in my hometown of Knoxville, Tennessee, nearly half of the infants in the hospital’s NICU are suffering from terrible opiate withdrawals. And the human toll does not end there. Preliminary studies indicate those infants will suffer from a variety of mental and physical health issues the remainder of their lives. Yet we are constantly hearing that drug crimes are “non-violent.” And in case the human suffering is not enough, the financial cost to the American taxpayer and the burden on the healthcare system is considerable. On average the cost to Medicaid is \$53,000 to wean one opioid dependent infant. Similarly, in 2011 alone there were approximately 2.5 million emergency department visits caused by drug misuse and abuse.

All of this is to ask, “Why now?” Why would Congress act now when significant, untested sentencing reforms returning tens of thousands of drug traffickers to their communities are underway? Why would Congress act now when the early returns are that “reform” measures are not working? Why would Congress return even more drug traffickers to the street when we

⁴ Testimony of Prof. Matt DeLisi, Ph.D., Dep’t of Sociology. Iowa State Univ., Oversight of the Bureau of Prisons and Cost-Effective Strategies for Reducing Recidivism. Committee on the Judiciary. U.S. Senate. 113 111 Cong., 1st Session (Nov. 6, 2013).

⁵ CBS Los Angeles, *LA County Sheriff: Prop. 47 A ‘Significant’ Reason for Increase in Crime*, July 23, 2015, available at <http://losangeles.cbslocal.com/2015/07/23/la-county-sheriff-prop-47-a-significant-reason-for-increase-in-crime/>.

are in the midst of a raging heroin epidemic? Why would Congress return violent criminals to the streets when many cities are experiencing a surge in violent crime?

Sentencing Reform and Corrections Act

In other words, why would Congress pass the Sentencing Reform and Corrections Act—an Act that has retroactive and prospective elements that are dangerous and unwise?

First, I would like to address the retroactivity issue. The overwhelming majority of criminal legislation is prospective in its application—that is, it does not undo and revisit past cases that are final. This bedrock principle is important in the law for a number of reasons. Fundamentally, as the Supreme Court has said, “the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.”⁶ And there are compelling practical considerations as well: reopening sentencing for convicted criminals (as the Sentencing Commission has recently done for over 70,000 federal prisoners) continually forces the government “to marshal [its limited] resources in order to keep in prison defendants whose trials and appeals conformed to then-existing [legal] standards.”⁷ And it is not just the prosecution that is impacted by reopening thousands of cases. Victims, judges, and the public are understandably frustrated when the law is faithfully applied, only to have Congress cast aside those outcomes and restart the process under new rules.⁸ That is why, absent an express statement to the contrary, “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute.”⁹

The Sentencing Reform and Corrections Act rejects this basic principle of our criminal jurisprudence by making every major provision in the bill retroactive. And the impact is huge. The retroactive application of lighter penalty provisions will seemingly make thousands of armed career criminals, serial violent offenders, and high-level repeat drug traffickers eligible for substantial sentence reductions.¹⁰ This can only serve to undermine the confidence of communities and victims who relied on the system for a measure of justice, law enforcement officers who investigated the cases and believed them to have been final after full and fair litigation, and the general public that followed the cases with confidence and an expectation that the cases had ended. And since most of these cases were resolved by negotiated plea agreements

⁶ *Teague v. Lane*, 489 U.S. 288, 309 (1989).

⁷ *Id.* at 310.

⁸ *Cf. id.*

⁹ 1 U.S.C. § 109.

¹⁰ Since the SRCA reduces the mandatory minimum penalties for armed career criminals under 18 U.S.C. § 924(e), serial violent criminals and drug offenders using firearms in violation of 18 U.S.C. § 924(c), and repeat drug offenders sentenced under 21 U.S.C. § 841(b)(1)(A), and makes those reductions retroactive, all of the offenders incarcerated under those provisions will be eligible for reduced sentences.

in which concessions were made by the government (often including the dismissal of or agreement not to pursue other sometimes serious federal or state charges), this will be a complete windfall to criminal defendants and at the same time will deprive the government of the benefit of its bargain.

To be clear, the beneficiaries of the retroactivity provisions of the Act will be dangerous criminals who blatantly violated clearly established laws, have already pled guilty or been convicted by juries, have been sentenced by judges, appealed their cases to our appellate courts and have thus received the full measure of due process afforded by our Constitution. If this legislation passes and is made retroactive, for some of these offenders this will be the fourth time their sentencing has been reopened.¹¹ How can we expect the public to have confidence in a criminal justice system that is unstable to the point that the rules are rewritten every year or two and the litigation never concludes? When does it end?

That is why federal prosecutors like me, and thousands of my colleagues, fear that retroactive application of the so-called “reforms” in the Senate bill—by reopening sentencing and make tens of thousands of dangerous criminals eligible for early release—will undermine the rule of law, the principle of finality, and public confidence in our federal criminal justice system.

More importantly, as I have suggested previously, the early release of prisoners will have sure and potentially drastic consequences. According to one recent Bureau of Justice Statistics’ study, recidivism rates are nearly 77 percent.¹² Given that, and our general experience in the criminal justice system, we know that the questions we should ask about releasing these violent and career offenders early are not if, but when, how many, and how badly citizens will be victimized as a result.

Moving beyond the retroactivity issue, the prospective application of much of the legislation is also flawed. I should begin the remainder of my comments by noting that NAAUSA supports measured changes to the statutory provisions under review. Most notably, NAAUSA supports changes to 18 U.S.C § 924(c), the statute that makes it a crime to use a firearm during a federal crime of violence or drug trafficking offense. As the law stands, an offender who commits multiple violent crimes—say carjackings—using a firearm would receive a mandatory minimum term of imprisonment depending on several factors to include how the firearm was used. For example, if the firearm was possessed there is a mandatory five-year sentence, if it was brandished there is a mandatory seven-year sentence, and if it was discharged

¹¹ As noted previously the Sentencing Commission has implemented three retroactive sentencing amendments.

¹²Alexia D. Cooper, Matthew R. Durose, & Howard N. Snyder, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*(2014), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>.

there is a mandatory ten-year sentence for the first offense. For the second and for each subsequent offense (even with no enhancement-triggering prior conviction), there is a mandatory consecutive twenty-five year sentence. Imposition of this second consecutive sentence has become known as “stacking.” NAAUSA supports reducing the sentence for the second and each additional “stacked” offense. Rather than a twenty-five year sentence for the second and each subsequent use of a firearm, NAAUSA supports reducing the mandatory consecutive term from twenty-five years to a mandatory consecutive term consistent with the penalties for the first offense. Thus, an offender who brandished a firearm in connection with two carjackings would receive two “stacked” seven-year sentences. Although there has been confusion on the issue by some commentators, it seems clear that the “stacking” provision of 18 U.S.C. § 924(c) has been retained.¹³ Based on the understanding that “stacking” is retained, NAAUSA supports the prospective reduction of penalties under 18 U.S.C. § 924(c).

The proposed legislation does have other objectionable provisions, and one deserves particular note. Section 103 creates a “second safety valve” and limits application of the 10-year mandatory minimum presently applicable to major drug offenders. The creation of a whole new safety valve provision via section 103 relative to the 10-year statutory minimum distorts what a safety valve should be. The proposed legislation limits application of the enhanced penalty to offenders who act as an importer, exporter, high-level distributor or supplier, wholesaler, or manufacturer of “large quantities” of the controlled substances involved in the offense or engage in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act. This carve-out dramatically expands the safety valve, essentially returns the application of the enhancement to the discretion of the sentencing judge, and thus eviscerates the 10-year mandatory minimum and creates disparity in sentencing for similar conduct.

One final note on the importance of mandatory minimum penalties in drug cases. Trafficking in controlled substances is an extraordinarily profitable activity, but it is exceptionally harmful to our society. It is activity, however, that requires organized and coordinated effort by numerous people to be successful. Whether out of fear for their lives or those of loved ones, or a warped sense of loyalty, those who engage in the activity at any level, from the kingpin to the street dealer, are reluctant when apprehended to sever their ties with other participants and cooperate with law enforcement officials in identifying coconspirators. No one should make any mistake about this: many drug trafficking organizations engage in exceptionally violent behavior to discourage participants from cooperating with law enforcement.

At the same time, securing cooperation of insiders who can identify participants, their roles, and the method of operation of the organization, is the single most valuable tool law enforcement has to successfully disrupt and dismantle interstate and international drug

¹³ See 18 U.S.C. § 924(c)(1)(D)(ii).

trafficking organizations. Since the mid-1980s, the cornerstone to securing cooperation from participants at all levels has been the mandatory minimum penalties created by Congress with an eye toward just that—encouraging drug traffickers to provide information. And they have been extremely effective in incentivizing drug traffickers to provide information and testimony against their coconspirators. In 2013, 48.5 percent of defendants facing mandatory minimums were relieved of the application of those statutory penalties because they provided information to law enforcement—information that was key to apprehending more culpable higher-level participants. Those who remain subject to the mandatory penalties are those who do not qualify for the existing “Safety Valve” provisions, trafficked in significant amounts of drugs, and elected not to assist law enforcement in order to maintain their ties and loyalty to their criminal organizations.

Every incremental weakening of those mandatory minimum penalties will have a corresponding impact on the ability to successfully investigate and prosecute drug trafficking. The current proposal will significantly weaken the mandatory penalties and significantly deprive law enforcement authorities and prosecutors of the tools they need to successfully address drug trafficking.

Finally, I would like to make it clear that Assistant United States Attorneys are not opposed to measures that would reduce our current rate of recidivism. In fact, we wholeheartedly support any proven program in the context of our federal system. But we must never lose sight of the fact that currently a large number of our federally convicted prisoners will re-victimize our citizens, and most of that will occur in our minority communities. Therefore, before any federal corrections plan is implemented, it should be carefully studied and analyzed on an experimental basis to insure that the proposed programs really will be effective before spending millions of dollars in an untested nationwide federal program and placing the public at risk. Our citizens deserve nothing less.

Thank you for your consideration of these comments. I look forward to your questions.