



November 16, 2015

The Honorable Robert Goodlatte  
Chairman  
U.S. House of Representatives  
Committee on the Judiciary  
Washington, DC 20510

The Honorable John Conyers Jr.  
Ranking Member  
U.S. House of Representatives  
Committee on the Judiciary  
Washington, DC 20510

**Re: ACLU Supports H.R. 3713, the Sentencing Reform Act of 2015**

Dear Chairman Goodlatte and Ranking Member Conyers,

AMERICAN CIVIL  
LIBERTIES UNION  
WASHINGTON  
LEGISLATIVE OFFICE  
915 15th STREET, NW, 6<sup>TH</sup> FL  
WASHINGTON, DC 20005  
T/202.544.1681  
F/202.546.0738  
[WWW.ACLU.ORG](http://WWW.ACLU.ORG)

KARIN JOHANSON  
DIRECTOR

NATIONAL OFFICE  
125 BROAD STREET, 18<sup>TH</sup> FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT REMAR  
TREASURER

On behalf of the American Civil Liberties Union (ACLU), we write to express our support for H.R.3713, the Sentencing Reform Act of 2015 (“SRA”). The bill is a first step to address the problem of mass incarceration in the federal system. For all its benefits, however, much more needs to be done. We support the current version of the bill because it is the most significant criminal justice reform legislation to be considered by Congress since the Fair Sentencing Act of 2010.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

Mass incarceration is an utter failure as a public policy due to its devastating impact on those who become ensnared in the criminal justice system. It fails to produce a proportional increase in public safety, and it creates disproportionate harm to poor communities of color. This nation’s use of incarceration is no longer grounded in sound principle or policy. The U.S. has the highest rate of incarceration of any country in the world, and spending on incarceration in 2010 was estimated at \$80 billion.<sup>1</sup> The cost of the federal Bureau of Prisons (BOP) accounts for nearly a third of the Department of Justice’s discretionary budget. Federal incarceration has become one of our nation’s biggest expenditures, swallowing the budget of federal law enforcement.<sup>2</sup> It costs more than \$30,000

<sup>1</sup> See TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2012 — PRELIMINARY TBL. 1 (2015), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239> (showing FY 2012 state and federal corrections expenditure was \$80,791,046,000).

<sup>2</sup> NANCY LA VIGNE & JULIE SAMUELS, THE URBAN INSTITUTE, THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 1-2 (Dec.

a year to house just one federal inmate, almost four times the average yearly cost of tuition at a public university.<sup>3</sup>

This country's extraordinary incarceration rates impose much greater costs than simply the fiscal expenditures necessary to incarcerate almost 25 percent of the world's prisoners in a country with less than 5 percent of the world's population. Roughly half the people in federal prisons are serving drug sentences. Americans commit drug offenses at roughly equal rates across race and ethnicity.<sup>4</sup> Yet African Americans make up 37% and Hispanics 34% of the Bureau of Prisons (BOP) population, making it clear that our criminal justice system disproportionately targets and incarcerates people of color. The true costs of this country's incarceration practices must be measured in human lives and particularly the generations of young black and Latino men who serve long prison sentences and are lost to their families and communities.

## I. Expanding and Creating New Safety Valve

The SRA would begin to modify some of the federal policies and laws that have contributed to the growing federal prison population and racial disparities in the system.<sup>5</sup> H.R. 3713 would expand eligibility for the existing safety valve under 18 U.S.C. 3553(f)<sup>6</sup> from one to four criminal history points if a person has no prior 2-point convictions for crimes of violence or drug trafficking offenses, and no prior 3-point convictions. Judges would also have discretion to grant the safety valve in cases where a person's criminal history score over-represents the seriousness of the offenses, or it is unlikely he or she would commit new crimes. The bill also would give judges discretion to reduce a 10-year mandatory minimum sentence to a 5-year mandatory minimum in cases meeting certain criteria.<sup>7</sup>

---

2012) [hereinafter LAVIGNE URBAN INSTITUTE REPORT], *available at* <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.

<sup>3</sup> "Annual Determination of Average Cost of Incarceration", 80 Fed. Reg. 12,523 (March 9 2015), *available at* <http://docs.regulations.justia.com/entries/2015-03-09/2015-05437.pdf> (showing FY 2014 average annual cost of incarceration for federal inmates was \$30,619.85)

<sup>4</sup> See, e.g., NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES (J. TRAVIS AND B. WESTERN, EDS.), THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION at 60-61, 97 (2014).

<sup>5</sup> LAVIGNE URBAN INSTITUTE REPORT at 5; NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 9 (Jan. 22, 2013) [hereinafter CRS REPORT]; KAMALA URBAN INSTITUTE REPORT, *supra* note 5, at 3; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (Aug. 1991).

<sup>6</sup> A "safety valve" is an exception to mandatory minimum sentencing laws. A safety valve allows a judge to sentence a person below the mandatory minimum term if certain conditions are met. Safety valves can be broad or narrow, applying to many or few crimes (e.g., drug crimes only) or types of offenders (e.g., nonviolent offenders). See 18 U.S.C. 3553(f) (2010).

<sup>7</sup> Unless the person had an enhanced role in the offense or was an importer, exporter, high-level distributor or supplier, wholesaler, or manufacturer. Consistent with 18 U.S.C. 3553(f), the person must not have used violence or a firearm or been a member of a continuing criminal enterprise, and the crime must not have resulted in death or serious bodily injury. The defendant must also truthfully provide to the government any and all information and evidence known about the offense. This provision also excludes offenders

While we support these provisions, we are concerned their impact will be quite limited. Mandatory minimums do not deter people from entering the drug trade and do not increase public safety. Instead, they inflict punishment that is disproportionate to the offense and disproportionate in impact on people from neglected communities, especially young black and Latino men. Rather than chipping away at these problems with expanded and new safety valve provisions, Congress should repeal mandatory minimum sentencing laws outright.

## **II. Reducing the impact of mandatory minimums**

This legislation would reduce the mandatory life sentence for a third drug felony to a mandatory minimum sentence of 25 years and reduce the 20 year mandatory minimum for a second drug felony to 15 years. Both changes would be retroactive except for people with prior convictions for serious violent felonies.<sup>8</sup> However, the section containing these improvements also imposes a new sentencing enhancement for heroin laced with fentanyl or fentanyl disguised as heroin, *even if the person selling the heroin had no knowledge that his or her supplier cut it with fentanyl*. This is unjustified and unfair because it is not clear a person would have to have knowledge that fentanyl was mixed in with the drug before being subjected to this sentencing enhancement.

The bill would also amend 18 U.S.C. 924(c), which currently allows “stacking” or consecutive sentences for gun charges stemming from one incident committed during a drug crime or crime of violence. The legislation would require a prior gun conviction to be final before a person could be subject to an enhanced sentence for possession of a firearm. This provision in federal law has resulted in very long and unjust sentences<sup>9</sup>, and this change would also apply retroactively except for people with prior convictions for serious violent felonies. These changes in federal law will result in fewer people being subjected to harsh mandatory minimums.

## **III. Correct Inconsistency in the Armed Career Criminal Act Statute**

In addition, a provision in the bill would correct an inconsistency in current law which results in the statutory *maximum* of 10 years under the Armed Career Criminal Act (ACCA) being less than the mandatory *minimum* of 15 years under the law. H.R. 3713 increases the statutory maximum for the unlawful possession of a firearm from 10 to 15 years, while also reducing the mandatory minimum under the ACCA from 15 to 10 years. This change would be retroactive except for people who have prior convictions for serious violent felonies.

## **IV. Making revisions to crack disparity retroactive**

---

with prior serious drug or serious violent convictions or offenders who distributed drugs to or with a person under the age of 18.

<sup>8</sup> However, “serious violent felonies” would be allowed to count as a “strike” or a prior conviction against a person under 21 U.S.C. 841(b)(1). See Sec. 2.

<sup>9</sup> However, prior convictions “under State law for a crime of violence that contains as an element of the offense the carrying, brandishing or use of firearm” can count as a prior conviction under 18 U.S.C. 924(c). See Section 5.

H.R. 3713 would retroactively apply the statutory changes of the Fair Sentencing Act of 2010 (FSA), which reduced the indefensible disparity in sentence lengths between crack and powder cocaine. This change in the law would allow people who were sentenced under the harsh and discriminatory 100 to 1 crack to powder cocaine ratio to be resentenced under the 2010 law. We not only strongly support this provision, but we also continue to advocate that the disparity in sentence lengths between crack and powder cocaine should be eliminated entirely.

V. **Reducing the use of juvenile life without parole and juvenile solitary**

We also strongly support provisions in Title II of S. 2123, the Sentencing Reform and Corrections Act – the pending Senate bill that parallels several provisions of the House measure, that would give judges discretion to reduce juvenile life without parole sentences after 20 years, allow compassionate release of more people over the age of 60, and effectively ban juvenile solitary confinement in the federal system. We also support provisions in Title II of S. 2123 that would permit some juveniles to seal or expunge non-violent convictions from their record and establish procedures for people who undergo background checks for employment to challenge the accuracy of their federal criminal records. We encourage House Judiciary members to incorporate similar language in H.R. 3713.

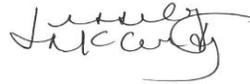
VI. **Conclusion**

The Chairman, Ranking Member and Crime, Terrorism, Homeland Security, and Investigations Subcommittee Ranking Member Sheila Jackson Lee all deserve credit for their commitment to rethinking and improving our federal justice system. This legislation is a delicate balance by the sponsors of competing visions for maintaining public safety and creating a system that is fairer and more just. Though limited in scope, the SRA is an important step forward to address this country's deeply flawed criminal justice system. We encourage Representatives to cosponsor and support this legislation. If you have any additional questions, please contact Jesselyn McCurdy, Senior Legislative Counsel, at [jmccurdy@aclu.org](mailto:jmccurdy@aclu.org) or (202) 675-2307.

Sincerely,



Karin Johanson  
Director  
Washington Legislative Office



Jesselyn McCurdy  
Senior Legislative Counsel  
Washington Legislative Office

cc: House Judiciary Members