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VIA UPS AND EMAIL (pubaffairs@ussc.gov)

United States Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington DC 20002-8002

Attention: Public Affairs-Priorities Comment

Dear Commissioners,

The Center on the Administration of Criminal Law at New York University School of Law (“the Center”) submits this letter in response to the Commission’s request for comments on its Notice of Proposed Priorities and Request for Public Comment for the amendment cycle ending May 1, 2009.<sup>1</sup>

### **Introduction**

*Summary of Proposal.* The Center proposes that among the top priorities for the next amendment cycle, the Commission include two key issues that are currently absent from the Commission’s agenda.

First, given the rising costs of incarceration and the increasingly limited available federal prison space, the Commission should forecast the fiscal costs of any provision affecting sentencing in pending criminal legislation prior to congressional enactment and should similarly forecast the costs of any proposed Commission amendment to the Guidelines before those amendments go into effect. This proposal will allow Congress to

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<sup>1</sup> 73 Fed. Reg. 46341 (Aug. 8, 2008).

have valuable information about the costs of proposed legislation during its deliberations so that it can assess whether the legislation will make the most efficient use of federal resources in combating crime.

Second, given the racial and ethnic imbalance among the large federal prison population and the concerns this has raised in communities across the country, the Commission should also implement a program where it forecasts the racial and ethnic impact of any provision affecting sentencing in pending criminal legislation prior to congressional enactment and should likewise forecast the racial and ethnic impact of any proposed Commission amendment to the Guidelines. As with cost forecasting, this information would be enormously valuable to legislators as they consider what policies are the most appropriate for fighting crime and maintaining citizen confidence in the equal treatment of the law. Both of these recommendations are based on the successful experience in the States with similar forecasts. The federal government – with the Commission’s assistance – should examine these state practices with an eye toward adopting a version of them at the federal level.

*About the Center.* The Center is an apolitical advocacy organization and think-tank dedicated to the improvement and promotion of good government and prosecution practices in criminal matters. The Center pursues this mission in three main arenas: academia, litigation, and public policy debates. The public policy component applies the Center’s criminal justice expertise to improve the dialogue on criminal justice matters with elected and appointed public officials. The Center’s Faculty Director, Professor Rachel E. Barkow, is a nationally-recognized expert on criminal law and sentencing. In 2004, she testified before the United States Senate Judiciary Committee regarding the future of the federal sentencing guidelines in the wake of the Supreme Court’s decision in *Blakely v. Washington*. The Center’s Executive Director, Anthony S. Barkow, was a federal prosecutor for 12 years, the last six of which were spent as an Assistant United States Attorney in the United States Attorney’s Office for the Southern District of New York, where he prosecuted some of the most significant terrorism and white collar criminal cases in the United States. In 2005, he was awarded the Attorney General’s Award for Exceptional Service, which is the highest award bestowed in the United States Department of Justice.

The Center submits these comments on the basis of its extensive research into successful state practices and sentencing commission models.

**I. The Commission Should Include Among Its Priorities the Pre-Enactment Forecasting of the Costs of Federal Criminal Legislation and of Commission Proposals**

The Commission should include among its priorities the implementation of a program in which it forecasts the fiscal impact of its proposed amendments and of federal criminal legislation prior to congressional enactment so that Congress can determine if the legislation’s benefits are worth its costs. Virtually every state with a sentencing commission has adopted a cost projection program, and these fiscal impact forecasts have

been enormously successful in helping states make the most of their crime fighting resources.<sup>2</sup> Indeed, these cost projections have been so successful that the American Bar Association has included cost forecasts as an integral part of its proposed Model Sentencing Act. That Act requires an impact analysis on the theory that “it is in every state’s interest to coordinate resource and policy decisions.”<sup>3</sup>

The United States Sentencing Commission has the resources and capacity to perform these cost projections, and that information would be valuable to Members of Congress and the Commissioners in helping them determine how best to use federal resources. In addition, using this data to assist policymakers will improve the Commission’s standing as a valuable public agency. State commissions that use these forecasts “have found that, over time, as their resource projections have been shown to be accurate and objectively-determined, their legislatures have placed ever-greater stock in their forecasts, affording the commissions a deepening reputation for credibility, and allowing their research to play a more powerful role in legislative deliberations.”<sup>4</sup>

Since Minnesota established the first sentencing commission in the country in 1978 and passed guidelines in 1980 that included cost projections as a key part of its mandate, virtually every sentencing commission has followed this model because of its demonstrated success. In the face of legislative concern with keeping the Minnesota prison population below capacity, the Minnesota Sentencing Commission has developed sophisticated computer models to estimate prison populations under different sentencing options. The Minnesota legislature, in turn, has relied on the Minnesota Commission’s “prison population impact statements” on proposed legislation. The Minnesota Commission’s pre-enactment input has allowed Minnesota to avoid the prison overcrowding that has plagued other states and had increased the Minnesota Commission’s influence over state sentencing policy.<sup>5</sup> In Minnesota, “this ‘early-warning system’” has empowered – indeed, forced – elected officials to consider the costs of sentencing proposals prior to enacting them.<sup>6</sup> During the period it has received this cost-benefit data, the Minnesota legislature has proceeded more rationally and cost-effectively in enacting criminal sentencing legislation, allocating its resources according to its needs but within its cost constraints. The state has increased sentences for violent crimes, such as first-degree criminal sexual contact, but has kept sentences lower for nonviolent offenses.<sup>7</sup> If Congress were advised of the costs of proposed criminal legislation and of Guideline amendments, it, too, could consider *ex ante* the costs of the laws prior to enactment, and thereby achieve a more rational and effective criminal justice system that maximizes the nation’s crime reduction benefits from its criminal justice expenditures.

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<sup>2</sup> See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 809 (2005) (noting that “[a]lmost every state to adopt a guideline system since the middle of the 1980s has opted to require some version of an impact statement” and that these cost estimates have “proven to be effective”).

<sup>3</sup> Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA’s New Sentencing Standards*, 78 JUDICATURE 189, 194 (1995).

<sup>4</sup> Barkow, *supra* note 2, at 810 (quoting Kevin R. Reitz, *A Proposal for Revision on the Sentencing Articles of the Model Penal Code* 31, available at <http://www.ali.org/MPC02Revision.htm>).

<sup>5</sup> See Barkow, *supra* note 2, at 771-77.

<sup>6</sup> See Richard Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 38 (1993).

<sup>7</sup> See Barkow, *supra* note 2, at 775.

Indeed, precisely because of Minnesota's success with this model, virtually every state with a commission has followed suit. Like its Minnesota counterpart, the Washington Sentencing Commission provides the state legislature with prison resources cost estimates with its recommendations. These estimates project whether implementation of its recommendations would exceed its current correctional capacity and, if so, includes a list of alternative sentence ranges that are consistent with correctional capacity. Undoubtedly in reliance, at least in part, upon this data, the Washington legislature has implemented drug sentencing reforms and alternative treatment programs and expanded use of cost-effective community corrections programs at a projected savings to the state of \$45 million per year.<sup>8</sup> Similar to the experience in Minnesota, providing such data has increased the Washington Sentencing Commission's influence in the politics of crime in the state.<sup>9</sup>

The North Carolina Sentencing Commission similarly uses expert forecasting models to highlight the costs of legislative choices. In making recommendations to the legislature, the Commission considers "available resources and constitutional capacity" of prison facilities, and provides statements of an "estimate of the effect of [its recommended] sentencing structures . . . both in terms of fiscal impact and on inmate population."<sup>10</sup> If its recommendations would result in prison populations exceeding current capacity, alternative recommendations are made. The North Carolina Commission's estimates have been extremely accurate, and the state legislature has relied upon them.<sup>11</sup> In response to political and cost pressures in the state, the North Carolina Commission now uses its computer models to provide the state legislature with "two plans [for each proposal] for the legislature to choose from, one with more severe sentences, and another with slightly less severe sentences that would forestall the need to build new prisons for a few more years."<sup>12</sup> Armed with this data, the North Carolina legislature has acted more rationally, adopting lower sentences when that is the appropriate course and longer sentences when that makes the most sense.<sup>13</sup> Moreover, the data have allowed the legislature to engage in more accurate long-term planning. For example, in connection with the enactment of a three-strikes law, a gun enhancement law, and higher penalties for rape, the Commission's fiscal impact statements permitted the legislature to calibrate the precise number of new prison beds needed to accommodate the anticipated increase in incarceration that would result from the legislation.<sup>14</sup> And, as in Minnesota and Washington, provision of cost forecasting data has increased the influence of the North Carolina state sentencing commission on the enactment of criminal policy there.<sup>15</sup>

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<sup>8</sup> See *id.* at 779-81.

<sup>9</sup> See *id.* at 780-81.

<sup>10</sup> N.C. Gen. Stat. § 164-42(d).

<sup>11</sup> Barkow, *Administering Crime*, *supra*, at 784-85.

<sup>12</sup> *Id.* (citing Daniel F. Wilhelm & Nicholas R. Turner, Vera Inst. Of Justice, *Is The Budget Crisis Changing the Way We Look At Sentencing and Incarceration?* 7 (2002), available at [http://www.vera.org/publication\\_pdf/167\\_163.pdf](http://www.vera.org/publication_pdf/167_163.pdf)).

<sup>13</sup> See *id.* at 786.

<sup>14</sup> See *id.* at 786-87.

<sup>15</sup> See *id.* at 782-87.

Other states have similarly embraced the value of cost information, using this data to implement rational sentencing policies and to further their incarceration policies.<sup>16</sup> In fact, it is precisely because commissions can help states use their limited resources most effectively that so many states have established commissions in the first place. A recent empirical study of all the states with commissions and guidelines found that legislative concerns with costs are a main driver for the establishment of sentencing commissions and the promulgation of sentencing guidelines.<sup>17</sup>

It is important to note that cost information, standing alone, does not support either reduced or increased sentences. Sometimes states raise sentences in light of cost data, knowing that they have the resources to afford the financial outlay. Other times, states lower sentences for some crimes (particularly nonviolent crimes) in order to reserve scarce prison resources for violent crimes and achieve the same overall reduction in crime, but at a lesser cost. What the data allows is more informed, efficient use of resources to achieve whatever policy goals are set by Congress or the Commission.

The experience in the states has shown that using cost information to help set policy can help achieve lower crime rates or maintain already low rates while saving money. The states have managed to maximize their limited resources without increasing their crime rate. Indeed, during the last twenty years – the period in which most states have made the use of these estimates – crimes rates have largely declined or stabilized. Beginning in 1992, and by 1999, homicide rates had declined to rates not seen since the 1960s.<sup>18</sup> Nationwide, the overall crime rate reached a historic low in 2000.<sup>19</sup> During this entire period of lower crime rates, states used cost projections to make the most of their limited resources by lowering the growth in their incarceration rates and reducing the growth rate of corrections as a percentage of their overall expenditures.<sup>20</sup>

The federal government, like the states, can therefore achieve cost savings and keep crime rates low. Such forecasting by the Commission would achieve benefits at the federal level like those attained in these states. Using cost forecasting, the federal government could realize fiscal rationality and implement better, more cost-effective federal criminal justice policies. Whatever the benefits to crime control of the incarceration boom, the possibility is worth exploring that the existing sentencing structure could perform at a lower cost equally well or more effectively, by producing even lower crime rates, by

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<sup>16</sup> See, e.g., Kim Hunt, *Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process*, 20 LAW AND POL'Y 465, 470 (1998) (describing the use of fiscal impact statements in Virginia); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1288-1289 (2005) (describing the impact of these cost estimates in Alabama).

<sup>17</sup> See Rachel Barkow & Kathleen O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 2011, 2017 (2006).

<sup>18</sup> See Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, published in THE CRIME DROP IN AMERICA, at 3-4 (2000).

<sup>19</sup> See Emma Schwartz, *Crime Rates Shown to Be Falling: Latest figures show a reversal of an upward tick, but the picture remains complicated*, U.S. NEWS AND WORLD REPORT, June 11, 2008, available at <http://www.usnews.com/articles/news/national/2008/06/11/crime-rates-shown-to-be-falling.html>.

<sup>20</sup> See Barkow & O'Neill, *supra* note 17, at 2008-09.

yielding the same rates in a more cost-effective manner, or by reducing the social costs of incarceration policies without increasing the crime rates.

Commission-provided information on costs in advance of the adoption of any amendment or law would be particularly valuable because resource management is often otherwise lost in the legislative debate. The focus is instead on short-term costs and the desire for retribution or the need for deterrence or incapacitation. Of course those are important considerations. But the long-term fiscal impact is also critical. Sentencing laws can require large capital expenditures to maintain and staff prison facilities that are often overlooked. Although the costs of longer terms of imprisonment may make sense for many offenses and offenders, in some situations the money spent on longer prison terms would be better spent on incarceration for more serious offenders, alternatives to incarceration for some nonviolent offenders, or resources for policing or education. Because the political process does not, on its own, always provide reasoned consideration of these options,<sup>21</sup> Commission-provided cost data can fill the void and ensure that federal dollars are spent wisely.

Cost forecasting is all the more important in the current era of limited federal budgets and escalating costs. Federal budget deficits are ballooning to record levels, in part due to the current recession as well as the need to fund military operations in Iraq and Afghanistan.<sup>22</sup> Even though incarceration costs represent only approximately 1% of federal government expenditures,<sup>23</sup> corrections expenditures are rising rapidly. Between 1982 and 2003, the federal government increased expenditures on corrections by 925%, compared to increases of only 241% on police protection during the same period.<sup>24</sup> At year-end 2005, the last year for which the Bureau of Justice Statistics has issued a report on the status of the Nation's prisons, federal prisons were operating at 34% above their capacity.<sup>25</sup> Greater attention to costs could therefore assist the Commission and Congress in using these overtaxed resources wisely and to use the money saved for more police protection, other crime-fighting programs, or other congressional priorities.

Such forecasting is consistent with the Commission's statutory purpose, duties, and authority. "The purposes of the United States Sentencing Commission are to . . . develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing . . ." <sup>26</sup> Indeed, the Sentencing Reform Act explicitly charges the Commission in promulgating guidelines to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and to "make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the

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<sup>21</sup> See *id.* at 1291-99.

<sup>22</sup> See Martin Crutsinger, *Budget Deficit Soars to \$102.8 Billion in July* (Associated Press 8/12/2008), available at <http://ap.google.com/article/ALeqM5gEiJcU7rR0o8aFOk3fXoM29cpGbOD92GTPEO0>.

<sup>23</sup> See Bureau of Justice Statistics, *Justice Expenditure and Employment in the United States 2003*, at 2, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf>.

<sup>24</sup> See *id.* 2, 9.

<sup>25</sup> See Bureau of Justice Statistics, *Prisoners in 2005*, available at <http://www.ojp.usdoj.gov/bjs/abstract/p05.htm>.

<sup>26</sup> 28 U.S.C. § 991(b)(2).

guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . .”<sup>27</sup> The Commission unquestionably has the authority to conduct such cost forecasting: “[t]he Commission . . . shall have the power to . . . make recommendations to Congress concerning modification or enactment of statutes related to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”<sup>28</sup>

Not only is cost forecasting consistent with the Commission’s specific mandate, it is consistent with the government’s practice in other areas. The federal government has embraced cost benefit analysis as a centerpiece of the movement to reinvent government to be more effective and streamlined. The Office of Management and Budget reviews the proposed regulations of executive agencies before they take effect to ensure that they are justified under a cost-benefit analysis. Although the Commission’s proposed amendments are exempt from this requirement, they fall within its spirit. Sentencing policies, like all other government policies, should seek to make government as efficient and effective as possible. It is the very definition of good government to ensure that any proposed policy maximizes welfare at the lowest cost.<sup>29</sup> This should therefore be a top priority for the Sentencing Commission as it enters its next amendment cycle.

## **II. The Commission Should Include Among Its Priorities the Pre-Enactment Forecasting of the Racial and Ethnic Impact of Federal Criminal Legislation and of Commission Proposals**

The costs of a system of mass incarceration are not just measured in dollars. There are social costs as well, and one of the greatest stems from the racial and ethnic disparities in our federal prison population. Blacks and Hispanics are disproportionately incarcerated, relative to both their numbers in the general population and the incidence with which they commit crimes. As of July 26, 2008, of the 201,417 people incarcerated in federal prisons, 79,476 individuals (39.5% of the total) were black and 64,079 (31.8%) were Hispanic.<sup>30</sup> In 2007, 72.2% of federal drug offenders were black or Hispanic.<sup>31</sup> Blacks comprise only

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<sup>27</sup> *Id.* § 994(g).

<sup>28</sup> *Id.* §995(a)(20); *see also id.* §§ 995(a)(12)-(16).

<sup>29</sup> *See* RICHARD L. REVEZ AND MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 12-13 (2008) (discussing benefits of cost-benefit analysis in government decisionmaking, even regarding government regulation motivated by goals other than efficiency, because it achieves more rational government programs, increases accountability and transparency in government, and structures and channels exercises of discretion by government decisionmakers); STEPHEN HOLMES & CASS SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 228-29 (1999) (noting that public deliberation should be focused on, among other things, how much to spend on a given right and “the optimal package of rights, given that the resources that go to protect one right will no longer be available to protect another right.”).

<sup>30</sup> *See* Federal Bureau of Prisons, Inmate Population, available at <http://www.bop.gov/news/quick.jsp#1>.

<sup>31</sup> *See* UNITED STATES SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, available at <http://www.ussc.gov/ANNRPT/2007/Table34.pdf>.

12.4% of the American population, and Hispanics make up 14.8%.<sup>32</sup> Eleven and one-half percent of black men under the age of 40 are imprisoned, and more than 20% of black men born since the late 1960s have spent at least a year, and typically two, in jail for a felony conviction.<sup>33</sup> In some cities, more than 40-50% of black men are under the supervision of the criminal justice system.<sup>34</sup> “If brought together in one incorporated region, the black males who are now in prison would instantly become the twelfth-largest urban area in the country.”<sup>35</sup> If current trends continue, almost one-third of black men can expect to be incarcerated during their lifetimes, while only 4% of white men face the same expectation.<sup>36</sup> And black children are nearly 9 times more likely to have a parent in prison than are white children.<sup>37</sup>

Critically, despite their disproportionate representation among incarcerated individuals, black men do not commit crimes (other than serious violent crimes) more than whites. Thus, although high rates of homicide among black men explain the parallel high rates of imprisonment for murder, for less serious offenses, race differences in incarceration are not well explained by higher crime rates among blacks.<sup>38</sup> This is particularly true for drug offenses, where, as noted, people of color make up almost three-fourths of the federal prison population. Their rates of offending are nowhere near those numbers. Instead, “black men are much more likely than whites to be arrested for a drug offense, and go to prison if arrested, even though they are no more likely to use drugs than whites.”<sup>39</sup>

State prisons have comparable demographics, and they have begun to take action to investigate why the numbers are so disproportionate. For example, Iowa recently enacted

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<sup>32</sup> See 2006 American Community Survey, United States Census Bureau, available at [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-context=dt&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-CONTEXT=dt&-mt\\_name=ACS\\_2006\\_EST\\_G2000\\_B02001&-tree\\_id=306&-redoLog=false&-currentselections=ACS\\_2006\\_EST\\_G2000\\_B02001&-currentselections=ACS\\_2006\\_EST\\_G2000\\_B02003&-currentselections=ACS\\_2006\\_EST\\_G2000\\_C02003&-geo\\_id=01000US&-geo\\_id=02000US1&-geo\\_id=02000US2&-geo\\_id=02000US3&-geo\\_id=02000US4&-search\\_results=01000US&-format=&-lang=en](http://factfinder.census.gov/servlet/DTable?_bm=y&-context=dt&-ds_name=ACS_2006_EST_G00_&-CONTEXT=dt&-mt_name=ACS_2006_EST_G2000_B02001&-tree_id=306&-redoLog=false&-currentselections=ACS_2006_EST_G2000_B02001&-currentselections=ACS_2006_EST_G2000_B02003&-currentselections=ACS_2006_EST_G2000_C02003&-geo_id=01000US&-geo_id=02000US1&-geo_id=02000US2&-geo_id=02000US3&-geo_id=02000US4&-search_results=01000US&-format=&-lang=en).

<sup>33</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 19, 26 (2006).

<sup>34</sup> See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 744 (1993).

<sup>35</sup> DERRICK BELL, SILENT COVENANTS 183 (2004).

<sup>36</sup> See *Impact of Incarceration on the African-American Family*, ed. Harris & Miller, at 89, available at [http://books.google.com/books?id=zr0BWzjLrKgC&pg=PA167&lpg=PA167&dq=Impact+of+Incarceration+on+the+African-American+Family&source=web&ots=jO02Cj\\_ZFt&sig=XUsUZCfrQMnG5WF9I2xaEP8c63c&hl=en&sa=X&oi=book\\_result&resnum=1&ct=result](http://books.google.com/books?id=zr0BWzjLrKgC&pg=PA167&lpg=PA167&dq=Impact+of+Incarceration+on+the+African-American+Family&source=web&ots=jO02Cj_ZFt&sig=XUsUZCfrQMnG5WF9I2xaEP8c63c&hl=en&sa=X&oi=book_result&resnum=1&ct=result); see also Bureau of Justice Statistics, Lifetime Likelihood of Going to State or Federal Prison (March 1997), available at [http://209.85.165.104/search?q=cache:CssOMn0m\\_NIJ:www.ojp.usdoj.gov/bjs/pub/ascii/lgsfp.txt+1/3+black+men+incarcerated+during+lifetimes&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a](http://209.85.165.104/search?q=cache:CssOMn0m_NIJ:www.ojp.usdoj.gov/bjs/pub/ascii/lgsfp.txt+1/3+black+men+incarcerated+during+lifetimes&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a).

<sup>37</sup> See *id.* 88. This problem promises only to become more acute because “[e]thnic and racial minorities will comprise a majority of the nation’s population in a little more than a generation, according to new Census Bureau projections.” Sam Roberts, *In a Generation, Minorities May Be the New U.S. Majority*, N.Y. TIMES, Aug. 13, 2008, at A1.

<sup>38</sup> See WESTERN, *supra* note 33, at 50.

<sup>39</sup> See *id.* at 50.

legislation requiring a “Minority Impact Statement” for any proposed criminal law. The law, which was overwhelmingly endorsed by both parties (the vote in favor was unanimous in the Iowa House and 47-2 in the Iowa Senate), requires examination of the impact upon minorities, including racial and ethnic minorities, of all new criminal laws, including sentencing laws, prior to passage.<sup>40</sup> The Minority Impact Statement Bill provides a means for Iowa legislators to anticipate any unwarranted disparities and enables them to consider alternative policies to accomplish the goals of the proposed legislation without causing undue negative effects on public safety and without creating the same disparities.

The Commission should follow Iowa’s example and set as a priority the establishment of a reporting scheme whereby the Commission would report to Congress on the racial/ethnic impact of proposed criminal legislation and Guideline amendments.<sup>41</sup> In addition to empowering Congress – like the Iowa legislature – to anticipate and reduce unwarranted disparate effects posed by pending legislation and to consider alternatives prior to enacting criminal legislation, such forecasting would reflect federal legislative priorities and be consistent with the Commission’s currently-listed tentative priorities.

Forecasting the racial and ethnic impact of proposed federal criminal legislation and Commission sentencing rules could help Congress and the Commission develop more fair and rational federal criminal legislation. Unwarranted disparate effects of criminal laws are unjust and discriminatory. To the extent such unwarranted, unfair effects are not tied to actual differences in the incidence of crime commission, such effects should be avoided and alternatives considered. The Commission would provide invaluable data to Congress in the effort to root out such unfair racial and ethnic discrimination and to enact alternative legislation without unwarranted disparate impact.

There is already congressional interest in such information. This summer, Senator Joseph Biden introduced the Justice Integrity Act.<sup>42</sup> The legislation would establish a pilot program in the Justice Department to identify and eliminate unjustified racial and ethnic disparities in the administration of criminal justice. The program calls for an advisory group to gather and examine data regarding the criminal process in 10 federal districts and seek to determine the causes of any racial or ethnic disparity, produce a report on key findings, and recommend a plan to reduce any unwarranted racial and ethnic disparity. The bill is now co-sponsored by Senators Cardin, Feingold, Kerry, Murkowski, and Specter.<sup>43</sup> Commission examination of racial and ethnic impact of proposed criminal legislation would be consistent with the goals of the Justice Integrity Act and the Commission is well positioned to provide this information given its extensive staff and expertise.

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<sup>40</sup> See Iowa House File No. 2393, available at <https://www.edinfo.state.ia.us/web/legisupdate.asp>.

<sup>41</sup> Such examination is consistent with the Commission’s statutory purpose. “The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct . . .” 28 U.S.C. § 991(b)(1)(B) (emphasis added).

<sup>42</sup> See S. 3245, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3245:>.

<sup>43</sup> See <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03245:@@P>. A companion bill has been introduced in the House of Representatives. See H.R. 6518, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6518>.

Examining the racial and ethnic impact of proposed criminal legislation would also complement the Commission's currently-listed tentative priorities. Two of those tentative priorities – “a study of statutory mandatory minimum penalties” and “[c]ontinuation of . . . work . . . on cocaine sentencing policy” – are intertwined with the severity of racial and ethnic disparities. Black and Hispanic offenders make up the overwhelming majority of individuals convicted under mandatory minimum law. Black offenders make up 32.9% of those convicted with a mandatory minimum sentence, and Hispanic offenders make up 38.2%. Overall, black offenders comprise a greater percentage of offenders convicted under a statute carrying a mandatory minimum penalty than their already high percentage of the overall offender population.<sup>44</sup> And, as the Commission itself has recognized, the disparity of penalties between crack cocaine and powder cocaine offenses is vast: more than 80% of crack cocaine defendants in 2006 were black, and black defendants serve as much time in prison for drug offenses (58.7 months) as white defendants do for violent offenses (61.7%). Recognizing the severity of this disparity, the Commission has repeatedly advocated eliminating it, and in fact, recently took steps to reduce the disparity.

Imprisonment causes significant adverse socio-economic consequences for the imprisoned individual, their families, and society generally. Imprisonment causes dislocation from the labor market upon release, dissolves marriages and relationships with children and family, causes post-release domestic violence, and by reducing wages and employment opportunities, creates social welfare costs that must be borne by rest of society.<sup>45</sup> When warranted, such consequences are a necessary part of ordering society under the rule of law. But when such consequences are unwarranted and are not linked to the actual incidence of crime – and thus do not achieve deterrence of criminal conduct – such consequences should be avoided, particularly when they fall disproportionately on certain communities. Implementation of the proposed program would assist Congress to achieve a more rational and fair criminal justice policy and avoid the adverse consequences of unwarranted disparate incarceration.

Providing Congress and the Commission with cost data about proposed sentencing legislation and its impact on racial and ethnic communities will help policymakers to fight crime efficiently and effectively and to minimize the social costs of this effort.

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<sup>44</sup> See Statement of Ricardo H. Hinojosa before House Judiciary Committee, June 26, 2007, at 3, *available* at [http://www.ussc.gov/testimony/6\\_26\\_07.pdf](http://www.ussc.gov/testimony/6_26_07.pdf).

<sup>45</sup> See WESTERN, *supra* note 33, at 108-67.

Respectfully submitted,



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cc: Members of the U.S. Sentencing Commission