

May 25, 2021

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

The Honorable Chuck Grassley  
Ranking Member  
Committee on the Judiciary  
U.S. Senate  
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.<sup>1</sup> Previous

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<sup>1</sup> *Jones 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.<sup>2</sup> 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](mailto:npysno@nacdl.org), or Shana-Tara O'Toole of the Due Process Institute, at 202-558-6683 or [Shana@idueprocess.org](mailto: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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<sup>2</sup> National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), <http://www.nacdl.org/trialpenaltyreport>.

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