



RESEARCH AND ADVOCACY FOR REFORM



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**Prepared for Senate Judiciary
Committee Hearing:**

**“Rising Prison Costs: Restricting
Budgets and Crime Prevention
Options”**

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I am Marc Mauer, Executive Director of The Sentencing Project, a national nonprofit organization engaged in research and advocacy on criminal justice policy. I commend Chairman Leahy and the Senate Judiciary Committee for holding today's hearing, "Rising Prison Costs: Restricting Budgets and Crime Prevention Options."

I am writing to express our support for reducing prison costs, as can be accomplished through legislative changes in federal sentencing policy and administrative actions to reduce unnecessarily lengthy incarceration.

The Sentencing Project has long been engaged in research and advocacy regarding federal and state sentencing policy and alternatives to incarceration. In the area of sentencing policy, we have published broadly, engaged with policymakers nationally, and frequently presented testimony before Congress and state legislative bodies.

In this written testimony, I seek to highlight a number of ways that we might curb the unprecedented size of the federal prison system and the burdensome cost associated with its continued growth. I urge the members of this Committee, the Congress as a whole, and the Obama Administration to take action to address rising costs caused by the unsustainable growth of recent decades.

DRAMATIC GROWTH OF INCARCERATION

The growth of our prison system is well documented. The United States is the world's leader in incarceration with 2.2 million people currently in the nation's prisons or jails – a 600% increase over 40 years. These trends have resulted in prison overcrowding and state governments being overwhelmed by the burden of funding a rapidly expanding penal system, despite increasing evidence that large-scale incarceration is not the most effective means of achieving public safety.

Throughout the last decade, prison growth moderated substantially, and by 2008 the population growth in state prisons had stabilized. Even prior to the recent fiscal crisis lawmakers had become increasingly interested in adopting evidence-based policies directed at producing more effective public safety outcomes. Indeed, today's hearing suggests bipartisan support for addressing the cost of incarceration by reducing the number of people in our federal prisons.

In addition, other factors give us reason for guarded optimism about the prospects for reform. Significant drops in crime rates have contributed to a lessening of the “tough on crime” rhetoric of the past. Moreover, we now have a generation of reforms and alternatives to incarceration that have been implemented throughout the country, including community service programs, victim restitution, restorative justice, and a host of treatment and community supervision programs.

Despite this progress, a stabilizing prison population hardly represents a reversal of mass incarceration. Even if we were somehow able to cut the prison population in half over the next decade, the United States would still incarcerate people at three to four times the rate of other industrialized nations. There is much more work to be done to address the burgeoning costs caused by our nation’s excessive use of incarceration.

PROMISING STATE REFORMS

After nearly four decades of unprecedented expansion, a number of states have reduced prison capacity, even closing prisons, in recent years. Such reductions have been made possible by a mix of reforms, including changes in sentencing and parole release and revocation. Notably, these reforms have created no observable adverse impacts on public safety.

For example, in New York and Michigan, reforms to mandatory sentencing for drug offenses have had a significant role in reducing prison populations. In other states, such as Colorado and Kentucky, parole eligibility rules have been changed to allow earlier parole consideration for nonviolent offenders. In Kansas, evidence-based practices and other tools have been adopted for use in parole determinations, resulting in a significant decrease in parole revocations in recent years.

OPPORTUNITIES FOR FEDERAL REFORM

In order to capitalize on this momentum for reform, there are a variety of measures that can be undertaken by Congress and the Administration to reduce the federal prison population without adverse affects on public safety. These include:

Congressional Action to Reduce Costs: Examine the Implications of the USSC Report on Mandatory Sentencing

Last year, the United States Sentencing Commission (USSC) released an exemplary report to Congress, “Mandatory Minimum Penalties in the Federal Criminal Justice System,” which provides a comprehensive assessment of the impact of mandatory minimum penalties on federal sentencing. I urge this Committee to hold a hearing on the findings of the report and in particular to consider the following key issues suggested by the Commission’s analysis:

- Examine those mandatory minimum penalties that are rarely used to determine whether they are necessary and appropriate. Of the 194 current statutory provisions requiring mandatory minimum terms of imprisonment, six (6) provisions accounted for 65% of all convictions. Under 116 of the mandatory minimum provisions, ten or fewer individuals were convicted, and dozens of these provisions appear to have never been used.
- Analyze and respond to the racial disparities documented in the imposition of mandatory penalties, and consider the effect of prosecutorial discretion in this regard, as documented in several recent analyses. Take up legislation such as the *Justice Integrity Act*, which has called for the establishment of task forces in federal districts to assess whether unwarranted disparities exist in federal prosecutions.

Administrative Actions

Reduce Federal Drug Prosecutions

In his recent testimony before the House Appropriations Committee, Bureau of Prisons (BOP) Director Charles Samuels singled out increasing prosecutions for drug offenses as one of the primary contributors to population growth in our federal prisons – and thus to rising costs.

Despite its public commitment to make more effective use of criminal justice resources, the Obama Administration has made few significant changes in the scale of drug offense prosecutions. For example, 25,275 individuals were convicted in 2011 for federal drug

offenses compared to 25,337 drug convictions in 2008 under the previous administration. In addition, as documented by the USSC and others, a substantial proportion of federal drug offenders are in the lower levels of the drug trade, and not high level importers or sellers.

The Department of Justice should examine whether its drug offense cases are appropriate for federal prosecution and whether the punishment of such offenders accomplishes sound criminal justice objectives.

Alleviate Overcrowding and Lengthy Incarceration

In addition, the Administration should take the following steps, none of which would require new statutory authority, to reduce prison costs while ensuring public safety:

- Expand the Residential Drug Abuse Treatment Program (RDAP). Though Congress has mandated that the Bureau of Prisons make available substance abuse treatment for those in BOP custody, the potential cost-savings of the RDAP program have not been realized. According to a recent GAO study, only 19% of qualifying RDAP participants received a full 12-month sentence reduction. BOP should change its policy to prioritize RDAP participants who are eligible for a reduction in sentence. Moreover, BOP should expand the pool of offenders who are eligible for sentence reduction by revising its definition of “violent offender” to ensure that only truly violent individuals are excluded. Finally, BOP should allow completion of RDAP by undocumented immigrants – a step that would save \$25 million each year.
- Expand invocation of Compassionate Release. BOP may ask a court to reduce a sentence under “extraordinary and compelling circumstances.” Under this provision, BOP has sought sentence reductions in cases where the prisoner has a terminal illness with less than a year of life expectancy or has a profoundly debilitating medical condition. The Bureau should expand the use of its authority to seek sentencing reductions as well as taking steps to broaden its interpretation of “extraordinary and compelling circumstances.”

- Consider commutation for persons incarcerated for crack cocaine offenses.
Following passage of the Fair Sentencing Act in 2010, the USSC revised its guidelines for these offenses and made them apply retroactively, so that there is no distinction between those convicted before or after adoption of the new law. The harsher mandatory sentences that apply to persons convicted prior to the change in the law, though, still apply to those in prison, thus creating a “fairness gap” based merely on date of conviction. In the interests of both fairness and reducing unnecessarily lengthy incarceration, the President should examine the cases of these individuals and consider commutation of sentences to a level that would comport with sentencing ranges under the new law.

EXPANDING PRISON CAPACITY IS COUNTERPRODUCTIVE

Analyzing the efforts of state lawmakers to maintain public safety while working to contain correctional costs can provide an example to Congress. In recent years, strained state budgets have encouraged a new political environment that does not rely on the costly approach of expanding prison capacity. Rather, state lawmakers have focused efforts on the diversion of people charged with lower-level drug offenses, developing graduated sanctions for people on probation and parole who violate rules, and enhancing reentry strategies.

Developments at the state level demonstrate that controlling prison growth is not an intractable problem. In recent years lawmakers and practitioners have worked together to assess the sources of growth in incarceration and have developed policy responses that have reversed those trends while promoting public safety.

The result has been a new trend of closing prisons rather than building them. Last year, at least thirteen states closed or contemplated closing prison institutions, potentially reducing prison capacity by over 15,500 beds. Since 2002, Michigan has led the nation in this regard. The state has closed 21 facilities, including prison camps, as a result of sentencing and parole reforms. Overall, the state has reduced capacity by over 12,000 beds for a total cost savings of \$339 million. Other states, including New York, Florida, and Texas, have also closed prisons in recent years amid changes in sentencing policy and parole decision-making that have resulted in a leveling of state prison populations.

CONCLUSION

Though prison populations are stabilizing at the state level, this development should be considered in context. Even if population growth levels off, prison populations would remain at highs unprecedented in American history or that of any other democratic nation. The consequences for fiscal spending, public safety, and the impact on communities are very troubling.

Congress should build on the work of the USSC by examining unnecessary and excessive mandatory minimum penalties. Congress should respond to racial disparities in the imposition of mandatory penalties, and examine the effect of prosecutorial discretion on such disparities.

In addition, the Administration should fulfill its “smart on crime” promise by decreasing prosecutions of low-level drug traders and expanding its use of existing tools that provide drug treatment to those in custody and compassionate release in appropriate cases.

We welcome this opportunity to explore strategies to reduce the number of people in our prisons. I urge this Committee and this entire Congress to take up legislation to build on the progress we have made in reforming our approach to incarceration.