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August 20, 2020

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chairman Graham and Ranking Member Feinstein,

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), a coalition charged by its diverse membership of more than 220 national organizations to promote and protect civil and human rights in the United States, we write to urge the Judiciary Committee not to advance the slate of nominees to the United States Sentencing Commission that President Trump announced on August 12, 2020.¹ We are concerned that the four Republican nominees lack the diversity of race, viewpoint, and professional experience needed to reform a federal sentencing regime that has devastated communities of color for decades. Our nation incarcerates people at a higher rate than any other country in the world.² The First Step Act of 2018 is proof of the bipartisan consensus in favor of changing this course. But Senate confirmation of this homogeneous slate will delay meaningful sentencing reform and moves in the wrong direction at a moment when our nation demands a reckoning with structural and racial inequality.

The Sentencing Commission exerts significant influence on federal sentencing policy. The sentencing guidelines promulgated by the Commission are a driving force in who goes to prison and for how long. By law, courts must calculate the guideline sentence, and that calculation has an anchoring effect on sentences imposed.³ Through the power of the guidelines, access to data, and the authority to direct a research agenda, the Commission shapes both individual sentences as well as the composition of the entire federal prison population. For that reason, it is imperative that the Commission entrusted with such responsibility includes a diversity of experience and perspectives reflective of all individuals

¹ The four Republican nominees are: Hon. J. Michael Moore (as Chairman); Hon. Claria Horn Boom; Hon. Henry E. Hudson; and Mr. John G. Malcolm. The Democratic nominee is: Hon. Luis Felipe Restrepo. See The White House, Press Release, *President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts* (Aug. 12, 2020), <https://bit.ly/2Y0WmL0>; see also Carrie Johnson, *Concerns Mount Over Possible Trump Picks for Influential Crime Panel*, NPR (June 19, 2020), <https://n.pr/33Y5zri> (listing the Republican candidates).

² See Radu, S. *Countries with the Highest Incarceration Rates*. U.S. News. (May 13, 2019) <https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates>.

³ See, e.g., *Peugh v. United States*, 569 U.S. 530, 542-43 (2013) (“Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges”); see also *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) (“the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar.”).

who move through federal courts. It is also no secret that policies are viewed as more legitimate if they are supported by diverse perspectives.⁴ Considering the lack of diversity on the federal bench,⁵ a balance of viewpoints on the Commission is vital. While diversity on the Commission alone is not a cure-all for this nation's mass incarceration crisis, it is key in fostering a more equitable system of justice.

Indeed, at the inception of the Commission, Congress demanded that it reflect diversity of viewpoint and background. Congress sought a Commission with "a broadly represented membership" so that commissioners "represent some diversity of backgrounds" such that sentencing policy be made on the basis of "a wide spectrum of views."⁶ Congress also intended the Commission's membership to be based on merit — not politics — and flatly condemned political appointments: "presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority."⁷

The Republican slate recently announced by President Trump makes no effort to meet these laudable goals. Not a single Republican nominee is a person of color, and only one is a woman. As practitioners, each nominee's experience with federal sentencing has been primarily through the lens of a prosecutor, U.S. Marshal, or both.⁸ While these experiences are relevant to the Commission's work, the disproportionate emphasis on them is not reflective of the diversity of background that Congress intended. Moreover, the weight of these perspectives will worsen an already troubling bent towards law enforcement on the Commission, as the Department of Justice and the United States Parole Commission each have a designated ex officio member — an honor conspicuously not bestowed on any group that directly represents individuals in the federal legal system.

Two prospective nominees have particularly concerning records that suggest their inclusion on the Commission would hinder rather than redress this nation's mass incarceration crisis. At the top of the slate is Judge K. Michael Moore, the Chief Judge of the U.S. District Court for the Southern District of Florida, to be chair of the Commission. Prior to becoming a judge, Mr. Moore had no professional experience outside of law enforcement, working first as a federal prosecutor in Florida, and then with a young Attorney General William Barr (then Deputy Attorney General) as the director of the U.S. Marshals Service. He has taken a law and order perspective to the bench and has issued sentences so

⁴ See Root, D., Faleschini, J. & Oyenubi, G. *Building a More Inclusive Federal Judiciary*. CENTER FOR AMERICAN PROGRESS. (Oct. 3, 2019). <https://ampr.gs/3aFUfBt> ("The inclusion of judges from different backgrounds and walks of life results in more thoughtful and balanced decisions, thereby bolstering the legitimacy of the courts, while—at the same time—offering a wide array of benefits to litigants and the legal profession.")

⁵ See, e.g., Buchanan, M. *Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench*. CENTER FOR AMERICAN PROGRESS. (Aug. 13, 2020). <https://ampr.gs/2E8p1Xm> (recognizing that more than 70 percent of all sitting appellate judges are former prosecutors and approximately 30 percent are educated at the same four law schools); Federal Judicial Center. *Biographical Directory of Article III Federal Judges, 1979-present*. (last visited Aug. 14, 2020). <https://bit.ly/340atEj> (over 80 percent of sitting Federal judges are white and 72 percent are men).

⁶ S. Rep. 98-225, 1983 WL 25404. (Aug. 4, 1983).

⁷ *Ibid.*

⁸ Judge K. Michael Moore previously served as the Director of the United States Marshals Service, the United States Attorney for the Northern District of Florida, and as an Assistant United States Attorney. Judge Claria Horn Boom previously served as an Assistant United States Attorney in the Eastern and Western Districts of Kentucky and was in private practice. Judge Henry E. Hudson previously served as Director of the United States Marshals Service, a United States Attorney for the Eastern District of Virginia, and the Commonwealth's Attorney for Arlington County, Virginia. Prior to his current position at the Heritage Foundation, John Malcolm served as both a Deputy Assistant Attorney General in the Department of Justice's Criminal Division, and as an Assistant United States Attorney for the Northern District of Georgia.

severe that they have provoked cross-ideological condemnation. For example, in 2015, Judge Moore sentenced a non-violent, first-time offender, Ronen Nachmani, to 20 years — the maximum sentence allowed by law.⁹ Disturbed by an unjust sentence, prominent former Justice Department leaders as well as bipartisan lawmakers asked President Trump to grant Mr. Nachmani clemency.¹⁰ President Trump agreed the sentence was too harsh, and ultimately granted Mr. Nachmani’s petition for clemency in 2019.¹¹

The proposed slate also includes Judge Henry E. Hudson, nicknamed “Hang ‘Em High Henry.”¹² Judge Hudson was originally recommended by Attorney General Jeff Sessions in 2017. At that time, Judge Hudson’s “views on sentencing [we]re considered to be in line with Sessions, who supports tougher sentencing,”¹³ and his nomination was seen as part of a strategy to implement a “reversal of several Obama-era policies” and a fulfillment of President Trump’s campaign promise to “restore law and order.”¹⁴ Judge Hudson’s history bears this out: a former prosecutor, he once said, “I live to put people in jail.”¹⁵ In his autobiography, Judge Hudson “offer[ed] no apologies” to an intellectually disabled man he had prosecuted in Arlington, Virginia, for murder, remaining convinced of the man’s involvement in the murder despite his exoneration based on DNA evidence.¹⁶ For these reasons, when he was originally nominated, advocates across the ideological spectrum spoke out against his nomination, stating, for example, that he “should not be anywhere near the Sentencing Commission.”¹⁷

⁹ *United States v. Nahmani*, 696 Fed. Appx. 457, 468 (11th Cir. 2017).

¹⁰ Prominent former Justice Department leaders, including two former U.S. Attorneys General (Michael Mukasey and Edwin Meese), former Acting U.S. Attorney General Stuart Gerson, former Deputy U.S. Attorney General Larry Thompson, former U.S. Solicitor General Seth Waxman, former FBI Director Louis Freeh, numerous former U.S. Attorneys and federal judges, former Senator Orrin Hatch, Senators Mark Rubio and Rand Paul, and Representatives Mark Meadows and Matt Gaetz, wrote to President Trump seeking clemency for Mr. Nachmani. See *Crown Heights. President Trump Commutes Sentence of Orthodox Jew*. (July 29, 2019). <https://crownheights.info/jewish-news/674397/president-trump-commutes-sentence-of-orthodox-jew/>; Borchardt, R. *Trump Commutes Sentence of Boaz Nahmani*. HAMODIA. (July 29, 2019). <https://hamodia.com/2019/07/29/trump-commutes-sentence-boaz-nahmani/>.

¹¹ *Ibid.*

¹² Bauer, P. *Arlington’s ‘Hang ‘Em High’ Prosecutor*. THE WASHINGTON POST. (Feb. 14, 1983). <https://www.washingtonpost.com/archive/local/1983/02/14/arlington-hang-em-high-prosecutor/9a69acdc-fa9b-434a-94b9-bf1ece30b661/>

¹³ Lynch, S. *Trump’s Sentencing Panel Picks May Face Uphill U.S. Senate Path*. REUTERS. (Mar. 2, 2018). <https://www.reuters.com/article/us-usa-trump-sentencing/trumps-sentencing-panel-picks-may-face-uphill-us-senate-path-idUSKCN1GE2GO>.

¹⁴ Reinhard, B. *Sessions Promotes Tough-On-Crime Judge for Sentencing Panel*. THE WALL STREET JOURNAL, (Aug. 10, 2017). <https://www.wsj.com/articles/sessions-promotes-tough-on-crime-judge-for-sentencing-panel-1502385002>

¹⁵ Michaels, S. “*I Live to Put People in Jail*”: Here Are Trump’s Nominees for the US Sentencing Commission. MOTHER JONES. (Mar. 1, 2018). <https://www.motherjones.com/crime-justice/2018/03/i-live-to-put-people-in-jail-here-are-trumps-nominees-for-the-us-sentencing-commission/>.

¹⁶ Reinhard, B. *Sessions Promotes Tough-On-Crime Judge for Sentencing Panel*. THE WALL STREET JOURNAL. (Aug. 10, 2017) <https://www.wsj.com/articles/sessions-promotes-tough-on-crime-judge-for-sentencing-panel-1502385002>; Jackman, T. *Journey Up the Rungs of Justice*. THE WASHINGTON POST. (Dec. 11, 2008). <https://www.washingtonpost.com/wp-dyn/content/article/2008/12/10/AR2008121000012.html>.

¹⁷ Lynch, S. *Trump’s Sentencing Panel Picks May Face Uphill U.S. Senate Path*. REUTERS. (Mar. 2, 2018). <https://www.reuters.com/article/us-usa-trump-sentencing/trumps-sentencing-panel-picks-may-face-uphill-us-senate-path-idUSKCN1GE2GO> (quoting Jason Pye, *FreedomWorks*); see also Ford, M. *The Man Who Hates Criminal Justice Reform*. THE NEW REPUBLIC. (May 7, 2018). <https://newrepublic.com/article/148307/man-hates-criminal-justice-reform>; Furst, B. *Trump’s Budget Requests Nothing for the First Step Act*. THE BRENNAN CENTER FOR JUSTICE. (Mar. 21, 2019). (“Judge Henry Hudson...was a notoriously punitive prosecutor known for aggressively

At a time when millions of people across this country are demanding that our institutions work to change course from the decades of systemic racism that have beget law enforcement brutality, it is more important than ever that the body charged with developing federal sentencing policy be representative of all people — particularly those upon whom it has had a disproportionate impact. Past Commissions have taken important steps to address mass incarceration, from lowering the offense levels under the guidelines for drug trafficking offenses in 2014 to advocating as early as 1995 for parity between crack and powder cocaine. The nominees recently proposed by President Trump, however, if confirmed by the Senate, are likely to undermine this progress by perpetuating outdated beliefs and confounding bipartisan efforts to reform our nation’s harsh sentencing practices. We must not risk veering off the path towards meaningful sentencing reform. For these reasons, we urge the Judiciary Committee to reject the proposed slate of nominees for the U.S. Sentencing Commission, and to work to ensure that the Commission’s composition embodies the congressional intent of a diverse Commission membership. If you have any questions about the issues raised in this letter, please contact Sakira Cook, director of the Justice Reform Program at The Leadership Conference, at cook@civilrights.org.

Sincerely,



Vanita Gupta
President & CEO



LaShawn Y. Warren
Executive Vice President, Government Affairs

cc: The Honorable Mitch McConnell, Majority Leader, U.S. Senate
The Honorable Chuck Schumer, Minority Leader, U.S. Senate
Members of the U.S. Senate, Committee on the Judiciary