May 25, 2021

The Honorable Dick Durbin  The Honorable Chuck Grassley
Chairman  Ranking Member
Committee on the Judiciary  Committee on the Judiciary
U.S. Senate  U.S. Senate
Washington, D.C. 20515  Washington, D.C. 20515

Re: Prohibiting Punishment of Acquitted Conduct Act of 2021, S. 601

Dear Chairman Durbin and Ranking Member Grassley:

The undersigned organizations write in support of the Prohibiting Punishment of Acquitted Conduct Act of 2021, which is scheduled for markup by the Judiciary Committee on May 27. This bill, introduced by Senators Durbin and Grassley, and cosponsored by Senators Leahy, Tillis, Booker, and Lee, would end the unjust practice of judges increasing sentences based on conduct for which a defendant has been acquitted by a jury. We urge the Committee to pass this bill without amendments.

The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury for those accused of a crime are fundamental to our criminal justice system. These guarantees require the government to prove a defendant’s guilt to a jury beyond a reasonable doubt.

Despite this, current federal law allows judges to override a jury’s not guilty verdict by sentencing a defendant for the very conduct he or she was acquitted of by the jury. This is because the law requires a jury to convict beyond a reasonable doubt, but allows a judge to impose sentencing enhancements based on the less demanding standard of preponderance of the evidence.

Permitting sentencing based on acquitted conduct is unjust, undermines due process, and subverts the critical function of jury trials in our legal system. This practice has been roundly criticized by practitioners, judges, and scholars. In one case, three defendants were convicted of possessing small amounts of crack cocaine, but were acquitted by the jury on conspiracy to distribute charges. Nevertheless, the judge increased their sentences based on them engaging in a conspiracy. Though the Supreme Court did not take the case, Justice Scalia, joined by Justice Ginsburg and Justice Thomas, stated that the practice of sentencing based on acquitted conduct “has gone on long enough” and constituted a likely violation of the Sixth Amendment.¹ Previous

¹Jones v. United States, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari).
versions of this bill have been introduced by this group of sponsors and co-sponsors as well as by former Judiciary Committee Chairman Orrin Hatch.

Allowing acquitted conduct to be considered in sentencing exacerbates the trial penalty, which is generally manifested in the significant difference in sentence between what a defendant receives via plea bargain and what his or her sentence would be if convicted at trial. This trial penalty has virtually eliminated the constitutional right to a trial in the federal system. It also contributes to the possibility of innocent people pleading guilty, because they fear the long and harsh sentence they would receive if convicted at trial, even if the chance of conviction is remote. The crucial constitutional protection provided by the right to trial by jury is weakened when a defendant may be sentenced based on conduct even if he or she is acquitted of that conduct by a jury. This contributes to coercive plea bargaining and to the trial penalty.

This important bill would eliminate an unjust practice and would strengthen the protections our Constitution provides. We urge the Committee to approve it without amendments.

If you have further questions, feel free to contact Nathan Pysno of NACDL, at 202-465-7627 or npysno@nacdl.org, or Shana-Tara O’Toole of the Due Process Institute, at 202-558-6683 or Shana@idueprocess.org.

Respectfully,

National Association of Criminal Defense Lawyers
Due Process Institute
ALEC Action
American Civil Liberties Union
Americans for Prosperity
Americans for Tax Reform
Black Public Defender Association

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Digital Liberty
Dream Corps JUSTICE (formerly #cut50)
Drug Policy Alliance
Fair Trials
Faith and Freedom Coalition
FAMM
Federal Public and Community Defenders
FreedomWorks
The Innocence Project
Justice Action Network
The Leadership Conference on Civil and Human Rights
National Legal Aid & Defender Association
R Street Institute
Right on Crime
The Sentencing Project
Texas Public Policy Foundation
Tzedek Association

cc: Members of the Senate Judiciary Committee