

**Testimony of Chief Judge Patti B. Saris
Chair, United States Sentencing Commission
For the Public Meeting of the
Charles Colson Task Force on Federal Corrections**

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Chair Watts, Vice Chair Mollohan, and distinguished members of the Task Force, thank you for providing me with the opportunity to speak with you on behalf of the United States Sentencing Commission about current sentencing issues in the federal criminal justice system.

We are pleased that Congress created this Task Force and that such a distinguished group of experts has agreed to serve on it. We are particularly pleased that you are interested in looking at issues like mandatory minimum penalties, over-incarceration, and federal sentencing policy – issues that are inextricably linked to the state of federal corrections.

I will briefly explain today why the Commission was created and what it does. I will describe our recent focus on over-incarceration, which resulted in a significant amendment to the sentencing guidelines governing drug cases and a series of legislative recommendations. I will then briefly set out the Commission’s current proposals and projects. I look forward to discussing these issues with you and to addressing your thoughts and questions.

I. History of the Commission and of Drug Sentences

The United States Sentencing Commission was created as an independent bipartisan Commission within the judiciary 30 years ago to eliminate unwarranted disparities in federal sentencing.¹ Previously, judges had almost unlimited discretion to sentence defendants as they saw fit. 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 were before. The Sentencing Commission was tasked with developing proportionate sentencing guidelines assigning sentencing ranges based on an offender’s conduct and criminal history.² 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.

In 2005, the Supreme Court’s decision in *United States v. Booker*³ began yet another era of federal sentencing by rendering the federal sentencing guidelines “effectively advisory.”⁴

¹ See Sentencing Reform Act of 1984, Title II, Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473 (1984).

² See U.S. Sent’g Comm’n, *Supplementary Report on the Initial Sentencing and Policy Statements Guidelines* 13 (1991); USSG §1A.1 (explaining Congress’s goals of honesty, uniformity, and proportionality) (2014).

³ 543 U.S. 220 (2005)

⁴ *Id.* at 245.

Nonetheless, the Commission and the guidelines continue to be “the lodestone of sentencing,” as the Supreme Court wrote last year.⁵ 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.⁶

The bipartisan seven member Commission⁷ identified reducing costs of incarceration and overcapacity as a priority for its 2013-14 amendment cycle.⁸ While state prison populations have begun to decline slightly due to reforms in many states, the federal prison population has grown by about a third in the past decade.⁹ Early last year, the Federal Bureau of Prisons’ (BOP) population began to decrease slightly, perhaps because budget cuts have reduced the number of prosecutors and agents.¹⁰ Nonetheless, the size of the federal prison population remains a serious problem that needs to be addressed. When we were deliberating about drug sentences, last year, the size of the BOP’s population exceeded the BOP’s capacity by 32 percent and by 52 percent in high security facilities.¹¹ Meanwhile, the nation’s budget concerns persist. The overall Department of Justice budget had decreased, meaning that as more resources are needed for prisons, fewer are available for other components of the criminal justice system that promote public safety, including law enforcement officers, prosecutors, assistance to victims, and crime prevention programs. Federal prisons and other detention of federal offenders now cost well over \$6 billion a year and account for more than a quarter of the overall Department of Justice budget.¹²

⁵ *Peugh v. United States*, 133 S.Ct. 2072, 2084 (2013)

⁶ See U.S. Sent’g Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* 5-6 (2012).

⁷ By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

⁸ See U.S. Sent’g Comm’n, *Notice of Final Priorities*, 78 Fed. Reg. 51,820-821 (Aug. 21, 2013) (Notice of Final Priorities).

⁹ E. Ann Carson & Daniela Golinelli, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts* 2 (July 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

¹⁰ Testimony of Charles Samuels, Director, Fed. Bureau of Prisons at the U.S. Sent’g Comm’n Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (Mar. 13, 2014) (Samuels Testimony), March 13, 2014 Public Hearing Transcript (Transcript) at 46-47, 75, <http://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/transcript.pdf>.

¹¹ *Id.* at 47. By September 30, 2014, overcrowding was down slightly so that the BOP overall was 30% overcapacity, though high security facilities remained at 52% overcapacity. Fed. Bureau of Prisons, *Federal Inmate Population Declines* (Oct. 24, 2014) http://www.bop.gov/resources/news/20141024_populationDecline.jsp.

¹² See U.S. Dep’t of Justice, *Federal Prison System, FY 2014 Budget Request at a Glance* 1 (2013) (USDOJ FY2014 Budget Request), <http://www.justice.gov/jmd/2014summary/pdf/bop.pdf>; U.S. Dep’t of Justice, *Federal Prison System FY 2013 Congressional Budget* 1 (2013) <http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf>; see also Letter from Jonathan Wroblewski, U.S. Dep’t of Justice, to Hon. Patti Saris, U.S. Sentencing Comm’n, 8 (July 11, 2013) (http://www.uscc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf).

Consistent with its statutory charge to both promote public safety and take into account federal prison capacities, the Commission set out to determine ways to address the crisis faced by the federal prisons in ways that are fair, appropriate, and safe. In conducting this review, the Commission sought out the perspectives of law enforcement to be sure that any proposed changes to the federal sentencing system will not undermine the safety of our communities. 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,¹³ so they are in many ways the key to the size and nature of the federal prison population.

The laws and guidelines governing federal drug sentencing were put into place in the late 1980s and early 1990s. 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 University of Maryland basketball star Len Bias, convinced many on both sides of the aisle in Congress that America faced a drug crisis. Congress passed, quickly and with overwhelming bipartisan support, the Anti-Drug Abuse Act of 1986,¹⁴ which imposed new, harsh mandatory minimum penalties for drug trafficking – essentially the statutory penalty scheme we still have today. As explained more fully below, the sentencing guideline governing drug offenses was set up to conform to that statutory scheme.

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 in 40 years.¹⁵ While crime was decreasing, prison populations and costs were skyrocketing. The federal prison population is more than three times what it was in 1989.¹⁶

The rise in state prison populations was even more rapid,¹⁷ and many states have begun to respond by rethinking their approach to drug sentencing. A significant number of states have been able to reduce their prison populations and save money without seeing an increase in crime rates.¹⁸ This real-life experience in the states, together with new academic research, has begun to

¹³ Carson & Golinelli, *supra* note 9, at 2; U.S. Sent’g Comm’n, *2013 Sourcebook of Federal Sentencing Statistics* S-12 (2014).

¹⁴ U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 5-6 (MAY 2002).

¹⁵ FBI Uniform Crime Reports 2012, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime>

¹⁶ In 1989, the federal prison population was 58,000. <http://www.bop.gov/about/history/>. On May 22, 2014, it was over 217,000. http://www.bop.gov/about/statistics/population_statistics.jsp

¹⁷ State prison admissions for new offenses increased from 137,315 in 1978 to a high of 689,536 in 2006. E. Ann Carson & Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases 1991-2012*, U.S. DEP’T OF JUST., 3. <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>. The number of admissions for new offenses began to decrease in 2007, in part due to efforts to reduce state prison population. *Id.* at 1-3. The number of new admissions was down to 553,843 in 2012. *Id.* at 3.

¹⁸ See generally Pew Charitable Trusts, *Time Served: The High Cost, Low Return of Longer Prison Terms*, June 2012

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.

II. Commission Action to Reduce Drug Sentences

The Commission has recently acted on its own authority to amend the guidelines to reduce drug sentences for many offenders. We were careful to act in a way that is consistent with the existing statutory framework but will serve as an important first step to address prison populations and costs, as well as concerns about the fairness and effectiveness of federal drug sentences. Specifically, in April, the Commission unanimously approved an amendment which 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.¹⁹ The Commission voted in July, again unanimously, to make that change retroactive, with offenders eligible to be released pursuant to retroactive application of the guidelines reduction beginning November 1, 2015.²⁰

When Congress passed the Anti-Drug Abuse Act of 1986, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in the lowest criminal history category (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in that same criminal history category (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing ranges for all drug quantities.²¹

The 2014 amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties.²² 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

¹⁹ U.S. Sent’g Comm’n, *Notice of (1) Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2014; and (2) Request for Comment*, Amend. 3, 79 Fed. Reg. 25,996 (May 6, 2014).

²⁰ U.S. Sent’g Comm’n, *Federal Register Notice of Final Action Regarding Amendment to Policy Statement §1B1.10, Effective November 1, 2014*, 79 Fed. Reg. 44,973-01 (Aug. 1, 2014).

²¹ See U.S. Sent’g Comm’n, *Guidelines Manual* §2D1.1, comment. (backg’d.).

²² See 28 U.S.C. § 994(b)(1) (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 to 63 months at Criminal History Category I, which includes the five-year 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 to 121 months at Criminal History Category I, which includes the ten-year statutory minimum for such offenses). 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.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary. Previously, 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 a benefit to those who accept responsibility and save resources by pleading guilty or who otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the safety valve provision, which applies to certain non-violent drug defendants 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.”²³ The guidelines incorporate the safety valve at §5C1.2 and, furthermore, provide a 2-level reduction if the defendant meets the safety valve criteria.²⁴ These statutory and guideline provisions provide a framework that rewards defendant who accept responsibility and save resources by pleading 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 2013, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.2 percent if they qualified for the safety valve and a plea rate of 94.4 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that last year’s 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 the same as the amendment approved last year, so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32.²⁵ 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.

²³ See 18 U.S.C. § 3553(f).

²⁴ See §2D1.1(b)(16).

²⁵ See U.S. Sent’g Comm’n, *Guidelines Manual*, App. C, Amend. 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32. See *id.*, Amend. 748 (effective November 1, 2011).

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. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times – often in response to congressional directives – to provide a greater emphasis on the defendant’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 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 presently contains fourteen enhancements and three downward adjustments. 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.

These structural considerations complemented the Commission’s interest in addressing the significant overcapacity and costs of the Federal Bureau of Prisons, as explained above. In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal 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 percent — of drug trafficking offenders sentenced under §2D1.1 in one year, and their average sentence will be reduced by 11 months — or 17.7 percent — from 62 months to 51 months. 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.

Retroactive application of the amendment will have a more immediate effect on prison populations. The Commission found that around 40,000 offenders could be eligible for reduced sentences. These offenders would be eligible to have their sentences reduced by an average of 25 months or 18.8 percent. They would still serve 108 months, on average. More than 7,000 of these offenders could be eligible for release on November 1, 2015.²⁶ This potential reduction could result over time in a savings of more than 70,000 prison bed years.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment is consistent with the goal of protecting public safety. In particular, the Commission was informed by studies of recidivism rates for offenders who were released early as a result of retroactive application of the Commission’s 2007 crack cocaine amendment. In 2007, the Commission reduced by two levels the base offense level in the sentencing guidelines for each quantity level of crack cocaine and made the changes retroactive. The average decrease in sentences among those crack cocaine offenders receiving retroactive application of the 2007

²⁶ See U.S. Sent’g Comm’n, *Summary of Key Data Regarding Retroactive Application of the 2014 Drug Guidelines Amendment 2* (July 25, 2014) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf>.

amendment was 26 months, which corresponds to a 17 percent reduction in the total sentence.²⁷ In order to determine whether drug offenders serving reduced sentences posed any increased public safety risk, the Commission undertook a study in 2011 of the recidivism rates of the offenders affected by this change. The Commission studied the recidivism rate of offenders whose sentences were reduced pursuant to retroactive application of this guideline amendment and compared that rate with the recidivism rate of offenders who would have qualified for such a reduction, but were released after serving their full sentence before the 2007 changes went into effect.²⁸ The analysis showed no statistically significant difference between the two groups.²⁹

Of the 848 offenders studied who were released in 2008 pursuant to the retroactive application of the 2007 sentencing amendment, 30.4 percent recidivated within two years. Of the 484 offenders studied who were released in the year before the new amendment went into effect after serving their full sentences, 32.6 percent recidivated within two years. The difference is not statistically significant.³⁰ An updated study of the same offenders conducted last year showed that, after five years, there continued to be no statistically significant difference in the recidivism rates of the two groups.³¹

Furthermore, existing sentencing 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.

The Commission also relied on testimony from the Department of Justice that the amendment is consistent with protecting public safety and advancing law enforcement initiatives. 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.³²

²⁷ U.S. Sent’g Comm’n, *Guidelines Manual*, App. C, Amendments 706 and 711 (effective November 1, 2007). These changes predated the statutory changes to crack sentencing levels in the Fair Sentencing Act. *See* Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010).

²⁸ U.S. Sent’g Comm’n, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (May 31, 2011), http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

²⁹ *Id.* at 2.

³⁰ *Id.* at 4-7.

³¹ U.S. Sent’g Comm’n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

³² *See, e.g.*, Testimony of Hon. Eric H. Holder, Jr., U.S. Attorney General, U.S. Dep’t of Justice at the U.S. Sent’g Comm’n Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines (March 13, 2014), Transcript, *supra* note 10, at 22-24, 36-39; Samuels Testimony, *supra* note 10, at 79-80.

Finally, the Commission specifically delayed implementation of retroactive application of the guideline reduction until November 1, 2015 to address public safety concerns expressed by some in law enforcement and some judges. This delayed implementation will address public safety concerns in three ways.³³ First, it will allow judges more time to consider the initial influx of motions for reduced sentences. Judges will review every case to determine whether it is appropriate for a given offender's sentence to be reduced. The delayed implementation is allowing judges time to carefully weigh each case, including considering the public safety implications of releasing any given offender early, and is giving courts enough time to obtain and review the information necessary to make an individualized determination.

Second, the delayed implementation is intended to ensure that the Bureau of Prisons has enough time to give every offender the usual transitional services and opportunities that help increase the chances of successful reentry into society. In the regular course, many offenders transition from prison to halfway houses or home confinement before their ultimate release. Officials from the Bureau of Prisons have emphasized that these transitions help offenders with services, support, and skills they need to live productive lives.

Third, the delay will allow the Office of Probation and Pretrial Services adequate time to prepare so that released offenders can be effectively supervised. This delay will allow probation officers to be transferred or hired and trained and allow them to prepare for supervising additional offenders. With time to prepare, the Office of Probation and Pretrial Services will be able to provide more effective supervision, which will increase the chance of successful offender reentry and help ensure public safety. The Commission believes that this change to the drug guidelines, together with its retroactive application, is an important first step toward addressing prison costs and populations while promoting public safety.

III. Legislative Recommendations

While the Commission's actions to reduce drug sentencing guidelines were significant, the Commission feels strongly that only Congress can bring about the more comprehensive reforms needed to fully address prison costs and populations, as well as to reduce disparities and make the federal criminal justice system work better.

In our 2011 report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,³⁴ the Commission set out in detail its findings that existing mandatory minimum penalties are unevenly applied, leading to unintended consequences. Specifically, the Commission found that certain severe mandatory minimum penalties lead to disparate decisions by prosecutors and to vastly different results for similarly situated offenders.³⁵ The Commission further found that, in the drug context, statutory mandatory minimum penalties are often applied to lower-level offenders, rather than just to the high-level drug offenders that it appears Congress

³³ U.S. Sent'g Comm'n, *Guidelines Manual*, App. C, Amendment 788 (effective November 1, 2014), at 88.

³⁴ U.S. Sent'g Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

³⁵ *Id.* at 111-14, 255.

intended to target.³⁶ The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population.³⁷ Finally, as noted above, the Commission's analysis of recidivism data following the early release of offenders convicted of crack cocaine offenses after sentencing reductions showed that reducing these drug sentences did not lead to an increased propensity to reoffend.

Based on this analysis, the Commission has recommended unanimously that Congress consider a number of statutory changes. These recommendations, which are intended to address concerns about federal prison costs and overcapacity and improve the federal sentencing system consistent with public safety, include the following:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.
- The provisions of the Fair Sentencing Act of 2010, which Congress passed to reduce the disparity in treatment of crack and powder cocaine, should be made retroactive.
- Congress should consider expanding the so-called "safety valve," allowing sentences below mandatory minimum penalties for non-violent low-level drug offenders, to offenders with slightly greater criminal histories than currently permitted.

Republicans and Democrats in Congress have proposed legislation to reform certain mandatory minimum penalty provisions in ways consistent with these recommendations. The Commission strongly supports these efforts to reform this important area of the law.

IV. Current Commission Priorities

In addition to continuing to work with Congress to attempt to address concerns about mandatory minimum penalties and prison costs and populations, the Commission has a number of noteworthy ongoing proposals and priorities. The Commission just submitted its preliminary proposed amendments to the sentencing guidelines for 2015. Many of these proposed amendments are intended to make the guidelines clearer, more reflective of practical and legal realities, more useful for courts and litigants, and of course consistent with public safety. Doing so helps to ensure consistency and justice, to reduce unwarranted disparity, and to limit unnecessary litigation, which saves time and money.

The Commission has been studying the guideline governing fraud offenses in depth for several years. This extensive process has led us to believe that the fraud guideline may not be fundamentally broken for most forms of fraud. Nonetheless, our process has identified some problem areas where changes may be necessary. We have heard significant concerns about the use of intended loss and the sophisticated means enhancement, as well as suggestions that the current guideline may not effectively reflect the harm to victims because it is predicated only on

³⁶ *Id.* at 166-70.

³⁷ *Id.* at 81-81.

the number of victims. Some have expressed strong concerns about how the guidelines address fraud on the market cases, and the Commission is proposing a modified approach to sentencing for this type of fraud case.

The Commission has also proposed an amendment addressing sentences for offenses related to hydrocodone. The Drug Enforcement Administration recently rescheduled hydrocodone to reflect the seriousness of that drug, as well as the new, potentially more potent, forms in which it has become available. The proposed amendment puts forward changes that reflect that rescheduling.

The Commission is continuing a comprehensive long-term study of recidivism among federal offenders. We hope this year to begin releasing data and analysis from this study, which we hope will provide courts, attorneys, and policy makers with some insight into what does and does not work to reduce recidivism.

We are looking in particular this year at the use of risk assessment tools in sentencing and at other stages in the criminal justice system to see what benefits these tools can offer, but also to examine whether they can lead to inappropriate disparities and whether they are consistent with the principles underlying the federal sentencing guidelines system. In particular, we will examine whether risk assessment instruments may, depending on what factors they use to assess risk, have an unintended effect of contributing to disparate results based on race or socioeconomic factors. Risk assessment tools may use factors that some believe are inappropriate such as education, marital status, and even geographic area of residence. This is an issue that is extremely relevant to legislation that may come before Congress this year, which would tie reductions in imprisonment in part to risk assessment.

We are also continuing a study of violations of probation and supervised release. As of December 31, 2009, slightly more than six percent of inmates in BOP custody, 12,839 inmates at the time, were serving sentences imposed after revocation of supervised release.³⁸ We hope to develop more insight into how best to deter and respond to these violations

The Commission is pleased that you are undertaking this examination of important corrections and criminal justice issues including federal sentencing policy. We look forward to working with you on these issues in the months ahead.

³⁸ U.S. Sent'g Comm, *Federal Offenders Sentenced to Supervised Release* 69 (July 2010) http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.