I. INTRODUCTION

When it comes to crime policy, we have a choice - we can reduce crime or we can play politics. For far too long, government officials have chosen to play politics by enacting so-called "tough on crime" slogans such as "three strikes and you're out" or "you do the adult crime, you do the adult time." As appealing as these policies may sound, their impacts range from a negligible reduction in crime to an increase in crime.

I believe in the First Law of Holes: when you find yourself in a hole, the first thing you should do is stop digging. Clearly, our policies and laws have not---and are not---working.

All of the slogans and soundbites have achieved is the highest incarceration rate in the world, with 5% of the world population, the U.S. has 25% of its prisoners. And adding insult to injury, several recent studies have concluded that our incarceration rate is so high that it has a counterproductive effect---the slogans and soundbites are **adding** to crime, not preventing it. The situation is so acute in the minority community that the Children's Defense Fund labels our present incarceration problem as the "Cradle-to-Prison Pipeline."

In contrast, states have reformed their criminal justice systems to address almost identical problems as ours, with innovative, common-sense, and evidence-based reforms that have improved public safety, decreased crime, invested in beneficial community programs, and, at the same time, saved more money in reduced prison costs than they spent on the new program.

It is time for all three branches of the federal government to learn from the state experience. More to the point, it is time for the federal government to lead the way in ensuring that the administration of justice on the federal level is the model for the states.

The recommendations that follow are drawn directly from: (1) prioritized and consensus solutions to the primary drivers in the federal system from the Department of Justice, Federal Public Defenders, the Judicial Conference, and the Sentencing Commission (i.e. the four stakeholders in our criminal justice system); (2) reforms implemented by the states that have been effective in addressing similar problems; and (3) evidence-based analysis and recommendations from expert organizations.

This provides an executive summary of the findings and recommendations, but I encourage you to read the full report for the comprehensive data, analysis, and rationales supporting the recommendations.

II. THE EFFECT OF OUR CURRENT FEDERAL CRIMINAL LAWS AND POLICIES

1. CONTRARY TO CONSTITUTIONAL PRINCIPLES

- **Overfederalization** of what have traditionally been state crimes encroach on states' Tenth Amendment general police powers, prerogatives, and encroach on state prerogatives and conflict with local choice.
- **Transferring sentencing discretion and power from judges to prosecutors** in mandatory penalty cases
- **Erosion of the Constitutional right to jury trial** due to threatened mandatory penalties, which are excessively harsh, if the offender does not plead guilty

2. UNINTENDED CONSEQUENCES OF MANDATORY PENALTIES

- **Drug quantity, the sole determinant for mandatory minimums in drug offenses, fails to serve as an accurate proxy for role and culpability**, thus these penalties have applied far more indiscriminately, capturing mostly low-level, nonviolent offenders, rather than the kingpins, cartel heads, leaders, organizers, and managers of drug trafficking organizations engaged in violent acts as Congress intended.
- **Manipulation of drug quantity and enhancements to meet the thresholds for mandatory penalties** by aggregating multiple sales into one incident, using a confidential informant to negotiate a deal for the threshold amount, luring the offender into a "reverse sting" in which the offender can be held responsible for the entire drug quantity or firearms, or "charge stacking" in which a single criminal episode (a defendant is observed selling drugs over the course of a day's shift) is divided up into multiple crimes (a defendant is charged with each and every single drug transaction instead of the day), each carrying its own mandatory sentence that can be stacked to run consecutively to produce harsher punishment. This means that the drug quantity is frequently "calculated" very differently in cases that are essentially the same.
- **Sentencing inversion in which kingpins, cartel heads, and others in leadership positions often are able to avoid application of mandatory minimum sentences** and receive lower sentences because of their ability to provide "substantial assistance" to the prosecution based upon information about their subordinates, who then receive much higher mandatory minimum sentences.
- **Arbitrary and unwarranted sentencing disparities among similarly-situated offenders**, which results from widely-divergent charging policies in each judicial district and predicates for mandatory penalties that do not accurately account for the offender's role in the offense or other relevant and mitigating facts.
- **The current "safety valve" is an insufficient remedy** because it applies too narrowly to mitigate the unintended application of mandatory penalties.
- **Predicate felony convictions for mandatory enhancements and minimums that sweep too broadly** to include misdemeanors, simple drug possession, diversionary dispositions that did not result in a conviction, nonviolent offenses, offenses committed while mentally ill or addicted, and offenses that occurred in the distant past.

- **Distortion of the sentencing guidelines** even in those cases when mandatory minimums do not apply, the Sentencing Commission is still required to base its guideline range on and be proportionate to the relevant mandatory minimum, even when that stands in direct contravention to its own independent judgment and expertise in the matter.
- **Ineffective deterrent effect** as research demonstrates that the amount of punishment has no general or specific deterrent effect and imprisonment of drug offenders does not prevent drug crime because retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high.
- **Excessive sentences result weaken inmates' familial and community bonds and effectively terminate their employment and housing stability, all of which lead to the counterproductive result of impeding their successful re-entry and increasing the risk of recidivism.**
- **Disproportionate racial impact on African Americans and Latinos** who were more likely to be charged with offenses carrying mandatory minimums, enhancements, and consecutive counts and receive longer sentences as compared to Whites who are guilty of similar behavior.
- **Increased collateral consequences** due to state and federal statutes that impose restrictions on employment, housing, voting, benefits, education, and other areas, which impede re-entry and increase recidivism.
- **Contrary to changing social attitudes that support repealing or reducing mandatory penalties**. The most recent four presidents, the former DEA "Drug Czar,"and federal prosecutors, and all four federal stakeholder agencies support this endeavor. A recent survey found that a majority of those polled opposed mandatory minimums for non-violent offenses and stated that they would vote for a congressional candidate who supports ending such sentences.
- **Fiscally unsustainable** The President's FY 2014 budget request for BOP totals $6.9 billion, reflecting an increase of $310 million from the FY 2012 enacted budget. Barring any new prison construction or policy changes, overcrowding will continue to rise to 55 percent in BOP facilities within 10 years.

A. LEGISLATIVE RECOMMENDATIONS

PROCEDURAL

1. **MENS REA** Federal courts have consistently criticized Congress for imprecise drafting of intent requirements for criminal offenses. In numerous occasions, improper drafting has led to protracted litigation and confusion in the courts, all requiring further modifications to clarify Congressional intent. It is clear that the House and Senate need to do better. We can do so by legislating more carefully and articulately regarding *mens rea* requirements, in order to protect against unintended and unjust conviction. We can also do by ensuring adequate oversight and default rules when we fail to do so.
2. **CODIFYING THE RULE OF LENITY** for criminal offenses and matters involving criminal law and procedure.
3. **AUTOMATIC SEQUENTIAL REFERRAL TO COMMITTEE ON THE JUDICIARY** of all measures adding or modifying criminal offenses, penalties, or concerning the "enforcement of criminal law."
4. **SUNSET PROVISIONS** not only prospectively to the bills that we will pass, but passing an omnibus bill that amends existing all existing criminal laws to add sunset provisions occurring on a staggered basis over the next 5 years in the interest of equity or, in the alternative, provide for a review of the entire criminal code on a periodic basis.
5. **IMPACT ANALYSIS OF PROPOSED LEGISLATION** for all bills or amendments that would create or modify elements of a crime or criminal penalties of any kind or affect criminal justice policy to (1) justify why federal jurisdiction is necessary, why state jurisdiction is not permissible, advisable, or sufficient and certifying that states have been consulted on the exercise of federal jurisdiction; (2) identify any existing offenses in the United States code that overlap with the proposed offense; (3) identify the intended purpose and goal of the bill or amendment are, the empirical basis and analysis supporting the elements and penalties, including comparisons with the 50 states; and (4) project out 10 years' worth of fiscal impact for the federal government and affected branches and agencies (including correctional population and budget) and racial, ethnic, and gender impacts on offender and victims potentially affected.
6. **EXPLICIT RETROACTIVITY PROVISIONS** in bills that reduce penalties and collateral consequences to the extent that retroactivity is appropriate.
7. **REQUIRING DOJ TO LIST ALL FEDERAL CRIMES ONLINE** on one publicly accessible and promoted webpage the various offenses that carry criminal penalties to ensure that individuals have fair notice of prohibited conduct.
8. **PARITY IN PARTICIPATION WITH THE U.S. SENTENCING COMMISSION** to include an *ex officio* non-voting member for the Federal Defenders to equalize the current *ex officio* non-voting member from DOJ.
9. **STAFFING, RESOURCE, AND FUNDING PARITY IN THE ADVERSARIAL SYSTEM** for indigent defense to address existing disparities.

CRIME PREVENTION: DISMANTLING THE CRADLE-TO-PRISON PIPELINE WITH THE YOUTH PROMISE ACT (H.R. 1318)

This bill represents a new approach to crime policy, one that is based on evidence and research and has proven outcomes, one that will effectively reduce crime and dismantle the Cradle-to-

Prison Pipeline. It would put evidence-based approaches to crime reduction into legislative practice by mobilizing community leaders ranging from law enforcement officials to educators to health and mental health agencies to social service providers, and community organizations. These leaders would come together to form a PROMISE Coordinating Council that would identify the community's needs with regard to youth and gang violence and develop a plan to address these needs. The community would then be eligible for a grant to implement evidence-based strategies based on a comprehensive, locally tailored plan to dismantle the Cradle-to-Prison Pipeline.

The result of the Youth PROMISE Act will be to help communities get children off the Cradle-to-Prison Pipeline and onto a Cradle-to-College-And-Career Pipeline. It is important to note that the Youth PROMISE Act would not stop or impede the current enforcement of laws; the criminal justice system will continue to arrest, convict, and incarcerate those who commit crimes. But the Youth PROMISE Act would equip communities with tools to effectively prevent and reduce crime before it occurs.

We can make some major progress to turn Congress away from routinely adding more and more counterproductive "tough on crime" slogan-based policies, and instead, we can focus on efforts that employ a "smart on crime" approach by focusing on juvenile delinquency prevention and early intervention. The 114th Congress should pass the Youth PROMISE Act early next year so children in our next generation will be more likely to receive a college degree and less likely to serve time in prison.

FRONT-END REFORMS

1. **ALTERNATIVES TO INCARCERATION: PRE-TRIAL DIVERSION AND SPECIALIZED COURTS** Drug offenders are the biggest driver of federal prison growth due to the lengthy and often mandatory sentences associated with drug offenses. Before 1984 (and before mandatory sentences for drugs), a quarter of all federal drug offenders were fined or sentenced to probation, not prison. But today 95 percent are sentenced to a term of incarceration. The average time served before 1984 was 38.5 months, almost half of what it is now. **Diverting just 10% of all federal drug offenders to alternatives to incarceration would save $644 million over 10 years.**
2. **MANDATORY PENALTIES SHOULD BE REPEALED** Due to the myriad problems raised by "one-size-fits-all" sentencing that does not consider any extenuating facts, it has been my longstanding position, which is shared by three out of the four federal agency stakeholders (the Sentencing Commission, the Judicial Conference, and the Federal Public Defenders), the Urban Institute (the JRI implementation partner), and other experts that we must repeal all mandatory penalties federally. They discriminate, transfer unchecked sentencing powers to prosecutors, waste taxpayer money, and frequently require judges to impose sentences that violate commonsense. And, to add insult to injury, studies show that they do not reduce crime. When considering the imposition of long prison terms---especially those required by mandatory minimums until they are repealed---the following legislative changes are recommended.

- **For mandatory minimums triggered by drug quantity, requiring additional elements of proof beyond a reasonable doubt**
    - the offender is the type of high-level, violent kingpin, leader, organizer, and drug lord Congress intended to target with these penalties
    - the offender was not suffering from mental illness or substance abuse addiction at the time of the instant offense.
    - quantity threshold must be met by one transaction on one day at one time (sale, delivery, etc.)
        - cannot be met by applying:
            - conspiracy principles
            - aggregating multiple transactions over time
            - "reverse stings"
            - other methods of sentence manipulation
- **Narrowing the definition of "felony drug convictions" that serve as predicates for "supersized" mandatory enhancements in § 851 and § 924(e)**
    - require additional elements of proof beyond a reasonable doubt:
        - the "prior conviction for a felony drug offense" was entered within 5 years of the defendant's commencement of the instant offense
        - each "prior conviction for a felony drug offense" involved violence (actual serious bodily injury or death or an explicit threat of serious bodily injury or death)
        - the offender was not suffering from mental illness or substance abuse addiction at the time of "each prior conviction for a felony drug offense"
        - the offender was not suffering from mental illness or substance abuse addiction at the time of the instant offense.
    - exclude:
        - simple possession of drugs
        - misdemeanors in states in which misdemeanors are punishable by more than one year
        - deferred adjudications or diversionary dispositions where the defendant was not considered "convicted" in that state court. Specifically, it should clarify that a disposition resulting the dismissal of proceedings, regardless of whether the offender entered a plea of guilty or nolo contender or no contest is not a "conviction."
- **Narrowing the application of "second and subsequent convictions" that leads to consecutive "stacked" 924(c) sentences**
    - **Clarifying the definition of "second and subsequent conviction":**
        - to render it consistent with U.S.C. § 962(b), which defines the phrase "second or subsequent offense" to provide that "a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of such person for a felony drug offense have become final."

        - This amendment would address the abhorrent practice of "stacking" in cases where the multiple § 924(c) all arise out of the instant offense.
    - **Require additional elements of proof beyond a reasonable doubt:**
        - Each firearm was present at the instant offense
        - Each firearm was used in a violent manner that resulted in actual serious bodily injury or in an explicit threat of serious bodily injury or death
            - Excluding mere carrying or brandishing as qualifying as "explicit threats"
- **Narrowing the application of 924(e) "supersized" mandatory minimum sentences**
    - **Require an additional element of proof beyond a reasonable doubt**
        - Each firearm was present at the instant offense
        - Each firearm was used in a violent manner that resulted in actual serious bodily injury or in an explicit threat of serious bodily injury or death
            - Excluding:
                - mere carrying or brandishing as qualifying as "explicit threats"
                - "constructive possession"
- **Reducing the length of mandatory penalties as an interim step towards their repeal**
    - reducing mandatory minimums by half **would, over 10 years, save $2.485 billion and reduce overcrowding to 20% above capacity**
        - the Urban Institute projects that the only policy option that would, on its own, eliminate prison overcrowding going forward is the Smarter Sentencing Act of 2013 (H.R. 3382).
    - **Applying similar reductions as set forth in the Smarter Sentencing Act to the most problematic "supersized" mandatory penalties:**
        - § 851 (mandatory enhancement that multiplies the mandatory minimum) has three tiers of punishment
            - A reduction from life (projected at 39.16 incarcerative years by the Sentencing Commission's data regarding federal inmates), to 20 years **would save $561,220.35 for each applicable inmate**
            - A reduction from 20 years to 10 years **would save $292,912.50 for each applicable inmate**
            - A reduction from 10 years to 5 years **would save $146,456.25 for each applicable inmate**
        - § 924(c) (mandatory "stacking" consecutive counts)
            - A reduction from 30 years to 15 years **would save $439,368.75 for each applicable inmate**
            - A reduction from 25 years to 10 years **would save $439,368.75 for each applicable inmate**

            - A reduction from 7 years to 3 years **would save $117,165.00 for each applicable inmate**
            - A reduction from 5 years to 2 years **would save $87,873.75 for each applicable inmate**
        - § 924(e) (mandatory 15-year minimum sentence)
            - A reduction from 15 years to 7 years **would save $234,330.00 for each applicable inmate**
    - reducing drug sentences by 10% **would save $538 million over 10 years**
    - applying the Fair Sentencing Act of 2010 retroactively **would conservatively lead to savings of $229 million over 10 years**
- **Providing authority and discretion to judges to sentence below the statutory mandatory minimum penalty for any offender whose case-specific characteristics and criminal histories are inconsistent with a lengthy minimum sentence**
    - The Justice Safety Valve Act of 2013 (H.R. 1695) is projected to **save as much as $835 million in 10 years.**
- **Applying the Fair Sentencing Act of 2010 retroactively**
    - The Sentencing Commission has determined that, should the mandatory minimum penalty provisions of the FSA be made fully retroactive, **8,829 offenders would likely be eligible for a sentence reduction,** with an average reduction of 53 months per offender. That would result in an estimated total savings of 37,400 bed years over a period of several years and in **significant cost savings of over a billion dollars---$1,095,492,750**. The Commission estimates that **87.7 percent of the inmates eligible for a sentence reduction would be African-American**.
- **Instituting true 1:1 parity for crack and powder cocaine offenses** instead of the existing 18:1 ratio.

Even with the repeal or reduction in length of mandatory penalties, federal sentencing will still be guided by the Sentencing Guidelines, which function as an important benchmark to ensure sufficient punishment, to protect against unwarranted disparities, and to encourage fair and appropriate sentencing.

BACK-END REFORMS

1. "TRUTH-IN-SENTENCING" REQUIREMENTS

- **Clarifying and providing for the full 54 days of credit**
    - The Urban Institute projected that if BOP changed its internal calculation to reflect Congressional intent of 54 days, it would result in **4,000 releases and save over $40 million---in the first year alone. FAMM projected doing so would save $914 million *every* 9.5 years.**
- **Decreasing the amount of time required to be served prior to release**
    - **reducing the required minimum of time served from 87.5 to 75 percent for those inmates that exhibit exemplary behavior while in BOP custody would save over $1 billion in 10 years**

- **reducing the minimum to 70 percent would save over $1.5 billion and prevent any growth in overcrowding over the next 10 years.**

2. **EXPANDED PRISON AND TRANSITIONAL PROGRAMS** that would provide inmates with sentence reduction credits upon their successful completion of rehabilitative, educational, or vocational programming.

    - **Creating:**
        - reentry programs in-prison and post-release
        - transitional leave programs to help prisoners orient themselves before full release from custody
        - institutional access and support in obtaining to state-issued identification, housing resources, and health insurance coverage
        - easier ways to access wages and commissary accounts and increase their balances upon release
        - greater opportunities to promote family connection and reunification
        - mitigating the burden of criminal justice debt by allowing those released to meet these obligations through community service.
    - **Providing sentence reductions credits for programs and activities tiered to an inmate's assessed risk level**, such as through The Public Safety Enhancement Act of 2013 (H.R. 2656).
        - The main revision that the Urban Institute urged to this policy proposal is that evidence suggests that services are more effective when they are targeted toward reducing recidivism among high-risk individuals, as opposed to low-risk individuals.

3. **EXPANDING MOTIONS TO REDUCE SENTENCE** to provide judges with the authority to provide relief in cases in which the offender is serving a sentence that, by operation of law (either statute or judicial interpretation), would be different if imposed today, but with the discretion to decline to do so if warranted. The prosecutor, defense attorney, and probation officer were already immersed in the case and all proceedings in the past and thus are the best advocates and resources to allow the sentencing judge, who is similarly familiar, the best record from which to make the most empirically-sound, holistic, and individualized decision.
4. **EXPANDING COMPASSIONATE RELEASE TO PERMIT FILING BY PROSECUTION, THE COURT SUA SPONTE, OR THE DEFENSE,** as in all other sentence reduction cases, that the advocates, the probation officer, and the sentencing judge will seek BOP's assessment in the resolution of the matter. Not only would this relieve BOP from the burden of identifying these cases, drafting the required documentation, seeking the necessary approvals through the various levels of management, and then preparing the motion for the court's review, but that burden-shifting and corresponding time savings will result in a greater number of filings done so more expeditiously, resulting in greater savings in both prison bed space and correctional spending.
5. **REFORMING SUPERVISED RELEASE** by passing a law that awards early termination credits and other benefits (e.g. decreased reporting or travel out of district) as

well as presumptively terminates supervision of those who have been consistently compliant for a year of supervised release. Moreover, judges and probation officers should employ a presumption against incarceration for violations on supervised release. As this falls within the discretion and authority of judges, a more detailed discussed follows in that section of the report.

INCENTIVIZING STATE REFORMS by providing more favorable funding considerations for states that pass legislation that:

- mitigate collateral consequences
- mandate more in-prison support prior to release, such as transitional leave programs in which inmates are moved into intensive supervision in the community just prior to release or providing access to state-issued identification or housing resources
- alleviate the burden of court-imposed fines or other criminal justice debt, such as restitution or user fees by substituting community service
- expand options for sealing or expunging criminal records
- clarify and strengthen the effect of record sealing and expungement
- limit the consequences of a criminal record
- reduce the number of juvenile cases "direct filed" to adult court and the number of juveniles tried as adults

B. EXECUTIVE BRANCH

Our current federal law and practices have granted the Executive Branch incredible power in determining sentences, particularly sentence length. Thus, it is uniquely positioned, due to its inherent and statutorily-provided authority---even in the absence of any legislative changes---to significantly reform the number and profile of those entering our federal criminal justice system, the length of sentence they serve, and the incentives for earlier release.

STRUCTURAL

1. **LIST OF FEDERAL OFFENSES THAT CARRY CRIMINAL PENALTIES** should be compiled and published by DOJ on one webpage. The DOJ can work in conjunction with ICE, EPA, FDA, and other cabinet and component agencies to aggregate and publish this information on the internet.
2. **AGENCY COORDINATION WITH DOJ WITH REGARDS TO CRIMINAL PENALTIES** Over multiple hearings, the Overcriminalization Task Force received expert testimony that often criminal penalties are added by federal agencies without coordination with or input from DOJ. This would allow DOJ and the other agency to engage in discussions as to the suitability of criminal penalties as compared to increased civil sanctions, the parameters of the criminal penalty sought (and its relative severity to other criminal offenses), and the coordination of investigation, prosecution versus civil suit, and the purpose of the sanction.
3. **EXPANDING THE EXPEDITED CLEMENCY INITIATIVE** to give consideration to individuals who have served 5-, 7-, or 10 years of their mandatory terms, enhancements, or counts. Furthermore, DOJ should not interpret the criterion of "no history of violence prior to the period of incarceration" to exclude those who were convicted of § 924(c) mandatory consecutive counts but did not "use" (but merely "carried or brandished") the firearm during the commission of the offense or those convicted of the 15-year mandatory minimum § 924(e) in cases in which the firearm was not present or being "used" in the commission of an offense.
4. **COORDINATION WITH STATES AND LOCAL PROSECUTORS** to prevent infringing upon the states' general police power therefore avoiding parallel prosecutions and saving federal resources. Moreover, the data from the states demonstrates that states have experienced significant success in reducing overcrowding, out-of-control correctional spending, recidivism, addiction, and crime. After analyzing federal sentencing data and practices and summarizing federal prison overcrowding and growing correctional spending in comparison to state reforms, **the Urban Institute recommended that the DOJ "only accept certain types of drug cases, divert cases to states, and reduce drug prosecutions."** Remaining federal criminal jurisdiction should be restrained to:

    - Offenses against the federal government or its inherent interests;
    - Criminal activity with substantial multistate or international aspects;
    - Criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
    - Serious, high-level or widespread state or local government corruption; and,

- Criminal cases raising highly sensitive local issues, such as corruption.

5. **CREATING A MANDATORY PENALTY REVIEW SECTION** modeled after Capital Case Review Section that would be staffed by high-level DOJ and a geographically-diverse selection of high-level Assistant U.S. Attorneys or U.S. Attorneys with significant expertise and experience in offenses requiring mandatory penalties so that the committee may impart not only its subject matter expertise (e.g. drugs, guns, or other offenses for which mandatory penalties apply) but also its wisdom, judgment, and perspective gleaned from the perspective of careers spanning several thousand cases each. The prosecutor's duty to pursue justice, not merely convictions, requires at least this when imposing the harshest penalties our country permits.
6. **MORE JUDICIOUS USE OF STASH-HOUSE/REVERSE STINGS** Rather than responding to crime that has occurred as the result of the offender's initiative, "reverse stings" exploit desperation and bait individuals who are financially-distressed with sums of money beyond anything they have ever seen for schemes that are presented as low-risk, high-reward, "sure things" that they would regret passing up. Use of stash-houses and "reverse stings" should therefore not be used as a dragnet to entice unsuspecting victims into committing a crime but judiciously and only as a tool to gather evidence against suspicious targets who have been previously identified.
7. **DEMILITARIZATION OF LAW ENFORCEMENT** The Department of Defense and the Department of Justice should adopt the ACLU's recommendations to (1) reduce the distribution of military equipment to law enforcement; (2) insure that any such equipment is used only by properly trained personnel in the circumstances for which it was intended; (3) collect data on SWAT deployments; and (4) collaborate with state and local governments to standardize criteria and oversight for when SWAT teams are deployed such that those units are deployed only in situations that warrant it proportionally. Furthermore, Congress and the courts should exercise their constitutional oversight roles and check on this incredible power.
8. **TRANSPARENCY AND ACCOUNTABILITY** The Death in Custody Reporting Act (H.R. 1447) passed the House and the Senate and has been signed by the President. This is bill unanimously passed in 2000 but expired in 2006. Since then, the Justice Department has not had access to accurate information on deaths in custody or during arrest. Without this data, state and local law enforcement agencies are not operating in either a transparent or accountable manner. Without accurate and timely data, it is nearly impossible for policymakers to identify variables that lead to an unnecessary and unacceptable risk of individuals dying in custody or during an arrest. This reporting of basic information—demographic data, the name of the detaining or arresting agency, and the basic circumstances of the death—that virtually all law enforcement agencies already collect for their own internal purposes, permits the Attorney General of the United States to study this information and provide suggestions, including training and resources, to aid in reducing the number of such deaths.
9. **"BANK OF TRUST"** The DOJ should learn from state and local law enforcement that have invested in creating a community support network in which the officers as

"a matter of course" call local leaders, who, in turn, have direct lines to high-ranking police officials to request meetings and other reforms---all of which temper the "deep wounds" that surface "anytime something like this happens."

10. **CALL-LINE TO OIG/OVERSIGHT** Current procedure calls for the immediate supervisor or division chief within the U.S. Attorney's office for that judicial district to oversee concerns raised by these other stakeholders. Funneling these concerns to DOJ decisionmakers and supervisors not associated with the office in question provides an additional layer of objectivity and accountability.
11. **METRIC FOR EVALUATION AND ADVANCEMENT AND PRISON FOR PROFIT** States have implemented measures to hold their prosecutors, law enforcement officers, and correctional institutions accountable. They have held prosecutors accountable for recidivism and crime rates in their jurisdiction. On the federal level, we should require the same of our prosecutors in addition to evaluating their collaboration with and deference to state law enforcement and prosecution to avoid parallel cases. As states have held their correctional officers and institutions accountable for increasing vocational, educational, and rehabilitative programs; decreasing the use of solitary confinement or other punitive measures; and reducing overcrowding and overspending, we should similarly hold the BOP to the same standards. Moreover, states have reduced or eliminated their use of private prisons as a result of their evidence-based strategies. On the federal level, we should do the same to reduce our reliance on private prisons and private contractors.

DOJ/USAO CHARGING PRACTICES

1. **DECIDE BETWEEN FINES AND CRIMINAL PENALTIES AND MISDEMEANOR VERSUS FELONY** When DOJ's review of the facts of the investigation demonstrate that the individual against whom federal charges are being considered is one of the most common low-level roles in a drug organization---courier, mule, street-level dealer, wholesaler---DOJ should, as states have done, and file a misdemeanor or felony offenses that diverts the offender from incarceration.
2. **PRETRIAL PRACTICES: SUMMONS VERSUS ARREST AND INCREASED USE OF BOND** DOJ has wide latitude in deciding whether to pursue summons for initial appearances in court versus arrest warrants and in recommending bonds versus seeking detention (or bonds that are tantamount to detention). Pretrial detention **is ten times more expensive** that supervision by a federal pretrial services officer.
3. **PRETRIAL DIVERSION – MENTAL HEALTH, SUBSTANCE ABUSE, AND VETERANS** Within DOJ's wide latitude in its charging decisions is pretrial diversion. Currently, this is the closest federal analogue we have to specialized drug and alcohol courts, mental health courts, and veterans courts, which the majority of states have turned to in their efforts to ensure that incarceration was reserved for the most serious and dangerous offenders, as their statistics demonstrated that offenders with these medical conditions comprised a significant driver of their prison population. These specialized courts and the federal pretrial diversion program promote the conservative value of accountability.

4. **VACATE 924(c) STACKED COUNTS** Federal prosecutors should move to vacate one or multiple "stacking" § 924(c) convictions to ameliorate grossly disproportionate sentences.
5. **RECONSIDER IMMIGRATION OFFENSES (DHS, NOT BOP)** Lengthy sentences are not necessary to protect the public in all cases involving non-U.S. citizens. This is because they are subjected to a longer and more onerous term of incarceration than a similarly-situated and identically-sentenced American citizen and will inevitably be removed from the country.

BOP POLICIES AND PRACTICES

The Urban Institute noted that "in terms of immediacy, the BOP itself—without any legislative changes required—could within its authority and discretion begin to alleviate overcrowding by providing early release or transfer to community corrections for those already in BOP custody." It found based upon its review of the federal sentencing data and experience with the 17 JRI states that "[e]xpanding such opportunities can free up bed space through the early release of those who participate in intensive programs was proven at the state level to reduce recidivism.

1. **MOVE TO HALFWAY HOUSE OR E/M OR HOME CONFINEMENT EARLIER** Typically, BOP inmates are eligible to spend the last 6 months at a halfway house, but due to a lack of vacancy at halfway houses, not all eligible inmates spend the full 6 months at a halfway house. Given that the overwhelmingly majority of federal inmates are nonviolent---93%---BOP should consider, as states have done, prioritizing home confinement or electronic monitoring for them over halfway houses, in order to reserve bed space at those more structured and secure facilities for the 7% of inmates who were convicted of violent offenses. The average cost of 6 months incarceration per inmate is **$14,645.63**. Respectively, the savings (both bedspace and fiscal) created by diverting inmates to these alternatives for 6 months at the end of their sentence are as follows:

    - Home confinement, with or without electronic monitoring, **would cost $900 to $2700**
    - Supervision by a probation officer **would cost $1,942.20**
    - Halfway house or community correction center or residential reentry center (per BOP's criteria) **would cost $10,440 to $ 20,160 depending on the inmate and the facility**

2. **EXPAND THE RESIDENTIAL DRUG ABUSE PROGRAM (RDAP)** Unfortunately, even though up to 12 months of a sentence reduction is authorized, the Urban Institute found that most inmates receive much less credit (average is 8 months), due to the long waiting lists to participate in the programs. BOP should consider (1) prioritizing participation by those with longer sentences; (2) applying the maximum authorized reduction in each instance; and (3) setting the maximum authorized reduction to a standardized percentage reduction of the sentence (i.e. 33%). In addition to easing overcrowding, **each year reduction for each inmate results in $29,291.25 in average savings.**

3. **CREATE SIMILAR PROGRAM FOR MENTAL HEALTH** In a 2006 Special Report, the Bureau of Justice Statistics (BJS) estimated that 78,800 adults with mental illness were incarcerated in federal prisons. About 4 in 10 male inmates and 6 in 10 female inmates reported a combination of physical health, mental health, and substance abuse conditions, including an estimated **one-tenth of male inmates and one-quarter of female inmates with co-occurring substance abuse and mental health conditions**. Thus, an important reform that BOP should consider adopting in conjunction with expansion of RDAP is screening, diagnosis, treatment, and similarly intensive programs for mental health issues that occur prior to and in conjunction with substance abuse treatment.
4. **CALCULATION OF GOOD TIME CREDIT** Even though the statute provides for a maximum of 54 days of good time for each year of the sentence imposed, based on the way the BOP calculates good time, prisoners only earn a maximum of 47 days of good time for each year of the sentence imposed. **The Urban Institute projected that if BOP changed its internal calculation to reflect Congressional intent of 54 days, it would result in 4,000 releases and save over $40 million in the first year alone. FAMM projected doing so would save $914 million every 9.5 years.**
5. **COMPASSIONATE RELEASE** Although BOP's modest expansion of compassionate release in 2013 was helpful, it can still expand eligibility for compassionate release to a greater number of inmates as states have done to ease overcrowding and address correctional spending while still preserving public safety. Specifically, BOP should expand it to a greater number of inmates who are elderly, have serious medical conditions, or whose continued imprisonment poses substantial hardship, and have served a minimum of 5 years or 25% of their sentence. Correctional officers who interact daily with the prisoners at the facility in conjunction with defense counsel can assist in identifying those inmates who should be considered for compassionate release. Congress authorized sentence reductions for "compassionate release" out of recognition that changed circumstances could render continued imprisonment impractical, counterproductive, and inhumane. Although the FY 2011 annual cost for incarcerating an inmate averaged $28,893, the average annual cost for incarcerating an inmate at a BOP medical center was $57,962. The costs for operating these medical centers have increased 38% from FY 2006 to FY 2011. **Even expanding the program to 100 inmates with serious medical conditions from its medical centers each year would result in potentially at least $5.8 million in savings per year**.
6. **GATHERING AND NOTIFICATION OF STAKEHOLDERS OF UPTICKS OR TROUBLING TRENDS** As many JRI states and other states that have reformed their criminal justice system have done, BOP should follow suit in collecting demographic information of its inmates and the case-specific and sentencing factors, aggregating that data, and providing it to DOJ, FPD, the Judicial Conference, and the Sentencing Commission on a regular basis. The states have found that this sharing of data---in particular, the notification and regular analysis of any developing trends in the inmate population---is useful and practical as it permits the stakeholders to collaborate and react immediately to problematic trends at an earlier point to mitigate the damage. Thus, BOP should automatically notify the four federal stakeholder agencies of increasing prison populations and developing trends so that they may addressed at as early a stage as possible.

7. **CREATING AND EXPANDING PRISON PROGRAMMING PROVEN TO REDUCE RECIDIVISM** The BOP should provide the following programs and resources that states have implemented to aid offenders with their reentry into society and reduce recidivism: (1) expanding prison industries that teach vocational skills such as UNICOR, which has been undermined by the elimination of the "mandatory source clause" (requiring the majority of federal agencies to purchase products offered by UNICOR, unless authorized to solicit bids from the private sector); (2) transitional employment programs, which provide temporary, subsidized work upon release under high levels of supervision; (3) residential and training programs for disadvantaged youth, which is often combined with drug treatment and education; (4) prison work and education programs, either throughout the sentence or just prior to release; (5) providing resources to unemployed releases to provide stability while searching for work; and (6) increasing family visitation for inmates, which is correlated with higher levels of family support linked to higher employment rates and reduced recidivism following release.
8. **ASSISTING INMATES IN COMPLETING PROGRAMS THAT ENABLE THEM TO TRANSFER TO LOWER-SECURITY FACILITIES** The data demonstrates not only that overcrowding at federal high-security facilities is greater than that at lower security facilities, but that this high staff-to-inmate ratio, particularly at those facilities, poses safety concerns for the inmates and the staff and that higher security facilities are more expensive to operate. Although BOP's policies provide that depending on changed circumstances, such as medical condition, an inmate may be transferred to another facility with a different security designation, its policies generally do not actively incentivize and reward inmates to take steps to earn designation to a lower security facility. BOP should expand a program similar to its Special Management for inmates assigned to high, medium, and low facilities that allows them to "earn" their way down to the lower security facilities, with the goal of earning assignment at a minimum security facility, contingent on approval by the correctional officers. By permitting inmates to "earn" their way down to lower security facilities by completion of classes, not only would the BOP be encouraging accountability, BOP would reduce overcrowding in general and at high security facilities in particular. This would improve public safety to correctional officers, inmates, and their communities, and reduce correctional spending, as higher security facilities are almost double the cost of lower security facilities.
9. **REFORM USE OF ESCALATION AND DISCIPLINARY SEGREGATION OR SHU** The clinical impacts of isolation mirror those of physical torture. As states have done, the BOP should consider reforming its use of escalation tactics and disciplinary and administrative use of Special Housing Units (i.e. solitary confinement)

C. SENTENCING COMMISSION

Understanding that the Sentencing Commission receives many requests for substantive amendments to the sentencing guidelines, I have culled the list to reflect the ones that federal stakeholders and experts have identified as most pressing.

1. **COMPILE COMPREHENSIVE DATA ABOUT THE SENTENCES IMPOSED IN EACH JUDICIAL DISTRICT** With the assistance of the Judicial Conference, the Sentencing Commission should compile comprehensive data about the sentences imposed within each judicial district, including detailed information about the offense and offender characteristics, in order to permit sentencing judges to ensure that the sentences they impose do not treat similarly-situated offenders disparately or promote unwarranted sentencing disparities.
2. **EXPLANATIONS OF PURPOSE AND GOALS OF EACH GUIDELINE AND EMPIRICAL BASIS** The Sentencing Commission should explain what each guideline is meant to accomplish and the data upon which it is based. The prosecution and defense will be able to use the policy statements and data to anchor and frame their arguments as to where within (or outside) the guidelines the sentence should fall, based upon their analogies. The sentencing judge would similarly be empowered to determine whether a sentence above, below, or within the guideline range is warranted in a given case as compared to the baseline of what the Sentencing Commission considered as well as the decisions of other judges within the same judicial district and in other judicial districts. Moreover, when cases are appealed for substantive "reasonableness," those appellate judges, who are not tasked with sentencing decisions on a daily basis, have a full and rich record against which to evaluate that specific sentence. The even greater impact will be on the guidelines system itself as the Commission's analysis and stewardship will allow our advisory guideline system to continually evolve and respond best to empirical evidence.
3. **PARITY** The Judicial Conference and members of the House and Senate Judiciary Committee have supported the addition of an ex officio member of the Sentencing Commission for the Federal Public Defender. As an administrative matter, having the bi-partisan Sentencing Commission's written position would greatly aid us lawmakers in scheduling and passing the necessary legislation to formalize this important procedural reform that will yield better results for the federal criminal justice system moving forward.
4. **DRUG OFFENSE GUIDELINES** As part of its statutory duty under the SRA, the Sentencing Commission should examine the relevance of various factors present in every drug trafficking case, including the defendant's role in the offense, drug quantity, purity, drug type, and relative harms of each drug type. It could then conduct empirical research to determine how much consideration should be given to each of those factors and revise the guidelines accordingly. Second, and relatedly, the Sentencing Commission should equalize at a 1:1 level in the guidelines the disparity that exists between powder cocaine and crack cocaine cases, which further exacerbates the disproportionate impact on drug sentences. The Commission should make additional changes to §3B1.2 to further clarify when the adjustment should apply. Without such amendments, drug quantity will

continue to override other relevant considerations, rendering the mitigating role adjustment available in name, but rarely ever in practice.

5. **CAREER OFFENDER ENHANCEMENT** The current career offender guideline is much broader than Congress required in the Sentencing Reform Act and accordingly should be narrowed. As the Commission has known for ten years, the career offender guideline – particularly as applied to defendants who qualify based on prior drug convictions – dramatically overstates the risk of recidivism. The Commission has also known for ten years, that the guideline has an adverse impact on African-American individuals convicted in federal court.
6. **UNCHARGED, DISMISSED, AND ACQUITTED CONDUCT** The Sentencing Commission should eliminate and prohibit from guidelines calculation uncharged, dismissed, and acquitted conduct. It is both illogical and unfair and constitutionally concerning to increase a defendant's sentence based upon conduct that the defendant did not plead guilty to, the government chose not to prove at trial, or that the government was unable to persuade the factfinder beyond a reasonable doubt at trial.
7. **ALTERNATIVES TO INCARCERATION** Lastly, the Sentencing Commission should assemble information regarding recidivism and effective sentencing options (including alternatives to incarceration), and to conduct and provide its own research on these issues in conjunction with their analysis of successful practices from the states. This function is contemplated by the SRA, and would build knowledge and consensus on effective sentences.

D. JUDICIAL CONFERENCE

Out of respect for the Constitutionally-mandated independence of our federal judiciary, which provides a necessary check on the power of the legislative and executive branches, my recommendations are, in fact, merely reminders of this important and critical function.

STRUCTURAL

1. **COORDINATION WITH SENTENCING COMMISSION TO COLLECT DATA** I recommended that the Sentencing Commission compile and provide detailed information on the sentences imposed for each offense in each judicial district. This would provide counsel information from which to draw analogies or distinctions for the case at hand. It would aid judges in their preparation for sentencing hearings as this information would be regularly collected, compiled, and distributed. It would also help them identify novel arguments or analyses. Furthermore, this data will assist the Sentencing Commission in optimizing the Sentencing Guidelines, which will enable judges to impose sentences that serve the goals of § 3553(a).
2. **TRAINING ON EVIDENCE-BASED PRACTICES** The Judicial Conference should recommend that its magistrate, district, and circuit judges in addition to its pretrial and probation officers attend training on evidence-based practices. This will enable the judges in imposing bonds, sentences, terms of supervised release and probation that are "sufficient but not greater than necessary" to effectuate the "deterrence, rehabilitation, and punishment" goals of sentencing. This training will also assist them in setting conditions for pretrial, probation, and supervised release that are empirically-proven to reduce recidivism. As discussed earlier in this report, although many of these approaches sound counterintuitive, the research and data, supported by years of proven success on the state level, should be helpful in assisting judges.

PRETRIAL

1. **BOND (TYPES OF BONDS) VERSUS DETENTION** Pretrial detention is ten times more expensive than supervision by a pretrial services officer during that same period. In addition to the tremendous costs on our correctional system, pretrial detention also serves as a *de facto* termination of their employment, housing (due to inability to pay rent or the mortgage), and other facets of their subsistence. In terms of setting the bond, federal magistrates should avoid setting bonds that are tantamount to detention given the clear statutory mandate of the Bail Reform Act that promotes release.
2. **DISCOVERY IN CRIMINAL CASES** Pursuant to the Supreme Court of the United States' statutory authority under the Rules Enabling Act, it may amend and expand the existing discovery rule to permit "open file" discovery, as states have done, subject to Congressional approval. An "open file" discovery policy is one in which defense counsel is permitted to examine everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material. Requiring full disclosure of the prosecutor's and law enforcement's file (excepting work product and privileged material) would not only protect the defendant's constitutional rights to a fair trial, due process, effective assistance of counsel, effective confrontation and cross-

examination, but would also promote confidence in the judicial system and advance its principles---the presumption and protection of the innocent, the search for the truth, and the conviction of the guilty based upon a fair trial and effective representation.

3. **OVERSIGHT** The independence of the federal judiciary is necessary precisely because the presiding judge may inquire of the federal prosecutor as to what the reasons behind those choices are and convey that colloquy to the U.S. Attorney for that district, who has a vested interest in ensuring that his line attorneys represent the values espoused by the DOJ. Admittedly, defense counsel or the defendant may raise the same objections with senior management, but their position as an adversary in the case prejudices their assessment. Federal judges who are neutral arbiters and benefit from the experience of presiding over all the criminal cases filed in that district are routinely asked by their U.S. Attorney whether any concerns exist about perceived prosecutorial conduct.
4. **ALTERNATIVES TO INCARCERATION** Reserving prison bed space for violent and other more serious offenders, as states have done, would relieve overcrowding, contain correctional spending, and improve reentry outcomes. It bears noting that BOP and Sentencing Commission demonstrates that violent offenders represent only 7% of the federal prison population. Even when incarceration is required under the Sentencing Guidelines, it is appropriate and fair for sentencing judges to consider the duration of the sentence relative to those imposed in other federal districts, for other federal offenses, and in states for similar conduct to determine whether the sentence is proportionate to the harm.
5. **COLLABORATION WITH SENTENCING COMMISSION** Federal judges should continue to share their concerns about the disparities and problems they observe in our criminal justice system. The Sentencing Commission, the Executive Branch, and reform-minded lawmakers such as myself, rely upon their expertise in setting our priorities for reform. As we have seen with the crack cocaine disparity and with the "fast track" programs, the louder the chorus of federal judges, the greater the momentum for reform from the other branches. Thus, I commend the federal judiciary for its important dual roles as gatekeeper and herald, and I urge federal judges to continue exercising their statutory and Constitutional authority to express their concerns, policy disagreements, and proposed solutions for the serious and pressing concerns we face, including: (1) the effects of mandatory minimums, enhancements, and consecutive counts; (2) the accuracy of drug quantity as a proxy for culpability; (3) sentencing manipulation practices, involving "reverse stings" and charge stacking; (4) sentencing inversion when kingpins cooperate and "flip down;" (5) the scope of the "safety valve;" (6) enhancing sentences based upon acquitted, uncharged, or dismissed conduct; (7) tailoring sentences for non-citizens who will be removed from the United States; and (8) the scope of the career offender enhancement.

SUPERVISION (PRETRIAL, PROBATION, SUPERVISED RELEASE)

1. **INCENTIVIZE EARLY TERMINATION OF SUPERVISED RELEASE** The Judicial Conference's own 2013 study of early termination of supervised release demonstrated not only lower recidivism rates but substantial cost savings. The Judicial Conference should consider expanding the number of offenders eligible for early termination after 1 year with requirements for successful completion of educational,

vocational, medical, and psychological benchmarks for consideration. **Raising the number to 10,000 nonviolent, low-level, and low-risk offenders who have completed these rehabilitative programs would, based upon the Judicial Conference data above, save the Judiciary approximately $10 million.**

2. **CONDITIONS OF SUPERVISED RELEASE** States have recognized that supervision that is too intensive may be counterproductive. The Judicial Conference should consider implementing the following reforms: (1) creating day- and night-reporting centers to accommodate offenders' work schedules; (2) permitting offenders to report or drug test at various locations; (3) permitting offenders to report telephonically; (4) allowing specialized supervision officers to focus on offenders requiring assistance with substance abuse, mental health, and veterans affairs; (5) transferring supervision to districts in which the offender has family and/or employment prospects; (6) coordinating with local nonprofits, faith-based organizations, community organizers, and private employers to allow offenders to volunteer and develop job skills with the aim of eventual paid employment; (7) coordinating with nonprofits, faith-based organizations, community organizers, and private employers to provide mental health and substance treatment programs or funding for them; (8) permitting offenders who are not yet employed to meet their monthly restitution payments by completing work release or community service; (9) substituting employment training for community service requirements; (10) substituting employment training or work release programs for job search certification requirements; and (11) hiring and training officers to assist offenders with overcoming barriers to reentry such as food and subsistence benefits, housing assistance, applying to educational and vocational programs, and among other things
3. **VIOLATIONS OF SUPERVISED RELEASE** Federal judges should consider: (1) creating a presumption against incarceration for technical violations of supervised release; (2) for technical violations (e.g. positive drug tests, failure to attend meetings, violations of curfew), automatic modification to include substance abuse treatment, in-patient treatment, transfer to community confinement, additional drug testing, community service, and other sanctions; and (3) imposing flexible penalties to mitigate any disruption to the offender's employment, such as community confinement or incarceration on weekends only. The Judicial Conference should institute performance-based probation funding and metrics for advancement in order to incentivize pre-trial and probation officers to prioritize supporting offenders' successful transition and compliance rather than by filing violations that are ultimately counterproductive.