

# FEDERAL BUREAU OF PRISONS

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## HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM,  
HOMELAND SECURITY, AND INVESTIGATIONS

OF THE

COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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SEPTEMBER 19, 2013  
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# FEDERAL BUREAU OF PRISONS

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THURSDAY, SEPTEMBER 19, 2013

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM,  
HOMELAND SECURITY, AND INVESTIGATIONS

COMMITTEE ON THE JUDICIARY

*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:01 a.m., in room 2141, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Bachus, Franks, Scott, Conyers, and Bass.

Staff present: (Majority) Allison Halataei, Parliamentarian & General Counsel; Robert Parmiter, Counsel; Alicia Church, Clerk; and (Minority) Ashley McDonald, Counsel.

Mr. SENSENBRENNER. The Subcommittee will come to order.

And without objection, the Chair will be authorized to declare recesses of the Subcommittee at any point.

The Chair recognizes himself for 5 minutes for an opening statement.

Since the passage of the Sentencing Reform Act of 1984, the Bureau of Prisons has experienced exponential growth in its prison population. Today the BOP houses 219,196 inmates in 119 institutions across the country and currently accounts for a quarter of the Justice Department's operating budget. If you add the offenders in the custody of the Marshals Service, which is responsible for pre-trial and pre-sentencing detainees, the Department spends a full third of its budget housing prisoners.

The dramatic growth in the BOP's population over the last 3 decades is of concern to Members on both sides of the aisle. It has led to extremely high crowding rates in BOP facilities. Today the BOP is operating at 39 percent above capacity across the board. The crowding problem is particularly acute in high security facilities which house some of the most dangerous inmates in the Federal system. High security facilities are experiencing a crowding rate of 55 percent. To increase available bed space, wardens have resorted to extreme measures like triple and quadruple bunking or converting common space such as the television room into temporary housing space. As a result, inmates may experience crowded bathroom and food service facilities and more limited opportunities for

recreational, vocational, and educational programming, all of which can contribute to inmate misconduct.

It is clear that Congress and the Administration need to closely look at the problems associated with the BOP's population growth because there is no indication that the tide of Federal inmates is ebbing. On the contrary, GAO estimates that by 2020, BOP may be responsible for housing nearly a quarter of a million inmates eating up more and more taxpayer dollars. Clearly, this is an unsustainable trajectory.

While we all agree that there is a problem, it is less clear what the solution should be. Some in Congress and the Administration have suggested the answer is to give the inmates additional good time credits for not engaging in bad behavior while incarcerated. I am concerned, however, that Congress simply cannot solve the problem by letting the inmates out early. We need to take a hard look at the increasing incarceration costs that the BOP faces regardless of an increasing prison population. We need to address the issue of inmate and prison guard safety as exemplified by the murder of Correctional Officer Eric Williams at USP Canaan in Pennsylvania earlier this year. And we need to identify proven cost-effective programs to reduce recidivism and overcrowding.

Today's hearing will examine the Bureau of Prisons' policy surrounding all these issues and identify systemic problems that need to be corrected. I hope to learn more about the issues surrounding the cost to construct and operate BOP facilities and deliver health care to an aging population and rehabilitative programming to those inmates who will benefit and to support and maintain a professional, dedicated staff. I look forward to hearing from the director on all these important topics today.

And it is now my pleasure to recognize for his opening statement the Ranking Member of the Subcommittee, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I thank you for calling the hearing today.

I welcome Director Samuels to the hearing.

This hearing comes at a very important time. Today the number of Federal prisoners has grown from 25,000 in 1980 to almost a quarter of a million now. Imprisoning this many people is expensive. The average annual cost for an inmate for low security is about \$25,000; high security, over \$30,000 per year. Even if we go through with the sequester, the Bureau of Prisons is actually receiving over \$6 billion for this fiscal year.

The Federal prisons are overcrowded. The Bureau is currently operating at 39 percent its rated capacity with 55 percent crowding at high security facilities. Overcrowding at these levels threatens the safety both of inmates and correctional officers and undermines the ability of the Bureau to provide programming for inmates.

Now, the main drivers of prison growth are front-end decisions about how long someone goes to prison. Obviously, the Bureau cannot control that. But mandatory minimums have a lot to do with that, as well as simple-minded slogans like "three strikes and you are out," "the failed war on drugs," all of which lead to the fact that the United States locks up a higher portion of its population than any country on earth, about five times the international average.

I applaud the Attorney General's recent announcement about reforms within the Department of Justice, but we need to do a lot more if we are going to extend this expansive growth. The Bureau cannot control what we send them or how long, but the General Accountability Office has identified several programs that the BOP can make better use of on its own without congressional action to reduce overcrowding. These include fully utilizing the residential drug abuse program. The GAO found that only 19 percent of inmates who successfully completed the program in 2009 to 2011 received the maximum reduction available under the Bureau policy, and the average sentence reduction was only 8 months. If inmates had received the full 12-month reduction in those years, the Bureau would have saved over \$100 million.

In addition, the Bureau excluded by policy entire categories of inmates from participating in the program. For example, inmates whose Federal sentencing guideline was increased because a weapon was possessed are excluded from participation. Even more money could be saved if all statutorily eligible prisoners were allowed to participate.

Second, the GAO found that the Bureau was not fully utilizing the pre-release community corrections. The Second Chance Act of 2007 doubled the amount of time from 6 to 12 months that an inmate could serve in pre-release community corrections at the end of the sentence. However, the GAO found that in practice inmates serve an average of less than 4 months in community corrections. By just increasing home confinement by 3 months, the BOP could save over \$100 million a year.

These are actions that the BOP could take now to reduce overcrowding and save hundreds of millions of dollars.

In addition, there are reforms that we in Congress should pass to reduce overcrowding. The first and easiest thing we could do is to clarify how a good time credit is calculated. According to the U.S. Code, prisoners may currently earn 54 days of good time credit to be applied at the end of each year, but based on the way the Bureau calculates the good time, prisoners are actually only credited with 47 days each year or portion of a year for the sentence imposed. My colleague from Michigan, the Ranking Member of the Committee, and I have introduced H.R. 2371, the "Prisoner Incentive Act of 2013," a legislative fix for that calculation problem. If BOP changed its policy, it could save about \$40 million a year just through that alone.

Second, my colleague from Utah, Representative Chaffetz, and I, along with 12 other cosponsors from both sides of the aisle, have introduced H.R. 2656, the "Public Safety Enhancement Act of 2013." This would implement a post-sentencing risk and needs assessment to match inmates with evidence-based correctional programs. Inmates can earn credits for participating in the programs, credits for time each month toward eligibility for an alternative custody arrangement such as a halfway house or home confinement or ankle bracelet monitoring.

I hope the bill and the hearing today ignites a conversation on broader issues today: reducing overcrowding, reducing the amount of time spent in prison, reducing recidivism, and reducing costs.

I am also interested in hearing an update from the director on the Federal Prison Industries. FPI operates at no cost to the taxpayer, is entirely self-sufficient, never received appropriated money from Congress. CBO estimates by eliminating FPI and replacing it with other inmate training programs would cost about \$500 million over 10 years. Research shows that inmates in the FPI program are 24 percent less likely to recidivate than similar inmates not in the FPI program. But despite this, we in Congress are curtailing the FPI program.

Finally, I would like to hear from the director on many other important issues, such as the BOP's plans for prison construction, what effect the sequestration is having on operations, what educational programs are currently available in the prisons, and how a program might be expanded, and the use of solitary confinement, as well as inmate access to health care.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. SENSENBRENNER. Thank you very much.

The Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

I want to start off by quoting Michelle Alexander, who recently released a new book called "The New Jim Crow." And here is the quotation. Drug offenses alone account for two-thirds of the rise in the Federal inmate population and more than half the rise in State prisoners between 1985 and 2000. Approximately a half million people are in prison or jail for a drug offense today compared to an estimated 41,000 in 1980, in other words, an increase of 1,100 percent. Nothing has contributed more to the systematic mass incarceration of people of color in the United States than the war on drugs.

And so this becomes a very important hearing for that reason alone and also additionally because we incarcerate more people proportionately than any other Nation on the planet. And it is in that spirit that we approach this very important hearing.

And I would like to focus on what the Inspector General of the Department of Justice said when he testified earlier this year before the Committee. Even as the Bureau of Prisons receives an ever-increasing share of the Department's scarce resources, conditions in the Federal prison system continue to decline. And so when you add that to sequestration, we see that we are in a very difficult situation.

This Committee can help people understand the dilemma and some of the solutions that we are posing to relieve the stress of overcrowding and the continued reduction of the scarce resources of the Bureau of Prisons.

And with that, I will submit the rest of my statement into the record.

Mr. SENSENBRENNER. Without objection, it will be included.

[The prepared statement of Mr. Conyers follows:]

**Statement of the Honorable John Conyers, Jr. for the  
Hearing on Oversight of the Federal Bureau of Prisons Before the  
Subcommittee on Crime, Terrorism, Homeland Security, and  
Investigations**

**Thursday, September 19, 2013, at 10:00 a.m.  
2141 Rayburn House Office Building**

I am extremely concerned about the precipitous rise in the federal prison population over the last 40 years. We must do something to stop these rising numbers.

To begin with, I want us to examine the role of sentencing for drug offenses in the prison overcrowding problem.

Much of the growth in the federal prison population has been fueled by the so-called War on Drugs. Almost half of the 219,000 prisoners (46.8%) are incarcerated for drug offenses.

Michelle Alexander, in her excellent book, The New Jim Crow, says: "Drug offenses alone account for two-thirds of the rise in the federal inmate population and more than half of the rise in state prisoners between 1985 and 2000. Approximately a half-million people are in prison or jail for a drug offense today, compared to an estimated 41,100 in 1980 --- an increase of 1,100%. . . . Nothing has contributed more to the systematic mass incarceration of people of color in the [U.S.] than the War on Drugs."

I know Director Samuels does not make the laws, but he certainly sees the effects of them.

**Another issue we should consider** is the Bureau of Prison's use of solitary confinement.

While the Bureau does not use the term “solitary confinement,” it operates several types of segregated housing units which are, in fact, solitary confinement units.

For example, the Bureau as of February 2013, confined approximately 12,460 federal inmates—or about 7% of inmates in Bureau-operated facilities—in segregated housing units.

Federal prisoners in segregated housing are locked in their cells for 22 to 24 hours a day, sometimes for years on end.

Solitary confinement cells are no bigger than a parking space, and the inmates locked in them have little or no human interaction other than prison guards or a healthcare provider or attorney.

This is inhumane, and it undermines a prisoner's ability to successfully re-enter into society when his or her sentence is complete

The Bureau's own Psychology Services Manual recognizes that extended periods in segregated housing "may have an adverse effect on the overall mental status of some individuals."

Although the Bureau has not conducted any assessment of the effect of segregated housing on prison safety or of the effects of long-term segregated housing on prisoners, a recent report from the Government Accountability Office states:

“without an assessment of the impact of segregation on institutional safety or study of the long-term impact of segregated housing on inmates, BOP cannot determine the extent to which segregated housing achieves its stated purpose to protect inmates, staff and the general public.”

Accordingly, I very much want to hear Director Samuels’ thoughts about the Bureau’s use of solitary confinement.

**Finally**, I would like us to focus on what Michael Horowitz, the Inspector General of the Department of Justice, said when he testified before this Committee earlier this year that "even as the BOP receives an ever-increasing share of the Department's scarce resources" "conditions in the federal prison system continue to decline."

He stated, "For example, since FY 2000, the BOP's inmate-to-staff ratio has increased from about four-to-one to a projected five-to-one in FY 2013." He further said: "The OIG believes that the Department can make better use of existing programs to realize cost savings and reduce overcrowding."

I want Director Samuels to address these programs, such as the Residential Drug Treatment Program. It is clear that the Bureau needs to make full use of existing statutory authority and programs to save taxpayer funds, reduce recidivism, and reduce overcrowding.

Mr. SENSENBRENNER. The Chair of the full Committee, the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing, and I am very pleased to be here today on the issue of oversight of the Federal Bureau of Prisons.

When I became Chairman of the Judiciary Committee in January of this year, I said that this Committee would play an active role in advancing an agenda to restore economic prosperity and fiscal responsibility to America. And I know that you and the Ranking Member share that goal. This hearing is part of that agenda.

The Department of Justice currently spends a third of its budget housing prisoners, and the Bureau of Prisons population continues to grow, consuming even more taxpayer dollars every year. Given our current fiscal climate, it is our responsibility to ensure that every dollar spent is put to the wisest use.

The growth in the Bureau of Prisons population has also led to increased overcrowding in Federal prisons. As Chairman Sensenbrenner mentioned, earlier this year Correctional Officer Eric Williams was tragically murdered by inmates while performing routine lockdown duties. According to reports, Officer Williams was assigned to oversee a unit of approximately 130 inmates on his own with only keys, handcuffs, and a radio to protect himself. In response to Officer Williams' tragic death, the Bureau of Prisons approved the use of pepper spray by correctional officers for all of the Department's high security prisons. This is a positive step following a horrible tragedy.

But Congress and the Justice Department must also ensure that the BOP can safely and properly house Federal inmates. Both branches of Government should also strive to deliver programs to inmates that are proven to reduce recidivism. The simple fact is that over 90 percent of Federal inmates will be released from prison back into society and will be our neighbors and coworkers. We can work to ensure that, upon their release, these individuals are able to become productive taxpayers rather than more efficient criminals.

There is a strong support from Members of Congress on both sides of the Capitol for current BOP programs that are proven to reduce recidivism. For example, inmates who participate in BOP's well known program, the Residential Drug Abuse Program, are significantly less likely to recidivate and less likely to relapse to drug use than non-participants. However, this program is currently experiencing long waiting lines. I look forward to hearing from the director about how that can be addressed and whether the Bureau of Prisons has similar recidivism-reducing programs in development.

Another program that has proven to reduce inmate recidivism is Federal Prison Industries, or FPI. FPI provides opportunities for training and work experience in textile and other forms of manufacturing to Federal inmates. However, the FPI has been severely restricted by Congress in recent years. In 1988, FPI employed 33 percent of the Federal inmate population. It currently employs less than 10 percent of the population, which has forced the Bureau of Prisons to close or downsize some 50 factories.

While I support FPI's mission, I also believe FPI must think creatively to avoid undue competition with American businesses. For example, FPI is currently running a repatriation pilot program involving a few different products from places like China and South America. This is a positive start.

I look forward to hearing from Director Samuels today about the steps the Judiciary Committee can take to address these and other important issues in the area of prison management and recidivism reduction. It is also my hope that this Committee and the Bureau of Prisons can work on new and innovative ways to address the Bureau of Prisons crowding and budget issues, protect its employees, and provide valuable training to inmates in a manner that does not create undue competition with American companies.

Again, I thank the Chairman and yield back.

Mr. SENSENBRENNER. Without objection, all Members' opening statements will be placed in the record at this point.

It is the procedure in this Committee to swear in witnesses. So, Mr. Samuels, could you please stand and raise your right hand?

[Witness sworn.]

Mr. SENSENBRENNER. Let the record show the witness answered in the affirmative.

Charles E. Samuels, Jr. was appointed Director of the Federal Bureau of Prisons on December 21, 2011. He is responsible for oversight and management of all Bureau of Prisons institutions and for the safety and security of inmates under the agency's jurisdiction. He began working for the Bureau in 1988 as a correctional officer and served in many capacities rising through the ranks from case manager up to warden and eventually was named Senior Deputy Assistant Director of the Correctional Programs Division, or CPD for short.

In 2011, Mr. Samuels was selected as Assistant Director of CPD where he oversaw all inmate management program functions, including intelligence and counterterrorism initiatives, security and emergency planning, inmate transportation, case management, mental health and religious services, and community corrections.

He received his bachelor of arts degree from the University of Alabama and graduated from the Harvard University Executive Education Program for Senior Managers in Government.

Mr. Samuels, without objection, we will include your written testimony into the record at this point. We would ask that you would summarize it in 5 minutes. You know what the green light, the yellow light, and most importantly, the red light in front of you means. So please proceed.

**TESTIMONY OF THE HONORABLE CHARLES E. SAMUELS, JR.,  
DIRECTOR, FEDERAL BUREAU OF PRISONS**

Mr. SAMUELS. Good morning, Chairman Goodlatte, Chairman Sensenbrenner, Ranking Member Conyers, Ranking Member Scott, and Members of the Subcommittee. I am pleased to appear before you today to discuss the Federal Bureau of Prisons.

I cannot begin without acknowledging that this past February, the Bureau suffered tragic losses with the murders of two of our staff. Officer Eric Williams from the United States Penitentiary in Canaan, Pennsylvania was stabbed to death by an inmate. Lieuten-

ant Osvaldo Albarati was shot and killed while driving home from the Metropolitan Detention Center in Guaynabo, Puerto Rico. We will always honor the memories of these two law enforcement officers, and their loss underscores the dangers that Bureau staff face on a daily basis.

I know we all share a commitment to our Nation's criminal justice system. We are proud of the role we play in supporting the Department of Justice's public safety efforts, but we understand that incarceration is only one aspect of our overall mission. I am sure you share my concerns about the increasing costs associated with operating the Nation's largest correctional system. Those costs make up one-quarter of the DOJ budget. We are optimistic the Attorney General's Smart on Crime initiative will reduce the Federal population in the years ahead, although the extent of the impact is hard to predict at this time.

The Bureau of Prisons is responsible for the incarceration of over 219,000 inmates. Our prisons are crowded, averaging 36 percent more inmates than they were designed to house. We are most concerned about the 53 percent crowding at high security facilities and 45 percent crowding at our medium security facilities.

I am extremely grateful for the support Congress recently provided to activate new facilities in Berlin, New Hampshire; Hazelton, West Virginia; Yazoo, Mississippi; and Aliceville, Alabama. When fully activated, these facilities will assist with the reduced crowding rates by almost 4 percent.

Reentry is a critical component of public safety. Our approach in the Bureau of Prisons is that reentry begins on the first day of incarceration. Preparation for release includes treatment, education, job skill training, and more that takes place throughout the inmate's term.

Over the past 20 years, there has been a significant evolution and expansion of our inmate reentry programming. My goal as director is to ensure that every institution provides cognitive behavioral therapy programs for the inmates, a treatment approach that has proven effective to improve reentry outcomes.

Several of our most significant programs have been proven to reduce recidivism. Federal Prison Industries, or FPI, is one of our most important programs. FPI participants are 24 percent less likely to recidivate than non-participating inmates. While FPI reached as many as 33 percent of inmates in the past, it currently only employs about 8 percent of the inmates. This decline is due to various provisions in Department of Defense authorization bills and appropriations bills that have weakened FPI's standing in the procurement process. We were recently given new authorities to seek repatriated work for FPI, and we are working diligently to maximize these opportunities.

We agree with many experts that inmates must be triaged to assess risk and to determine appropriate programming to reduce such risk. High risk offenders are our first priority for treatment as they pose the greatest public safety risk when released from our custody. We continue to provide effective, evidence-based, cost-efficient treatment programs to address the needs of the inmate population. We have recently begun to enhance the tools we use to assess risk and to construct appropriate treatment plans.

The safety of the staff, inmates, and the public are our highest priorities. I have made several recent changes to Bureau operations that will help us enhance safety and security. Let me highlight some of these recent advances.

We expanded the availability of pepper spray for our staff to use in emergency situations at all high security prisons, detention centers, and jails. We are developing plans to add an additional correctional officer to each high security housing unit for evening and weekend shifts using our existing resources. We have made significant advances in reviewing and reducing our use of restrictive housing, and we are expanding residential drug abuse programming by adding 18 new programs to bring our total to 81.

Chairman Goodlatte and Chairman Sensenbrenner, this concludes my formal statement. Again, I thank you, Mr. Conyers, Mr. Scott, and Members of the Subcommittee, for your continued support. The mission of the Bureau of Prisons is challenging. By maintaining high levels of security and ensuring inmates are actively participating in evidence-based reentry programs, we serve and protect society.

I will be happy to answer any questions.

[The prepared statement of Mr. Samuels follows:]



# Department of Justice

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STATEMENT OF

CHARLES E. SAMUELS, JR.  
DIRECTOR  
FEDERAL BUREAU OF PRISONS

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY AND  
INVESTIGATIONS  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ON THE

OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS

PRESENTED ON

SEPTEMBER 19, 2013

**Statement of Charles E. Samuels, Jr.**  
**Director of the Federal Bureau of Prisons**  
**Before the Subcommittee on Crime, Terrorism, Homeland Security and**  
**Investigations, U.S. House of Representatives Committee on the Judiciary**  
**For a Hearing on the Oversight of the Federal Bureau of Prisons**  
**September 19, 2013**

Good morning, Chairman Sensenbrenner, Ranking Member Scott, and Members of the Subcommittee. I am pleased to appear before you today to discuss the operations, achievements, and challenges of the Federal Bureau of Prisons (Bureau). While I was appointed Director in December 2011, I have been with the Bureau for nearly 25 years, having started as a correctional officer and then holding many positions including Warden and Assistant Director.

I cannot begin without acknowledging that this past February the Bureau suffered tragic losses with the murders of two of our staff. On February 25<sup>th</sup>, Officer Eric Williams, a Correctional Officer at the United States Penitentiary in Canaan, Pennsylvania, was working in a housing unit when he was stabbed to death by an inmate. The death of Officer Williams reminds all of us that our work on behalf of the American people is dangerous. Every day when our staff walk into our institutions they willingly put their lives on the line to protect society, one another, and inmates in their care. On February 26<sup>th</sup>, Lieutenant Osvaldo Albarati was shot and killed while driving home from the Metropolitan Detention Center in Guaynabo, Puerto Rico. This incident is still under investigation. We will always honor the memories of Officer Williams and Lt. Albarati, and their losses further underscore the challenges the dedicated men and women working for the Bureau face daily. While there are many facets to our operations, the foundation for it all is the safe, secure, and orderly operation of institutions, and each and every staff member in the Bureau is critical to this mission.

The mission of the Bureau is two-fold: to protect society by confining offenders in prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure and to ensure that inmates are actively participating in reentry programming that will assist them in becoming law-abiding citizens when they return to our communities. I am deeply committed to both parts of the mission. Yet continuing increases in the inmate population pose ongoing challenges for our agency. As the nation's largest correctional agency, the Bureau is responsible for the incarceration of over 219,000 inmates. System-wide, the Bureau is operating at 36 percent over rated capacity and crowding is of special concern at higher security facilities, with 53 percent crowding at high security facilities and 45 percent at medium security facilities. We are grateful for the support Congress recently provided to activate new facilities in Berlin, New Hampshire; Hazelton, West Virginia; Yazoo, Mississippi; and Aliceville, Alabama. When fully activated, these facilities will assist us somewhat with reducing crowding for our inmates, however, even with these institutions coming online, lessening crowding remains a critical challenge.

The safety of staff is always a top priority, and we use all available resources to secure our institutions. We continue to take a variety of steps to mitigate the effects of crowding in our facilities, and we applaud the policy changes the Attorney General recently announced to recalibrate America's federal criminal justice system. These changes, part of the Department of Justice's (Department) "Smart on Crime" initiative, will help ensure that federal laws are enforced more fairly and federal resources are used more efficiently by focusing on top law enforcement priorities.

### **Institution Crowding**

Of the 219,000 federal inmates, 176,000 are housed in Bureau-operated facilities, which have a total rated capacity of just under 129,000 beds. The remaining approximately 42,000 are housed in privately operated prisons and residential reentry centers. Most of the inmates in BOP facilities (50 percent) are serving sentences for drug trafficking offenses. The remainder of the population includes inmates convicted of weapons offenses (15 percent), immigration offenses (11 percent), violent offenses (5 percent), fraud and other property offenses (7 percent), and sex offenses (10 percent). The average sentence length for inmates in BOP custody is 9 ½ years. Approximately 26 percent of the federal inmate population is comprised of non-U.S. citizens.

It is particularly challenging to manage the 46 percent of the federal prisoner population housed at higher security levels, and crowding is of special concern at these facilities. For example, at the medium security level, approximately 75 percent of the inmates have a history of violence, 41 percent have been sanctioned for violating prison rules, and half of the inmates in this population have sentences in excess of 8 years. At the high security level, more than 42 percent of the inmates are weapons offenders, or robbers, almost 10 percent have been convicted of murder, aggravated assault, or kidnapping, and half of the inmates in this population have sentences in excess of 10 years. Moreover, 71 percent of high security inmates have been sanctioned for violating prison rules, and more than 90 percent of high security inmates have a history of violence. One out of every four inmates at high security institutions is gang affiliated.

There is a much higher incidence of serious assaults by inmates on staff at medium and high security institutions than at the lower security level facilities. In FY 2012, 85 percent of serious assaults against staff occurred at medium and high security institutions. Incidents at high security facilities made up 63 percent of serious assaults on staff, and 22 percent occurred at medium security facilities. Fewer assaults occur at low and minimum security institutions that house inmates who are less prone to violence.

The BOP performed a rigorous analysis of the effects of crowding and staffing on inmate rates of violence.<sup>1</sup> Data was used from all security levels of BOP facilities for male inmates for the period July 1996 through December 2004. We accounted for a variety of factors known to influence the rate of violence and, in this way, were able to isolate and review the impact that crowding and the inmate-to-staff ratio had on serious assaults. This study found that the rate of serious inmate assaults were associated with increases in both the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) and inmate-to-staff ratios. The analysis revealed that an increase of one inmate in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates. This sound empirical research underscores that there is a direct relationship between crowding, staffing, and institution safety.

The Bureau manages overcrowding by double and triple bunking inmates throughout the system, or housing them in space not originally designed for inmate housing, such as television rooms, open bays, and program space. To mitigate risks associated with crowding, we have made changes to our strategies for classification and designation, intelligence gathering, gang management, use of preemptive lockdowns, and controlled movement. We review available and emerging technologies to look for ways to address crowding in our facilities. However, the challenges remain as the inmate population continues to increase.

#### **The Inmate Reentry Strategy**

As I stated earlier in my testimony, I am committed to both parts of the Bureau's mission – security and reentry. The Attorney General has also made clear his strong commitment to reentry as a critical component of public safety. For 30 years, the Bureau has assessed offenders' risk of institution misconduct, and we thoroughly review the underlying causes of criminal behavior including substance abuse, education, and mental health. Institution misconduct is highly correlated with recidivism. Understanding the underlying causes of criminal behavior has allowed us to make great strides in enhancing our treatment efforts, and to ensure we are providing offenders the best opportunities for success once back in the community.

Significant advances have been made in research related to effective reentry programs. Most experts agree with the concept of identifying factors that put inmates at risk of failing to successfully reintegrate into society, and they also agree with several general principles regarding how best to lower such risks. It is critical that offenders are triaged based on risk of failure, prior to formulating a treatment plan. Offenders who are more likely to successfully reenter society do not require intensive programming, though the Bureau will provide them any services we identify, as needed, to ease their transition and occupy their time in prison—for

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<sup>1</sup> The Effects of Crowding and Staffing Levels in Federal Prisons On Inmate Violence and Administrative Remedies Granted, Federal Bureau of Prisons Office of Research and Evaluation. July 20, 2011.

example, resume preparation/job search, securing identification, applying for benefits, etc. High risk offenders require a more thorough assessment to identify their individual risk factors, and must be our first priority for appropriate treatment.

As a direct result of these advances, we are now modifying our reentry model to ensure that we provide effective, evidence based, cost-efficient treatment plans for each inmate. By providing all staff with an understanding of each inmate's strengths, weaknesses, and programming goals, staff can work more holistically to increase the likelihood of each inmate making a successful transition back to the community. We will continue to evaluate newly designated inmates with our validated classification tool to determine inmate risk for misconduct and appropriate security level placement, and will re-assess inmates over time to determine any changes in security level. We will also continue our comprehensive evaluation of inmate programming needs and are enhancing the tools we use to construct an appropriate treatment plan, and better track progress over time.

#### **Inmate Reentry Programming**

Each year, over 45,000 federal inmates return to our communities, a number that will continue to increase as the inmate population grows. Most need job skills, vocational training, education, counseling, and other assistance such as treatment for substance use disorders, anger management, parenting skills, and linkage to community resources for continuity of care if they are to successfully reenter society.

In the BOP, reentry begins on the first day of incarceration and continues throughout an inmate's time with us. As such, federal prisons offer a variety of inmate programs to assist inmates in returning to our communities as law-abiding citizens, including work, education, vocational training, substance abuse treatment, observance of faith and religion, psychological services and counseling, release preparation, and other programs that impart essential life skills. We also provide other structured activities designed to teach inmates productive ways to use their time.

Many of our programs have been demonstrated to reduce recidivism (i.e., Federal Prison Industries (FPI), Education, Occupational/Vocational Training, and Residential Drug Abuse Treatment (RDAP)). Specifically, empirical research has shown that inmates who participate in the FPI program are 24 percent less likely to recidivate than similar non-participating inmates; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate. Inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate, and 15 percent less likely to have a relapse in their substance use disorder use within 3 years after release. Also, research indicates inmates who participate in

work programs and vocational training are less likely to engage in institutional misconduct, thereby enhancing the safety of staff and other inmates.

The Washington State Institute for Public Policy conducted several evaluations of the costs and benefits of a variety of correctional skills-building programs, examining program costs; the benefit of reducing recidivism by lowering costs for arrest, conviction, incarceration, and supervision; and the benefit by avoiding crime victimization. Their work is based on validated evaluations of crime prevention programs, including the Bureau's assessment of our industrial work and vocational training programs (the Post Release Employment Project study) and our evaluation of the Residential Drug Abuse Treatment program (the TRIAD study). The benefit is the dollar value of total estimated criminal justice system and victim costs avoided by reducing recidivism, and the cost is the funding required to operate the correctional program. The benefit-to-cost ratio of residential substance use disorder treatment is as much as \$3.38 for each dollar invested in the program; for adult basic education, the benefit is as much as \$19.00; for correctional industries, the benefit is as much as \$4.97; and for vocational training, the benefit is as much as \$13.01. This body of research clearly indicates these inmate programs result in significant cost savings through reduced recidivism, and their expansion is important to public safety.<sup>2</sup>

Based on these proven-effective programs, we have implemented additional programs for the inmate population. These include Challenge for high security inmates, Resolve for females with trauma-related mental illness, BRAVE for younger, newly-designated offenders, Skills for cognitively-impaired offenders, Sex Offender Treatment, and STAGES for inmates with Axis II disorders.

But we have also experienced programming challenges, most notably with respect to FPI, one of the Bureau's most important correctional programs proven to substantially reduce recidivism. FPI provides inmates the opportunity to gain marketable work skills and a general work ethic -- both of which can lead to viable, sustained employment upon release. This is particularly noteworthy for reentry given the many barriers to post-release employment many offenders face. It also keeps inmates productively occupied; inmates who participate in FPI are substantially less likely to engage in misconduct. At present, FPI reaches only 8 percent of the inmate population housed in BOP facilities; this is a significant decrease from previous years. For example, in 1988, FPI employed 33 percent of the inmate population. This decrease is primarily attributable to various provisions in Department of Defense authorization bills and

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2 Aos, Steve, Phipps, P., Barnoski, R. and Lieb, R. (2001) The Comparative Costs and Benefits of Programs to Reduce Crime, Washington State Institute for Public Policy, as updated April 2012, <http://www.wsipp.wa.gov/pub.asp?docid=01-05-1201>.

appropriations bills that have weakened FPI's standing in the Federal procurement process by requiring FPI to compete for the work of Federal agencies in many instances where it was previously treated as a mandatory source of supply.

We are very grateful for the additional authorities Congress provided in the FY2012 appropriation to provide opportunities to expand FPI programming, and are working on the new programs. FPI has moved expeditiously to secure new business opportunities that are currently or would have otherwise been manufactured outside of the United States. FPI's Board of Directors has approved 17 pilot proposals to date. In addition to the approved pilots, more than 17 potential opportunities are being evaluated for Board approval. FPI is continuing to actively seek new business opportunities and has created an in-house group to focus exclusively on business development and to address the unique challenges of operating the FPI program.

#### **Recent Innovations and Achievements**

The safety of staff, inmates, and the public are our highest priorities. I have undertaken several recent changes to Bureau operations that I believe will help us enhance safety and security.

In May 2012, the Bureau began an evaluation to assess the effectiveness of oleoresin capsicum (OC) spray for use in emergency situations. The assessment involves designated staff being authorized to carry OC spray for use in situations where there is a serious threat to the safety of staff, inmates, or others. All staff authorized to carry OC spray underwent an initial four-hour training, and subsequently underwent quarterly re-familiarization training. Preliminary results of the assessment suggested that OC spray was improving safety, and in February 2013, I decided to expand the evaluation to all high security prisons and to our detention centers and jails. I am confident that the outcome of the assessment will support the use of this tool to assist our staff in maintaining institution safety and security.

I am working to increase our Correctional Officer complement at high security institutions. The Bureau operates using a "Correctional Worker first" philosophy. This means that every institution staff member, irrespective of their professional duties, is also expected to assist with security. Institution staff are visible on the compound, assist with inmate cell and pat searches, and respond to emergencies. As you can imagine, this philosophy is important at all institutions, but most critical at the high security institutions. During evenings and weekends when high security inmates are moving about the compound rather than in their cells, the institution is staffed primarily by Correctional Officers. Therefore, we are developing a plan to use existing resources to add an additional Correctional Officer to each high security housing unit during these shifts.

Next, we are in the midst of making significant changes to our Special Housing Unit (SHU) policies and procedures. These changes will allow us to improve the efficiency of our SHU operations without compromising safety. Specifically, in the past year we have decreased the number of inmates housed in SHU by 25 percent, primarily by focusing on alternative management strategies and alternative sanctions for inmates. Emphasis has been placed on timelier processing of disciplinary reports, thereby reducing the amount of time inmates spend in administrative segregation awaiting sanctions. We have also created a new automated system that allows us to better track inmates housed in SHU, and Executive Staff now receive a quarterly report that monitors SHU trends nationwide. We monitor average disciplinary sanction time given by disciplinary hearing officers to ensure relative parity among sanctions nationwide. I have focused significant resources on the mental health of inmates who are placed in SHUs to ensure we are doing everything we can to work with these inmates. The National Institute of Corrections recently awarded a cooperative agreement for independent consultants to conduct a comprehensive review of our restricted housing operations and to provide recommendations for best practices. We look forward to the outcome of the evaluation as a source of even greater improvements to our operations.

In July of this year, the Bureau updated policies regarding searches of staff and visitors. While we have had authority to conduct staff searches since 2008, these enhanced policies will provide increased security to deter the introduction of contraband into our facilities. While the vast majority of Bureau staff continually demonstrate the highest levels of professionalism and are committed to our agency's core values, we continue to have incidents involving the introduction of contraband into our facilities that threaten the safety of staff, inmates, and the public. These incidents provide clear justification for enhancing our search policies, and these policy changes are an important step to strengthening our public safety mission.

We are moving forward to expand RDAP programming throughout the agency. As noted earlier in my testimony, RDAP has been proven effective at reducing recidivism and relapse, while also decreasing institution misconduct. For non-violent offenders, successful completion of the entire RDAP program, to include transitional treatment while in the Residential Reentry Center (halfway house), includes an early release incentive of up to one year off the term of incarceration. Thus, RDAP not only helps return inmates to their communities as law-abiding citizens, but also helps somewhat with institution crowding. However, due to limited capacity, inmates completing RDAP who are eligible for a 12 month sentence reduction are currently receiving an average of 9.9 months. With the addition of 18 new programs in FY 13, bringing our total to 81 programs, increased drug treatment capacity will move us closer to reaching our goal of providing a 12 month sentence reduction to all eligible inmates.

Finally, in late April we made changes to our Compassionate Release program (Title 18 U.S.C. § 3582(c)). This program allows the Bureau to petition the court for a reduction in

sentence for inmates facing extraordinary and compelling circumstances and who pose no threat to public safety. We expanded the medical criteria for inmates seeking release, and the Attorney General recently announced additional revisions to the criteria to include other categories of inmates such as elderly inmates and certain inmates who are the only possible caregiver for dependents. In both cases, the Bureau would generally consider inmates who did not commit violent crimes and have served a significant portion of their sentence. The sentencing judge would ultimately decide whether to reduce the sentence.

#### **Initiatives Moving Forward**

There is more good news on the horizon. The Attorney General recently announced the Department's "Smart on Crime" initiative. This initiative, based upon a comprehensive review of the criminal justice system, has yielded a number of areas for reform. Two provisions in particular should have a direct, positive impact upon the Bureau's population while still deterring crime and protecting the public. I noted above the Attorney General's recent announcement about changes to Compassionate Release. These changes will provide for, upon order by the sentencing judge, the release of some non-violent offenders, although we estimate the impact will be modest. The Department is also urging prosecutors in appropriate circumstances involving non-violent offenses to consider alternatives to incarceration, such as drug courts, other specialty courts, or other diversion programs. The Department is also modifying their charging policies so that certain low-level, non-violent drug offenders who have no ties to large-scale organizations, gangs, or cartels will be charged with offenses for which the accompanying sentences are appropriate to their individual conduct rather than excessive prison terms more appropriate for violent criminals or drug kingpins. These initiatives will help stem the tide of offenders entering the Bureau and lead to lower average sentences, where appropriate, and thus should decrease our population somewhat over the long term.

The "Smart on Crime" initiative is only the beginning of an ongoing effort to modernize the criminal justice system. In the months ahead, the Department will continue to hone an approach that is not only more efficient and more effective at deterring crime and reducing recidivism, but also more consistent with our nation's commitment to treating all Americans as equal under the law. These reforms are about much more than fairness for those who are released from prison. They are about public safety and public good, and they make economic sense.

The Administration has also supported two legislative initiatives that would have a direct impact on the Bureau's crowding through incentivizing positive institution behavior and effective reentry programming. Both initiatives were included in 112<sup>th</sup> Congress' Second Chance Reauthorization Act, and we are hopeful the 113<sup>th</sup> Congress will consider them as well. The first expands inmate Good Conduct Time (GCT) to provide inmates up to the full 54 days

per year stated in statute, rather than the current net maximum of 47 days per year. It does so by awarding GCT based upon the sentence imposed rather than the time served (Title 18 U.S.C. § 3624(b)). The second would provide inmates with an incentive to earn sentence credits annually for successfully participating in programs that are effective at reducing recidivism. This initiative is modeled in part on the sentence reduction incentive already in statute for the RDAP, and caps the total amount of sentence credits earned from all sources at one-third of an inmate's total sentence.

**Conclusion**

Chairman Sensenbrenner, this concludes my formal statement. Again, I thank you, Mr. Scott, and Members of the Subcommittee for your continued support. As I have indicated in my testimony, the Bureau faces a number of challenges as the inmate population continues to grow. For many years now, we have stretched resources, streamlined operations, and constrained costs to operate as efficiently and effectively as possible. I look forward to working with you and the Committee on meaningful reform to enhance offender reentry while reducing our overburdened prisons, and would be happy to answer any questions.

Mr. SENSENBRENNER. Thank you very much, Mr. Samuels.

The Chair will recognize himself for 5 minutes.

Mr. Samuels, we heard an awful lot about the percentage of inmates that are in prison for drug offenses. What percentage of those inmates in there for drug offenses are there for possession of offenses?

Mr. SAMUELS. Approximately 50 percent of the inmates incarcerated in the Bureau are incarcerated for drug trafficking offenses.

Mr. SENSENBRENNER. You are talking about trafficking rather than possession?

Mr. SAMUELS. Total number.

Mr. SENSENBRENNER. Total number. I am trying to differentiate between those who are there for possession and those that are there for trafficking. Do you have that information?

Mr. SAMUELS. I would have to obtain that information and provide it to you for the record.

Mr. SENSENBRENNER. Thank you very much.

The second question is what percentage of the inmates are either repeat or violent offenders.

Mr. SAMUELS. Within our population, when you look at the individuals who have been released after serving time in the Bureau, 80 percent of the inmates who are released do not return to the Federal prison system within a 3-year period.

Mr. SENSENBRENNER. And what percentage of the inmates are violent offenders?

Mr. SAMUELS. Five percent of the inmates incarcerated within the Bureau of Prisons are there for violent offenses.

Mr. SENSENBRENNER. Now I want to go back to my first question. You say that 80 percent of the people who are released are not convicted and re-sentenced within a 3-year of period of time. What percentage of those that are in prison are repeat offenders? That is the other side of that coin. I am talking about in the Federal prisons.

Mr. SAMUELS. I will need to provide that for the record.

Mr. SENSENBRENNER. What percentage are immigration offenders?

Mr. SAMUELS. Eleven percent.

Mr. SENSENBRENNER. And do you have a breakdown of what the immigration offenders are actually in prison for? Is it an immigration offense or is it an offense that is criminal in nature but is committed by someone who also could be convicted of an immigration offense?

Mr. SAMUELS. I have the total number for the percentage, but I would have to gather the information to break it down into the specifics that you are requesting.

Mr. SENSENBRENNER. Thank you very much.

I yield back the balance of my time. I recognize the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Let me follow through on one of the questions that the Chairman just asked. You said 80 percent do not return to the Federal prison. Do you track whether or not they return to a State prison?

Mr. SAMUELS. When you look at the overall recidivism rate for the Bureau of Prisons, that number is 40 percent.

Mr. SCOTT. Forty percent—

Mr. SAMUELS. Forty percent recidivate. So the total would be 60 percent—

Mr. SCOTT. Do not come back. Okay. So 80 percent do not come back to the Federal prison, but only 60 percent do not come back. Forty percent actually go to either State or Federal.

Mr. SAMUELS. Yes.

Mr. SCOTT. We know from studies that solitary confinement causes a deterioration of mental health and actually increases recidivism. Is there any evidence that use of solitary confinement serves any useful purpose?

Mr. SAMUELS. Our practice for solitary confinement, which we are actually in the process of having an external evaluation done—the National Institute of Corrections has entered into a cooperative agreement. We are having corrections professionals come in to assess our practices and our policies.

Mr. SCOTT. Are you also studying the use of solitary confinement with juveniles?

Mr. SAMUELS. Could you repeat, sir?

Mr. SCOTT. Use of solitary confinement for juveniles. Is that part of the evaluation?

Mr. SAMUELS. No, sir.

Mr. SCOTT. Do you subject juveniles to solitary confinement?

Mr. SAMUELS. No, sir.

Mr. SCOTT. The Prison Rape Elimination Act audit. You are undergoing an audit now, as I understand it. Is that right?

Mr. SAMUELS. Yes.

Mr. SCOTT. What is the current status of those audits?

Mr. SAMUELS. We recently underwent the first pre-audit for the corrections systems for the entire United States at our facility at FCI Gilmer. The audit was completed toward the latter part of August. And I have not received the official report, but I am looking forward to reviewing the information.

Mr. SCOTT. We have received reports that there have been a lot of complaints about youths at Lewisburg. Are you familiar with these complaints?

Mr. SAMUELS. Complaints regarding USP Lewisburg?

Mr. SCOTT. Inhumane treatment of young people, use of shackles, deplorable conditions, solitary confinement, guards promoting cage fighting, other kinds of reports. Can you review the reports of complaints at Lewisburg and provide us with your response?

Mr. SAMUELS. Yes, sir.

Mr. SCOTT. Could you comment on the use of compassionate release? Are you familiar with the process in that?

Mr. SAMUELS. Yes.

Mr. SCOTT. The Inspector General made some recommendations. What is the status of the Bureau's response to the Inspector General report?

Mr. SAMUELS. The Bureau—the compassionate program for the Bureau, also referred to as reduction in sentence—we have embraced all of the recommendations from the Inspector General. The program now has expanded the use of compassionate release, and I have to this date approved approximately 42 individuals to be released under compassionate release. We have also taken the posi-

tion to ensure that there is transparency for the entire process. When individuals make a request at the institution level, we are monitoring all the requests to ensure that for any denials, that we have appropriate justification to include those that are being approved.

Mr. SCOTT. You mentioned 42. The prior year how many were processed?

Mr. SAMUELS. 39 were approved by me.

Mr. SCOTT. Could you say a word about what you are doing to reduce the cost of telephone calls from Federal prisons?

Mr. SAMUELS. Yes. Recently the FCC—they have addressed issues relative to telephone calls not only for the Bureau of Prisons but State corrections as well. The Bureau of Prisons—for years we have had a very low rate, which our rate has not increased in the amount of years we have had it. Right now, for direct calls domestically within the country, we have a rate of 23 cents per minute. We are waiting on the final ruling regarding the issue to determine where we go from there with any of the caps that have been determined by the FCC for the Bureau of Prisons, to include the States.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Samuels, everyone seems to agree that the Bureau of Prisons crowding is a problem. Some people here are saying we need to let people out of prison to fix it. However, certainly there are offenders we can all agree should not be released early. Correct?

Mr. SAMUELS. I did not hear the question.

Mr. GOODLATTE. That is a question. Do you agree that there are prisoners who should not be released early?

Mr. SAMUELS. Yes. With our population having approximately 219,000 inmates, I would state that for certain individuals, depending on their offense history and various areas when you look at risk factors—

Mr. GOODLATTE. So people with having a history of violence?

Mr. SAMUELS. It depends on the circumstances on how they are being evaluated.

Mr. GOODLATTE. What about sex offenders who are more likely to recidivate than anyone else?

Mr. SAMUELS. We would have to assess the risk factors for each individual. And the reason I make this statement, with the recent initiative with our compassionate release efforts, if an individual falls within that category and they are submitting a request, we would have to evaluate all of the issues to make—

Mr. GOODLATTE. But you would be less likely to release somebody with a history of violence.

Mr. SAMUELS. If there is a potential threat to the public based on the evaluation.

Mr. GOODLATTE. And sex offenders?

Mr. SAMUELS. Same. If there are significant concerns regarding any—

Mr. GOODLATTE. And gang members?

Mr. SAMUELS. The same evaluation would occur.

Mr. GOODLATTE. Your testimony says 75 percent of medium security and 90 percent of high security inmates have a history of vio-

lence. Additionally, you testified that one in four high security inmates are gang affiliated. Surely they would not be eligible for early release.

Mr. SAMUELS. They would be evaluated on a case-by-case basis, and if there is any likelihood that the individual would have the potential to re-offend, they would not be recommended for any type of release.

Mr. GOODLATTE. So which inmates are we mostly talking about here? Are we talking about low security offenders, white-collar offenders, drug offenders?

Mr. SAMUELS. Mr. Chairman, all inmates will be reviewed and assessed and the expansion of the compassion release program looks at medical and non-medical cases. So if an individual has been diagnosed with a terminal illness and they are subjected to have a life expectancy of less than 18 months, we would look at the individual, review all of the factors to include their potential risk to re-offend. And based on that assessment, a determination would be made whether to approve or deny the request.

And for the individuals who fall in the category where they are not able to take care of themselves, to provide self-care, and these are individuals who have a progressive illness or they have been subjected to an injury where they are either 100 percent bed-ridden and/or cannot maintain the basic self-care for more than 50 percent of their time, then we would evaluate and look at all the circumstances, to include individuals who are the primary caregiver for dependents if there is a situation due to extraordinary or compelling circumstances that we should evaluate. So each individual would be assessed on their own individual issues in these.

Mr. GOODLATTE. Do you envision that people with a history of violence or sex offenders who have a high recidivism rate or gang members would be likely to be primary caregivers?

Mr. SAMUELS. If we are able to determine, based on their lack of participation in programs within the Bureau and no efforts on their part and with our validated risk assessment that we have been using for the past 30 years to assess the factors associated with misconduct—

Mr. GOODLATTE. I want to get in one more question, so let move on since my time is running out.

What challenges does the Bureau of Prisons face in developing new programs that would help reduce recidivism? We have heard the RDAP and FPI have both proven to reduce recidivism. If Congress were to require the Bureau to implement additional recidivism-reducing programs to bring down its population, what challenges would you face?

Mr. SAMUELS. The challenges the Bureau would face with this initiative, which we have been developing cognitive behavior therapy programs similar to what we offer with the residential drug abuse program by taking various elements to establish these types of programs, we have been doing. We have created programs in our high security facilities, which we refer to as the Challenge Program. We have established a program that we call Resolve for female inmates who have been exposed to traumatic incidents within their life. We have a staged program, sexual offender programs. So we are in the process of doing.

Our biggest challenge is with the growth of the population. When you look at the inmate-to-staff ratio, all of the staff who work within the Bureau of Prisons are considered correctional workers, but to maintain the immediate concern of safety and security to protect staff, inmates, and the public, sometimes we have to pull these staff to provide coverage. When we are put in a situation to maintain at the highest level the safety and security, the staff who are assigned the duties to carry out these treatment programs are pulled away from those duties because they are carrying out the efforts of the correctional worker duties. So as long as our population is maintained at an acceptable level, we are able to continue to provide the necessary programs to give us those reductions which overall with the recidivism reduction efforts helps us.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

We welcome you here, Director Samuels. And this is for me the beginning of what I hope is a continuing and fruitful relationship because the prisons are so important in terms of whether they have any beneficial influence on the inmates and the procedures going on. I know that sequestration and budget cuts have made it very difficult. But I think that your philosophy and experience combine to give you a very good platform for advocating.

And I wanted to start off with the Aliceville site for women in which I note that 11 of our colleagues in the Senate have written you about asking about these changes of eliminating the women's site and sending them to very long distances away, which we think might be counterproductive.

Mr. SAMUELS. Thank you.

The issue relative to the potential mission change for FCI Danbury—I am still working with my staff to finalize the outcome of how we are going to proceed with the issues that have been raised by the 11 Senators which you made reference to. And at some point in the near future, we will be providing what we are trying to do.

But I think it is very, very important that everyone understands and knows that I firmly believe in trying to keep the inmates as close to their residences for all of the concerns and issues associated with making sure that they can have family visits and definitely for the individuals who have children, the children of incarcerated parents having access to their parents. We will continue to do everything possible within the resources that we have to make all of those efforts be something that is meaningful and doable to the best of our abilities.

Mr. CONYERS. Well, I would like to get a copy, if it is appropriate, of the response that you send the 11 Members of the Senate in this regard because I agree with what you are saying.

Mr. SENSENBRENNER. Without objection, when Mr. Conyers gets that copy, it will be included in the record.

[The information referred to follows:]

**U.S. Department of Justice****Federal Bureau of Prisons**

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*Office of the Director**Washington, DC 20534*

September 27, 2013

The Honorable Patrick Leahy  
United States Senate  
Washington, DC 20510

Dear Senator Leahy:

I am writing in response to your August 2, 2013, letter expressing concerns regarding the planned mission change for the Federal Correctional Institution (FCI) in Danbury, Connecticut, and in response to additional concerns set forth in an August 6, 2013, email from committee staff. I appreciate your concern for the well-being of the female inmates housed at Danbury, and I assure you that the Bureau of Prisons (BOP) remains committed to keeping inmates as close to home as reasonably possible in order to assist with maintaining family ties and preparation for reentry.

Before answering your specific questions, I want to provide you some background information about the BOP's inmate population and our facilities. Women have constituted a relatively small percent of the total federal inmate population, comprising approximately 6 to 7 percent of federal inmates for the past 50 years. But over time the number of women in BOP custody has increased, consistent with the overall growth of the federal inmate population. Crowding at secure female facilities is now higher than any other security level other than high security male facilities.<sup>1</sup>

Between FY 2006 and FY 2008, appropriations bills were enacted that provided \$210 million to complete construction of a secure prison in Aliceville, AL. By the time the final

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<sup>1</sup> Crowding percentages are based on the number of inmates housed in a facility above the rated capacity. For example, if a facility has a rated capacity of 1,000 and houses 1,400 inmates, then the crowding rate is 40% (400 inmates greater than rated capacity, divided by the rated capacity). Rated capacity calculations for secure female facilities assume 100 percent double bunking (for example, a secure female facility with 500 cells would have a rated capacity of 1,000).

construction appropriation for the prison in Aliceville was being debated and passed in FY 2008, the Senate Appropriations Committee included report language (S. Rept. 110-124), based on discussions with BOP, that recognized the need for "additional bedspace capacity for female inmates at new facilities." At that time, the crowding rate in secure female facilities was 56 percent and some facilities were being "quadruple bunked", that is, rooms designed for two inmates were housing four inmates.

Construction of a facility for women in Aliceville, AL began in September of 2008. The FY 2009 President's Budget Request named this facility "Secure Female FCI Aliceville, AL", and it has been identified as such in each President's Budget Request through FY 2013. Following submission of these budget requests, Congress appropriated partial year funding for staffing and equipping the facility (referred to as "activating") in FY 2012 (Public Law 112-55, November 18, 2011), and the remainder in FY 2013 (Public Law 113-6, March 26, 2013), for a total of about \$51.5 million.

FCI Aliceville's rated capacity is 1,536 inmates. It is the second LEED-certified facility in the Bureau of Prisons, consisting of all "green" materials by design and construction. FCI Aliceville formally opened and began receiving female inmates at its minimum security camp in December 2012, and at its secure facility in July 2013.

FCI Aliceville is located approximately 45 miles southwest of Tuscaloosa, which has a population of approximately 92,000, is home to the University of Alabama, and has commercial bus and Amtrak service. FCI Aliceville is also close (35 miles) to the town of Columbus, Mississippi, and is 111 miles from the Birmingham airport.

We have provided specific information below to address the questions posed in your letter and the supplemental questions submitted by Committee staff. We would be pleased to provide any additional information that might help assure you that our plans to proceed with activating FCI Aliceville and modify the mission of FCI Danbury are indeed in the best interest of all inmates in the BOP.

**1. Given the unique proximity of the Danbury facility to major Northeastern cities, why was it selected to be converted into a facility for men? And what facilities in the Northeast will be available for women currently at the security level housed at Danbury?**

Apart from FCI Aliceville, BOP presently operates low security female inmate institutions at the following locations: Danbury, CT; Dublin, CA; Hazelton, WV; Tallahassee, FL; and Waseca, MN. Before the recent activation of FCI Aliceville, the overall crowding rate at our five existing female low security institutions was 48%.

BOP low security male facilities, meanwhile, are operating at an overall crowding rate of 38%. As part of our regular evaluation of our facilities and inmate population, we have determined that with the activation of FCI Aliceville, we can convert one of the existing female low security institutions to a male facility. This conversion will allow us to realize substantial reductions in the crowding rates at low security female institutions, while also providing some relief to our overcrowded male low security institutions.

To realize these reductions in male and female low security crowding, we decided to change the mission at FCI Danbury. As of July 27, 2013, FCI Danbury housed 1,337 female inmates in two facilities: 1,120 inmates in a low security facility and 217 inmates in a minimum security camp.<sup>2</sup> The BOP's plan to change the mission at FCI Danbury concerns only the low security facility; the minimum security camp at FCI Danbury will continue to house female inmates. We estimate that even with the change in mission at FCI Danbury's low security facility, the activation of FCI Aliceville will permit the BOP to achieve a significant reduction in the overall crowding rate at low security female facilities across our system, from the pre-FCI Aliceville rate of 48% to an estimated crowding rate of 23%. Meanwhile, by converting FCI Danbury to a male institution, we anticipate the overall crowding rate at low security male institutions will be reduced to 36%.

<sup>2</sup> Following receipt of your August 2, 2013, BOP temporarily suspended its plans to transfer female inmates from FCI Danbury in connection with the change of mission. However, as we separately related to Committee staff during the week of August 19, 2013, approximately 98 female inmates have been transferred from FCI Danbury during the month of August in order to move these inmates to facilities closer to their release residences or to permit their continued participation in the Residential Drug Abuse Treatment Program. For purposes of answering the questions in your letter, we are using the inmate population as it existed before these moves took place.

Our justifications for converting the low-security facility at FCI Danbury to a male institution, as opposed to converting one of the other low-security female institutions, are two-fold. First, as of July 27, 2013, there were 7,421 male inmates housed in low security facilities throughout the BOP who would be closer to their release residences if they were transferred from their current institution to FCI Danbury. While FCI Danbury does not have the capacity to house all 7,421 of these male inmates, the conversion of FCI Danbury will allow hundreds of low security male inmates to move closer to their homes in the Northeast.

Second, while we anticipate that the mission change at FCI Danbury will result in some female inmates being moved farther from their release residences, we anticipate that the mission change on balance will result in the transfer of a much greater number of women closer to their release residences. As explained above, as of July 27, 2013, there were 1,120 women at FCI Danbury's low security facility. Of these women, 673 are United States citizens. BOP is reviewing each of these inmates, on a case-by-case basis, to determine the best possible transfer location. Consistent with BOP policies and practices, BOP is considering each inmate's eventual release residence as well as individual security, medical, and programmatic needs. The release residence will be a significant consideration in determining the transfer location.

While reviews of these 673 inmates are ongoing, we have identified a total of 391 women who are from Northeast or Mid-Atlantic states, including the District of Columbia. Of these, 43 will be released prior to January 1, 2014; these female inmates will not be transferred. Each of the remaining 348 inmates from Northeast or Mid-Atlantic states, including the District of Columbia, will be reviewed to determine if they qualify for a reduction in their security level, and, if so, they will be evaluated for placement at the FCI Danbury prison camp to the extent there is capacity there. Those who are not placed at the FCI Danbury camp will be transferred from FCI Danbury either to the Secure Female Facility (SFF) Hazelton, West Virginia, located in the Northeastern panhandle of West Virginia near the Maryland and Pennsylvania borders, or to the Federal Detention Center (FDC) in Philadelphia, Pennsylvania. We estimate that these transfers will result in placements of approximately 243 of the 348 female inmates at facilities that are closer to their residences than FCI Danbury.

Similarly, the 282 female inmates from areas outside of the Northeast and Mid-Atlantic Regions will be transferred closer to home as well. These inmates will be transferred to the Federal Medical Center Carswell, TX; FCI Waseca, MN; FCI Tallahassee, FL; FCI Aliceville, AL; or FCI Dublin, CA; as appropriate.

BOP records reflect that 447 female inmates at FCI Danbury are not United States citizens. Consistent with BOP practice for housing inmates who are not United States citizens, BOP will determine a transfer location for these women based on factors other than their identified address, including factors such as: security needs, medical needs, and crowding considerations. Additional information about these 447 inmates is set forth below in response to question number 10.

**2. What are the home residences for the women currently housed at Danbury, broken down by city and state?**

Although we do not have city information readily available, below please find a listing of the states of residence for the women in the low security facility at FCI Danbury as of July 27, 2013. The first listings below include all inmates regardless of their citizenship, but 305 of the 447 female inmates who are not United States citizens are not included because BOP's records do not contain a known United States address for these 305 women. Following the first listings, we have included a separate listing that shows country of origin for the 305 women for whom we lack an identified address in the United States.

Table of States of Residence for the 815 Inmates at DAN with Identified Address in the US Excluding Camp Inmates as of July 27, 2013

Sorted by Frequency

State of Residence	Number of Female Inmates
NY	92
TX	73
VA	53
PA	51
DC	47
CA	45
FL	44
MD	37
NC	30
IL	29
OH	24
WV	21
NJ	20
Puerto Rico	17
AZ	17
TN	16
MA	14
CT	13
ME	13
MI	13
IA	11
GA	11
NH	8
MN	8
IN	8
VT	7
SC	7
MO	7
KS	7
AR	6
WI	6
CO	5
LA	5
OK	5
AL	5
NE	4
ND	4
MS	4
SD	4
OR	4
HI	3
KY	3
NM	3
WY	2
RI	2
DE	2
ID	1
Virgin Islands	1
AK	1
Northern Marianna Islands	1
NV	1

Sorted Alphabetically by State Abbr.

State of Residence	Number of Female Inmates
AK	1
AL	5
AR	6
AZ	17
CA	45
CO	5
CT	13
DC	47
DE	2
FL	44
GA	11
HI	3
IA	11
ID	1
IL	29
IN	8
KS	7
KY	3
LA	5
MA	14
MD	37
ME	13
MI	13
MN	8
MO	7
MS	4
NC	30
ND	4
NE	4
NH	8
NJ	20
NM	3
NV	1
NY	92
Northern Marianna Islands	1
OH	24
OK	5
OR	4
PA	51
Puerto Rico	17
RI	2
SC	7
SD	4
TN	16
TX	73
VA	53
VT	7
Virgin Islands	1
WI	6
WV	21
WY	2

Below please find the countries of origin for the 305 female inmates at the low security facility at FCI Danbury who are not United States citizens and who do not have an identified address in the U.S.:

MEXICO	181
COLOMBIA	24
DOMINICAN REPUBLIC	17
CANADA	10
EL SALVADOR	8
JAMAICA	7
GUATEMALA	6
CHINA, PEOPLES REPUBLIC OF	5
HONDURAS	4
TRINIDAD AND TOBAGO	4
AUSTRALIA	3
KOREA, REPUBLIC OF	3
NIGERIA	3
CUBA	2
ECUADOR	2
GUYANA	2
HAITI	2
HUNGARY	2
KENYA	2
LAOS	2
PERU	2
PHILIPPINES	2
BELIZE	1
BRAZIL	1
DENMARK	1
GREECE	1
ISRAEL	1
ITALY	1
MALI	1
RUSSIA	1
RWANDA	1
TOGO	1
UNITED KINGDOM	1
VIETNAM	1

**3. What percentage of the female inmates at Danbury have children under the age of 18?**

Of the 1,120 female inmates at the low security facility at FCI Danbury on July 27, 2013, there are 665 (59%) with a child under the age of 21. BOP does not maintain more specific information regarding the ages of inmate's children.

**4. Why was the Danbury facility selected to be converted into a facility for men, given that Aliceville was explained as needed to respond to overcrowding of women's prisons?**

Please see our answer to question #1, above.

**5. How much will it cost to "convert" Danbury to a men's facility? What different kinds of programs, activities, and facilities will be provided? What will happen to the current equipment or other items used by women?**

The BOP does not have to remodel, construct, or make significant changes to FCI Danbury to accommodate male inmates. There will be costs of approximately \$260,000, to cover inmate clothing suitable for male inmates and other general inmate care items. Female-specific clothing and serviceable supplies from FCI Danbury will be distributed to our female facilities, including FCI Aliceville, thereby reducing expenditures for the facilities receiving the female inmates.

FCI Danbury will offer all of the education and reentry programs that are typically provided in male low-security institutions across the country, including Residential Drug Abuse Treatment.

**6. Since some Bureau policies suggest that family visits are one factor included when inmates are considered for transfer to less secure facilities, what role will visitation history play in the transfer of inmates from Danbury to Aliceville?**

Pursuant to BOP policy, family visits are a factor in reviewing inmates' custody scores, which impact their overall security level and the range of institutions where they can be housed. This information is included when inmates are considered for a transfer to a less secure facility, and will be taken into consideration when reviewing Danbury inmates for possible transfer to the minimum security camp.

**7. Given the 1997 Program Statement on meeting the needs of women prisoners, and the June 19, 2013 memo committing resources and support to parenting and to "helping you prepare to reenter society", what steps is the Bureau taking to ensure women inmates transferred from Danbury to Aliceville continue to have contact with their families and are prepared for reentry, including the following:**

- Cost of communication (e.g., phone calls, packages)?
- Cost of transportation to Aliceville?

- **Access to lawyers from their home districts to support keeping custody of children, dealing with immigration issues, or questions on convictions and sentencing?**
- **Access to education and reentry programs?**
- **Access to work opportunities?**
- **Access to residential drug and alcohol treatment programs similar to the ones currently offered at Danbury?**

As described above, the BOP presently is reviewing 673 female inmates at the low-security facility at FCI Danbury, on a case-by-case basis, to determine the best possible transfer location, mindful of the importance of fostering a successful reentry while also attending to security, medical and programmatic needs. Female inmates from FCI Danbury or other BOP facilities who are transferred to FCI Aliceville will be provided a broad variety of programs in the areas of education, drug and alcohol treatment, job training and work skills development. Some examples are listed below:

- **Adult Continuing Education:** GED, English as a Second Language, accounting, business ownership, publishing, and business courses.
- **Vocational Trade:** commercial driver's license (CDL) and HVAC/refrigeration.
- **Apprenticeship:** cosmetology, horticulture, barber styling, and culinary arts.
- **Psychology, Drug, and Alcohol Treatment:** Alcoholics Anonymous, drug education, non-residential drug abuse treatment program, and Resolve program (for abuse and traumatic experiences).
- **Employment Skills and Work Opportunities:** auto garage, general maintenance, HVAC, painting, welding, carpentry, electrical training, plumbing, landscaping, and food services.
- **Federal Prison Industries**

In addition, the FCI Danbury mission change will not impact participation in the Residential Drug Abuse Treatment Program (RDAP). Inmates currently participating in the FCI Danbury RDAP will be transferred to other RDAPs to ensure program continuity so that participants receive the maximum benefits of the program. We will attempt to place all of the RDAP inmates at facilities as close to their residences as possible.

**8. What will be the total cost of transferring female inmates to Aliceville from Danbury and moving male inmates into Danbury?**

As described above, the activation of FCI Aliceville and the conversion of FCI Danbury will involve transferring inmates to many different institutions in order to house inmates as close to home as reasonably possible. The exact movement plans have not yet been formulated for each individual inmate. Based on the average cost of an inmate transfer, we currently estimate the transfers will cost approximately \$847,000.

**9. What information did you provide to Congress and when regarding this transfer project?**

On July 2, 2013, the Bureau made telephonic contact with the following offices to inform them of the Danbury mission change:

- Personal offices of the Connecticut delegation: Senators Blumenthal and Murphy, and Representative Esty.
- Personal office of Delegate Holmes-Norton.
- Senate Judiciary Crime Subcommittee majority and minority offices.
- House Judiciary Crime Subcommittee majority and minority offices.
- Senate Appropriations Commerce, Justice, Science Subcommittee majority and minority offices.
- House Appropriations Commerce, Justice, Science Subcommittee majority and minority offices.

Staff members in the offices of Senator Murphy and Delegate Holmes-Norton were available to take our call and we responded to specific questions regarding the mission change. The remaining staff members were not available to take our call, and detailed voicemails and contact information were left as follows:

"I wanted to alert you that the Bureau of Prisons female facility in Danbury, CT will be undergoing a mission change. Due to additional female capacity added at our FCI Aliceville, AL site, beginning in August 2013, the Bureau will begin moving female inmates out of the Danbury facility. Movement to other facilities will be determined on a case by case basis. The movement should be complete by the end of the year, after which we will convert FCI Danbury to a low security male facility. Please let me know if you have any

questions regarding the mission change and I will be happy to assist you."

The House and Senate Judiciary Crime Subcommittee staff received the information above as both a voicemail and an email.

*In addition to the questions above included in your August 2, 2013 letter, the questions below were submitted in a follow-up email received on August 6, 2013:*

**10. For the 41% of the Danbury population that is comprised of "non-citizens", what is their U.S. home residence, or if that information is unavailable, in what jurisdictions were they sentenced? Many of them may well have family that live in the United States despite the fact that they are not U.S. citizens.**

As stated above, there are 447 female inmates at FCI Danbury as of July 27, 2013 who are not United States citizens. Of these 447 inmates, 142 have an identified address in the United States. Information pertaining to these 142 inmates is provided below:

State of Residence	Number of Inmates
NY	32
TX	27
FL	16
CA	15
VA	7
NJ	6
PA	6
AZ	5
IL	5
GA	3
KS	3
MA	3
MD	3
NC	3
AR	1
CO	1
DC	1
NM	1
OH	1
OR	1
Puerto Rico	1
SC	1

For the 305 female inmates who are not United States citizens and who do not have an identified address in the United States, the court of jurisdiction is listed below.

Court of Jurisdiction	Number of Inmates
TX S	47
CA S	29
TX W	20
NY S	18
AZ	17
FL S	17
CA C	9
FL M	8
TX N	8
GA N	7
NJ	7
VA E	7
NM	6
NY E	6
PA E	6
MA	5
MO W	5
IN S	4
MD	4
MI E	4
NY W	4
OH S	4
TX E	4
CT	3
IL N	3
NC W	3
NE	3
Puerto Rico	3
DC	2
ME	2
NC E	2
NV	2
NY N	2
OH N	2
TN E	2
TN M	2
VA W	2
AL M	1
AL N	1
AR E	1

Court of Jurisdiction	Number of Inmates
CA E	1
CA N	1
DC Superior	1
FL N	1
HI	1
IA N	1
IA S	1
ID	1
IL C	1
IN N	1
KY E	1
KY W	1
MN	1
MT	1
NC M	1
NH	1
PA M	1
SC	1
UT	1
Virgin Islands	1
WA W	1
WV N	1
WY	1

11. How many inmates will be transferred out of the Hazelton, West Virginia facility (and where are they from and where are they going) to make room for the Danbury inmates from the Mid-Atlantic region? What are the other facilities that are available in the Mid-Atlantic region?

We estimate that approximately 200 inmates at Hazelton can be moved to another facility without being transferred further from home, thereby freeing up beds for inmates from the northeast. At this point, we do not have the details of each specific case but can provide that at a later date.

\* \* \* \* \*

We anticipate lifting the suspension and resuming the transfers of female inmates from FCI Danbury on October 7, 2013. In the past, FCI Danbury staff have held informational sessions with inmates on these matters, and staff will do so again in the future when the suspension on transfers is lifted.

Thank you for your support of the Bureau. I trust this response has addressed your concerns and I look forward to continued collaboration on these important criminal justice issues. Please do not hesitate to contact me if I can be of assistance on this or any other matter.

Sincerely,

  
Charles L. Samuels, Jr.  
Director

Mr. CONYERS. Thank you, Chairman Sensenbrenner.

Now, let's turn to what I consider a not so pleasant subject of contracting with private prisons in the Federal system. I am not a supporter of that policy. And I understand that maybe as much as 11 percent of our inmates are in such facilities now. Is this necessary and cannot be avoided? Or is there some way that we can minimize and lower this number? You know, we have solitary confinement and segregated housing, and all of these things. When you combine that with private prisons, I do not think it helps things at all. What do you say to that?

Mr. SAMUELS. Congressman Conyers, with our population being at 219,000, we actually have 179,000 inmates in Bureau facilities. Approximately 42,000 of those inmates are in some form of private prisons, which that number is about 30,000, and the remaining number, or 12,000, in our residential release centers. When you look at the crowding for the Bureau of Prisons in our agency-wide crowding of about 36 percent, we would be placed in an extreme difficult situation to absorb those 30,000 inmates into the existing beds. Our rate of capacity for the 179,000 inmates I mentioned—we only have 126,000 beds. So we do not have the capacity to absorb the inmates who are in the private facilities.

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. CONYERS. Just let me get a yes or no from him on this. Do you support limiting the amount of private prisons to the maximum extent possible?

Mr. SENSENBRENNER. Yes or no.

Mr. SAMUELS. Yes.

Mr. SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you, Mr. Chairman.

Mr. Samuels, I think a lot of the problems that the Bureau of Prisons is experiencing is a failure of the Congress to respond to reforming our sentencing laws.

I do not know whether most Members of Congress realize that we have—China I think has four times as many people as the United States. Yet, there are fewer people in prison in China than in the United States, and we consider China as somewhat of a repressive regime.

We all, I think, know, if you have even paid scant attention, that our number of Black prisoners—almost 50 percent of our prison population is Black. And if you go back to 1980, first of all, that was not the case. Since that time, our violent crime rate in the country has decreased to a third of what it was in 1980, but the number of Black prisoners numerically and as a percentage of our total prison population has virtually exploded. And you can take about probably half of that because of the discrepancies between crack and cocaine.

I saw this article in the Economist that came about 1 month ago. It said that one of the most repressive regimes in the world and racist regimes was South Africa during apartheid. Yet, our incarceration of Blacks between the ages of 20 and 34 is almost four times that of South Africa during apartheid. So we talk about the conditions under apartheid in South Africa and how unfair it was for the Black population. Yet, our incarceration rate is actually 3.6 times as much for Blacks between the ages of 20 and 34. Now, that

is not something that you have caused. It is not something that I have caused, but it is something that I think we have a responsibility to respond to.

There are two pieces of legislation in the Senate right now. Both of them are bipartisan. One is the Justice Safety Valve Act by Senators Leahy and Paul, one of the liberal Members and one of the conservative Members. Another one is the Smarter Sentencing Act of 2013 by Mr. Leahy, Durbin, and Mike Lee of Utah. Mike Lee is one of the most conservative Members of the Senate.

Mr. SCOTT. Will the gentleman yield?

Mr. BACHUS. Yes, I will.

Mr. SCOTT. There is an identical bill in this Subcommittee.

Mr. BACHUS. You know, and I did not know that.

Mr. SCOTT. And we will be calling on you to cosponsor the bill.

Mr. BACHUS. In fact, I plan to do that because I have looked at this just this week and talked to two different Senators. We had a long conversation.

It just amazes me. Let me give another statistic that is hard to believe. Our prison population in 1940 was 24,000. In 1950, it was approximately 24,000. In 1960, it was approximately 25,000. In 1970, it was back around 24,000. Where am I? 1970? In 1980, it was about where it was in 1940. From 1980 to 2013, it has gone to over 200,000. And as I said, our violent crime rate is a third of what it was in 1940. In the history of our country, we are sentencing people to longer sentences than we ever have. 2008 is when we hit that mark.

So we talk about hanging people in the wild west and intolerance of crime in the late 1700's and the early 1800's. But when we send somebody to prison in the last 10 years, we send them for longer than we ever have in the country. So it is a national disgrace.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Bass.

Ms. BASS. Well, I first want to thank the gentleman for your comments. I really appreciate that and look forward to working with you on those issues.

I wanted to ask you a few questions, Mr. Samuels. One is do you know the percentage of inmates who have a history of child welfare, have been in the child welfare system?

Mr. SAMUELS. I do not have that information.

Ms. BASS. I would like to follow up with you about that. Okay?

And then also I wanted to talk to you about—I mean, all of us are concerned about the numbers of prisoners that we have in the Federal system and how do we go about reducing those numbers. And given that the drug laws are changing around the country, particularly marijuana, I know you said that 50 percent, I believe, of inmates are there for drug-related offenses, but you did not distinguish between possession and trafficking. So I would like if you can follow up on that. Because if you come from California, for example, and you have a marijuana possession or Colorado, States where they have now either legalized it completely for recreation use or decriminalized it down to medical marijuana, which in California it is really legal, should we not look at that in terms of people who are languishing in prison for possession but the laws have been changed?

Mr. SAMUELS. I will respond by stating what the Attorney General's initiative with the Smart on Crime initiative is and particularly with the low level drug offenses not tied to gangs or large scale drug organizations and/or to cartels, that for those types of offenses, depending on how the charging procedures are going to be assessed, that potentially, I mean, it could have some impact on the Bureau's population because when you look at the number with 50 percent of our population being individuals who are involved in some drug offense, I mean, it is pretty significant. As Congressman Bachus stated, our population overall, when you go to the 1940's, we were at 24,000, and in 1980, our population was 26,400. Our staffing at that time was 10,000. We had 10,000 staff. So you go from 1980 to 2013, that is an 832 percent increase.

Ms. BASS. Right, and we know that is because of drug laws that are now being reconsidered. So if we are reconsidering the drug laws, we should be reconsidering the people that are people that are incarcerated.

So in that regard, also in terms of the powder to crack and the change in law that happened before I got here but I was so excited that Members on this Committee got that done, what about those inmates? Because isn't there supposed to be an evaluation of people who are incarcerated when that changed? So do you know the numbers in terms of people that have been released because the law was changed? Because I thought it could be reconsidered. Couldn't it, Mr. Scott?

Mr. SCOTT. There is a Sixth Circuit case where there was a three-judge panel that ruled that it could be applied retroactively. That has been appealed en banc. And the first thing that happens when you go en banc is to vacate the three-judge panel decision. So there is really nothing pending in that decision right now.

Ms. BASS. I see.

And then I believe that you said that there are no juveniles that are in solitary confinement. I really wanted to ask you about that because I know in my State and I know in other States we reduced the age in which a juvenile could be tried as an adult. And I am sure they did that in other States too. But then the problem we got into in California was that there was no place to put them and then they were put in solitary. So I really wanted to ask you again. Are you sure there are no juveniles that are in—maybe they were not—

Mr. SAMUELS. To my knowledge, we do not have any juveniles who are in restrictive housing. The number is very, very small for the number of juveniles that we have within the Bureau. So I would double check. I will take this back and I will come back to confirm whether or not that is an absolute. But to my knowledge, we do not.

Ms. BASS. Okay.

And then also I believe in February of this year, the Bureau of Prisons was going to undertake a third party audit for the use of solitary confinement in general. And I wanted to know if you could give me a status of that audit.

Mr. SAMUELS. Yes. The National Institute of Corrections—they have awarded a cooperative agreement to correctional professionals to come in to look at the Bureau of Prisons, our policies and our

procedures. Within the last year, since I testified regarding this issue before Chairman Durbin, at that time, the Bureau of Prisons had 13,700 inmates in some form of restrictive housing. I have now been able to reduce that number from 13,700 to approximately 9,800. So we have had a 25 percent reduction.

Ms. BASS. Excellent. And when will the audit be done?

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Director Samuels, thank you for being here.

You know, sometimes it is important for those of us on this Committee just to get a sense of the general population ratios. Your testimony says 11 percent of inmates in the Bureau of Prisons' custody are there for immigration offenses, and that is over 24,000 of your 219,000 inmates. And you also testified that 26 percent of your inmates, nearly 57,000 inmates, are non-U.S. citizens.

What do you mean by "immigration offenses"? And could we get some kind of a breakdown of what those immigration offenders are actually in the prison for?

Mr. SAMUELS. Congressman, earlier that question was presented. I would need to come back for the record to provide the specifics to give the breakdown. This is just a general number that captures the entire population.

Mr. FRANKS. Okay. Well, I know that a lot is said about drug-related offenses. And of course, you have got pure drug offenses. But I understand that the drug-related offenses is quite high, that most prisoners are in prison on a drug-related offense as opposed to someone just there on a drug possession offense. What percentage are there on a drug-related offense?

Mr. SAMUELS. Again, for the record, I would need to come back with the specific details.

Mr. FRANKS. All right.

What do you think as Director of Prisons would be the number one thing this Committee could do to reduce the prison population without endangering the public?

Mr. SAMUELS. Could you repeat, sir?

Mr. FRANKS. Yes, sir. What do you think would be the most important reform that we could make as a Committee to try to help you reduce the prison population without endangering the public? What is the number one incongruity here? Where are we going wrong?

Mr. SAMUELS. I think for the Bureau, which our biggest concern is—we obviously are operating under the guidance of the Department and for the laws that we have to enforce with our mission. We do not control the number of individuals who are prosecuted, nor do we control the sentence length. The biggest driver of cost in the Bureau of Prisons and the challenges that we face are the significant numbers. The inmate-to-staff ratio right now is 4.8 to 1. When you look at the largest State systems, the inmate-to-staff ratio is 3 to 1. And when you break that out and you look at the specifics of the correctional officers, that number is 10 to 1. And when you look at the States specifically, you are looking at about 5 to 1.

If everyone could imagine in our system, because staff are considered correctional workers, all staff, it equates to having a teacher who is responsible for providing the education and also the teacher is responsible for providing the security in the classroom. In many other State systems, they have a correctional officer and a teacher in the classroom.

So we have to work with then trying to augment to have a balance and maintaining safety and security in our institutions. So if we are able to somehow find a way with the Smart on Crime initiatives and a lot of the other bills that are being introduced to reduce the population without jeopardizing the safety and security—

Mr. FRANKS. Well, that is my question. I am wondering what would you suggest would be a good strategy to accomplish that.

Mr. SAMUELS. I think a good strategy for us right now would be individuals embracing the Smart on Crime initiatives where when you are looking at the low level, you know, drug offenses where individuals are not attached to a significant large-scale drug operation and/or cartels, that if those numbers start to be reduced, it would eventually have some impact on the Bureau of Prisons. Now, we would not see any immediate impact. This would be based on, I think, the eventual outcome of reducing the population in the years to come.

Mr. FRANKS. As far as violent crimes, aren't a lot of the violent crimes that your prisoners are incarcerated for—aren't they also drug-related? A significant percentage?

Mr. SAMUELS. In most cases.

Mr. FRANKS. Yes, in most cases. So, I mean, I guess that is the concern, you know, as to how to protect the public.

And so last question. If you were here to ask this Committee any one thing that you thought would be good for this country, given your position, given your particular responsibility, what would that be?

Mr. SAMUELS. The one thing that I would ask this Committee is to consider the men and women who are very dedicated who go in and risk their lives every single day for the American public. They are working under very challenging circumstances, not to say that the Bureau of Prisons is any more important than any other Government agency, but with the continued growth, which is unsustainable, it puts staff at risk. It puts the public at risk, as well as the inmate population. There has to be an effort to find a solution to reduce the population.

Mr. FRANKS. I thank you, sir, and thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

I want to thank you, Mr. Samuels, for testifying today. We will include your responses that you promised into the record.

And before adjourning the hearing, I recognize the gentleman from Virginia, Mr. Scott, for a number of unanimous consent requests on documents.

Mr. SCOTT. Thank you, Mr. Chairman. I ask unanimous consent that the following documents be entered into the record: one from the ACLU; the other, the GAO report on ways to end the waste of millions on unnecessary over-incarceration; a letter from several organizations, the Drug Policy Alliance, Families Against Mandatory Minimums, the Leadership Conference on Civil and Human Rights,

the National African American Drug Policy Coalition, Open Society Policy Center, Sentencing Project of the United Methodist Church Board of Church and Society, and a separate letter from the Leadership Conference on Civil and Human Rights.

Mr. SENSENBRENNER. Without objection, all of the records referred to by the gentleman from Virginia will be included in the record.

[The information referred to follows:]



**Written Statement of the American Civil Liberties Union  
Before the United States House of Representatives  
Committee on the Judiciary's  
Subcommittee on Crime, Terrorism, Homeland Security and  
Investigations**

*Hearing on*

**Oversight of the Federal Bureau of Prisons**

*Thursday, September 19, 2013  
10:00 a.m.*

Submitted by the

ACLU Washington Legislative Office  
ACLU National Prison Project

For further information contact Jesselyn McCurdy, Senior Legislative Counsel at  
[jmccurdy@dcaclu.org](mailto:jmccurdy@dcaclu.org)

The American Civil Liberties Union (ACLU) welcomes this opportunity to submit testimony to the House Committee on the Judiciary’s Subcommittee on Crime, Terrorism, Homeland Security and Investigations for its hearing on *Oversight of the Federal Bureau of Prisons*, and urges the Subcommittee to take action to bring the Bureau of Prisons into conformity with accepted legal, public-safety, and human-rights standards.

The ACLU is a nationwide, nonprofit, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. Consistent with that mission, the ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal levels through public education, advocacy, and successful litigation.

The Federal Bureau of Prisons (BOP) is the largest prison system in the country, comprising 119 prisons and jails and managing the detention of about 219,000 people.<sup>1</sup> While most federal prisoners are housed in BOP-operated jails and prisons, BOP also contracts with private prisons, as well as state and local prisons and jails, to house some of its prisoners and detainees.<sup>2</sup> Many of BOP’s facilities are out of compliance with legal standards, as well as with widely acknowledged human-rights and public-safety guidelines for the treatment of prisoners and detainees. In particular, BOP should improve its policies on the use of solitary confinement; on contracts with private, for-profit prisons; on compliance with the Prison Rape Elimination Act (PREA) and with requirements for treating transgender and transitioning individuals; on the abusive practice of using Special Administrative Measures and Communication Management Units; and on the proposed relocation of approximately 1,000 women from a Connecticut federal prison to a new facility in Aliceville, Alabama.

**I. BOP’s use of Solitary Confinement is Excessive and Should Be Monitored**  
**a. The BOP’s Use of Solitary Confinement**

Solitary confinement is an extreme form of punishment that should be reserved only as a measure of last resort. Prisoners housed in solitary confinement are typically held in a small cell—no bigger than a parking space—for 22 to 24 hours a day, with little to no human interaction aside from prison guards and the occasional healthcare provider or attorney. Many in the legal and medical fields criticize solitary confinement as both unconstitutional and inhumane. It is widely accepted that the practice exacerbates mental illness and undermines a prisoner’s ability to successfully re-enter into society when his or her sentence is complete.<sup>3</sup> An estimated 80,000 people are currently held in solitary confinement in prisons across the country. Many are nonviolent offenders, caught up in punitive disciplinary systems that sometimes send prisoners into solitary confinement for infractions such as “possession of contraband” or talking back.<sup>4</sup> The United Nations Special Rapporteur on Torture has concluded that any period in solitary

confinement over 15 days amounts to torture.<sup>5</sup> Yet many American prisoners can end up spending months or years in solitary confinement.

Over the last two decades, corrections systems across the country have increasingly relied on solitary confinement, even building entire “supermax”—super-maximum-security—facilities, where prisoners are held in conditions of extreme isolation, sometimes for years on end. In addition to posing humanitarian concerns, this massive increase in the use of solitary confinement has led many to question whether it is an effective use of public resources. Supermax prisons, for example, typically cost two or three times more to build and operate than traditional maximum-security prisons.<sup>6</sup>

BOP currently holds about seven percent of its population—more than 12,000 prisoners—in solitary confinement.<sup>7</sup> About 435 of these people are incarcerated at ADX Florence, the federal supermax prison, in Colorado.<sup>8</sup> Thousands more are held in “Special Housing Units” (SHU) or “Special Management Units” (SMU) within other prisons.<sup>9</sup> Prisoners can be sent to these solitary confinement units for administrative reasons, as punishment for disciplinary rule violations, or as a result of gang affiliations or activity.<sup>10</sup> That is to say, many prisoners held in solitary confinement are not particularly dangerous or even difficult to manage. Despite the human and financial costs of solitary confinement, the number of federal prisoners in solitary confinement and other forms of segregated housing has grown nearly three times as fast as the federal prison population as a whole.<sup>11</sup>

**b. The Need for Monitoring of BOP’s Use of Solitary Confinement, and Its Effects**

Following a Senate hearing in the summer 2012 on the overuse of solitary confinement in American prisons, BOP announced that it would arrange for a third-party audit of its use of solitary confinement.<sup>12</sup> In particular, BOP planned to review the fiscal and public-safety consequences of solitary confinement.<sup>13</sup> A BOP spokesman told reporters in February that the audit would begin “in the weeks ahead.”<sup>14</sup> However, since then there has been no news on the progress of the planned audit.

In May, the U.S. Government Accountability Office (GAO) added to public calls for more information on BOP’s use of solitary confinement when it published a detailed report based on extensive investigations of BOP’s use of solitary confinement.<sup>15</sup> The report found that BOP does not adequately monitor its use of solitary confinement and other segregated housing. It also found that BOP should be evaluating the effects that solitary confinement has on people in BOP custody. GAO further reported that BOP has not conducted any research to determine how the practice impacts prisoners or whether it contributes to maintaining prison safety.<sup>16</sup> The report noted that BOP officials refused to acknowledge that long-term segregation can seriously harm

prisoners—even though BOP’s own policy recognizes the potential for damaging lasting effects.<sup>17</sup>

Solitary confinement does not make prisons safer. Indeed, the corrections departments in several states have limited their use of solitary confinement with little or no adverse impact on prison management and safety.<sup>18</sup> Indeed, emerging research suggests that supermax prisons actually have a negative effect on public safety, because prisoners released from solitary confinement may be more likely to recidivate than those released from general population.<sup>19</sup>

**c. BOP Can and Should Limit Its Use of Solitary Confinement**

Another federal agency with many detention facilities, the U.S. Immigrations and Customs Enforcement (ICE), recently released a new directive regulating the use of solitary confinement in immigration detention.<sup>20</sup> While not perfect, the new ICE directives represent a major step in curbing the inhumane and unnecessary use of solitary confinement. BOP should look to the ICE directives as an example of a policy designed to monitor and control the use of solitary confinement significantly more effectively than current BOP policies.

If strictly enforced, ICE’s new directive will create a robust monitoring regime that will enable the agency to oversee the use of solitary confinement across its sprawling network of approximately 250 immigration detention facilities.<sup>21</sup> The new directive also takes important steps to impose substantive limits on the use of solitary. For example, it requires centralized review of all decisions to place detainees in solitary confinement for more than 14 days at a time, including an evaluation of whether any less-restrictive option could be used instead of solitary.<sup>22</sup> The directive requires heightened justifications to place vulnerable detainees—such as victims of sexual assault, people with medical or mental illnesses, and people at risk of suicide—in solitary confinement.<sup>23</sup> In addition, ICE now requires medically and mentally ill detainees to be removed from solitary if they are deteriorating.<sup>24</sup> It requires attorney notification in certain circumstances<sup>25</sup> and it requires regular reviews of all longer detentions in solitary.<sup>26</sup>

In addition to examining ICE’s new directive, BOP should look to states that have reformed their use of solitary confinement, as examples of how close monitoring and reduction of the use of solitary confinement can improve prison management and safety, and can bring BOP more in line with accepted human-rights standards. We urge the Committee to inquire as to BOP’s plans in this area and to push the agency to move forward with reforms that have worked elsewhere.

**II. BOP’s Contracts with Private Prisons Under the Criminal Alien Requirement Pose Human-Rights and Accountability Problems**

Private prisons depend on and profit from America's high incarceration rates—more people in prison means, for these facilities, more business. In the past decade, BOP has become increasingly reliant on private prisons, and maintains 13 contracts, totaling a reported \$5.1 billion, with for-profit prison companies.<sup>27</sup> This increase in privatization demands that the companies who run private prisons subject themselves to the same degree of public accountability as would a federal agency running the same prison. However, contract companies that run these facilities dedicate significant resources to lobbying against subjecting their BOP contract facilities to the same transparency requirements as BOP facilities.<sup>28</sup>

According to the Sentencing Project, 33,830 BOP prisoners were held in private facilities in 2010 (a 67% increase from the number of prisoners in 2002); by the end of 2011, while overall numbers of state prisoners in private prisons decreased, the federal number continued to climb, to 38,546 (18% of the total BOP population).<sup>29</sup> And the number of people in private facilities continues to grow; for fiscal year 2014, BOP requested funding to add 1,000 more beds in private facilities.<sup>30</sup> Of the private facilities holding BOP prisoners, 13 are private prisons operating under Criminal Alien Requirement (CAR) contracts with BOP. These CAR prisons are specifically dedicated to housing non-citizens in BOP custody. These people are at low custody levels, and many are serving sentences solely for unlawfully reentering the United States after having been previously deported.<sup>31</sup>

For-profit prisons—even those under BOP contract, housing BOP prisoners—are not subject to the same disclosure requirements under the Freedom of Information Act (FOIA) as are BOP prisons. This is due to an Executive branch interpretation of the statute, which established that most disclosure requirements that apply to federally-run prisons do not apply to private prisons.<sup>32</sup> As a result, it is extremely difficult for the public to obtain the information necessary to help ensure that the constitutional rights of those held in private facilities are respected, and that their living conditions are humane.

Over the past several years, there have been reports of poor treatment—with devastating consequences—in BOP's CAR facilities. In one such instance, in 2009, at the GEO Group-operated Reeves County Detention Center in Pecos, West Texas, immigrant prisoners organized an uprising after a man with epilepsy died from a seizure while in solitary confinement. An ACLU lawsuit alleges that medical staff failed to provide the man anti-convulsant medication 90 times. His gums began to bleed and he suffered frequent seizures, but he was placed in segregation rather than treated. The lawsuit alleges that there was not even a nurse available on weekends.<sup>33</sup> And in 2012, immigrant prisoners at the Corrections Corporation of America (CCA)-operated Adams County Correctional Facility in Natchez, Mississippi, staged an uprising to demand better conditions of confinement. CCA staff then failed to quell the uprising, which resulted in 20 people being injured, one correctional officer being killed, and \$1.3 million in property damage.<sup>34</sup> Stories like these underscore the need for greater oversight and accountability of the conditions and policies at private, for-profit prisons within BOP's system—

and the need for BOP to cancel contracts when the private prison companies fail to meet appropriate standards.

**III. BOP Should Share Results of Audits of the Implementation of the Prison Rape Elimination Act**

The Prison Rape Elimination Act (PREA) passed unanimously through both houses of Congress and was signed into law in 2003. The Act charged the Department of Justice (DOJ) with gathering data on the incidence of prison rape,<sup>35</sup> and created a commission to study the problem and recommend national standards to DOJ.<sup>36</sup> After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of national standards implementing the Act in May 2012.<sup>37</sup> The Federal government was immediately bound to implement the PREA regulations in federal prison facilities.<sup>38</sup>

The PREA regulations include detailed requirements for the prevention, detection, and investigation of sexual abuse in both adult and juvenile correctional facilities, with specific guidance related to Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) individuals. Testimony before Congress and National Prison Rape Elimination Commission (NPREC) highlighted the particular vulnerability of LGBTI people to sexual victimization at the hands of facility staff and other inmates and the Department of Justice recognized “the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations.”<sup>39</sup> This testimony led to the landmark inclusion of LGBTI-specific requirements for the prevention of sexual abuse.

Some of the most important regulations for protecting this vulnerable population include guidelines for housing, searches, and the use of protective custody. BOP’s implementation of PREA will set the tone for state and local agencies. It is essential that BOP take full and complete measures to comply with PREA’s mandate to eliminate sexual assault across the agency. We hope the Committee will ask BOP for details about its compliance plans and performance.

**a. Individualized assessments for housing transgender individuals**

The final PREA standards require adult prisons and jails to screen individuals within 72 hours of intake to assess the individual’s risk for sexual victimization or abuse.<sup>40</sup> This screening “shall consider, at a minimum... whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex or gender nonconforming.”<sup>41</sup>

The standards also require agencies to make individualized housing and program placements for all transgender and intersex individuals.<sup>42</sup> This includes assignment of transgender and intersex individuals to male or female facilities.<sup>43</sup> All such program and housing assignments must “be

reassessed at least twice each year to review any threats to safety experienced by the inmate”<sup>44</sup> and an individual’s “own views with respect to his or her own safety shall be given serious consideration” in these assessments.<sup>45</sup> Agencies are required to provide transgender and intersex individuals with access to private showers in all circumstances.<sup>46</sup>

One year later, reports from transgender and intersex prisoners in BOP custody continue to reveal that the agency does not provide individualized assessments in making housing, program, work and other assignments. Transgender detainees regularly report that they are housed solely based on their genital characteristics and birth-assigned sex, and many transgender prisoners report violence from staff and other prisoners with no safety precautions being taken by BOP despite clear guidance under PREA.<sup>47</sup>

**b. Searches of transgender individuals**

The PREA regulations impose a number of requirements on how prison officials search transgender individuals. The regulations prohibit any search that is conducted for the sole purpose of determining an individual’s genital status.<sup>48</sup> All cross-gender searches are subject to strict guidelines under PREA, but restrictions on cross-gender pat searches of female individuals do not go into effect until August 2015.<sup>49</sup> Under the regular effective dates for PREA compliance, BOP is currently prohibited from conducting cross-gender strip and cavity searches except in exigent circumstances or when performed by a medical practitioner.<sup>50</sup>

PREA further mandates that facilities implement policies to ensure that individuals are able to shower and undress without being viewed by staff of the opposite gender and that staff of the opposite gender announce themselves prior to entering any housing area.<sup>51</sup> These limitations apply to transgender individuals in custody. BOP should take clear steps to protect transgender individuals from abusive cross-gender searches.

**c. Strict Limits on the Use of Protective Custody**

PREA also strictly regulates the use of protective custody. Prisoners cannot be placed in “involuntary segregated housing” unless (1) an assessment of all available alternatives is made AND (2) a determination has been made that no available alternative means of separation is available (and this determination must be made within the first 24 hours of involuntary segregation).<sup>52</sup> The PREA standards recognize that protective custody is too often synonymous with solitary confinement by requiring that involuntary segregated housing should generally not exceed 30 days.<sup>53</sup> PREA also set standards geared to ameliorate isolation by requiring that, when prisoners are placed in protective custody, they must be given access to “programs, privileges, education, and work opportunities to the extent possible.”<sup>54</sup> For all placements in protective custody, the nature of, reason for and duration of any restrictions to program, privilege, education and work opportunities must be documented.<sup>55</sup>

If the PREA regulations are subject to stringent and consistent enforcement, compliance, and monitoring, they are likely to protect many vulnerable prisoners from abuse and assault. In August, 2013, BOP commenced a series of PREA-mandated third-party audits, but has yet to release data or results.<sup>56</sup> These audits, along with publication of their results and implementation of follow-up compliance measures, should be a top priority and we urge the Committee to follow up on these reports.

**IV. BOP Should Ensure Compliance with Requirements To Provide Hormones and Other Medical Care to Transgender Individuals**

In 2011, BOP changed its policy for treating individuals in custody for Gender Identity Disorder (GID). As part of a settlement with one transgender prisoner who challenged BOP's policy that limited transition-related healthcare such as hormones to the level of treatment received prior to incarceration, the new policy promised to provide "a current individualized assessment and evaluation" to any prisoner with a possible GID diagnosis.<sup>57</sup>

Despite this change, reports persist from transgender individuals who have not received evaluations for hormone therapy despite repeated requests. Others have had their ongoing hormone treatment disrupted without any clear medical basis for the disruption in care and with severe physical and psychological side effects. For individuals in BOP custody who experience gender dysphoria and/or other symptoms of GID, there continues to be delayed or in some cases no response from BOP medical staff.<sup>58</sup>

BOP has an obligation under its own policy and the Eighth Amendment of the Constitution to provide necessary medical care, including transition-related medical care such as hormones, to prisoners in need of such care. To meet this obligation BOP should provide information on its compliance with the GID policy, and should take steps, including training of facility-level medical and mental health staff and contractors, to ensure that prisoners who are diagnosed or may be diagnosed with GID receive proper care.

**V. BOP Should Stop Monitoring Contact Between Prisoners and Attorneys, and Should Close Its Communication Management Units**

When BOP chooses to designate certain people as terrorists—including both post-conviction prisoners and pre-trial detainees—the agency removes constitutional safeguards that apply to other detainees. In some circumstances, BOP denies prisoners the basic right to confer confidentially with an attorney or to have normal limited visitation with loved ones. There should be greater transparency and accountability in the federal Bureau of Prisons' use of "Special Administrative Measures" and in its operation of Guantanamo-like "Communication Management Units" within two federal prisons.

**a. Special Administrative Measures**

After the September 11 attacks, the Department of Justice (DOJ) issued a rule that expanded BOP's powers under the special administrative measures (SAMs) promulgated in the 1990s. These SAM regulations allow the Attorney General unlimited and unreviewable discretion to strip any person in federal custody of the right to communicate confidentially with an attorney.<sup>59</sup> They apply to convicted individuals held by BOP, as well as others held by DOJ, even the pre-trial accused, material witnesses, and immigration detainees.<sup>60</sup>

BOP should not have the power to monitor communications between detainees and attorneys; nor should it be able to restrict such communications. Because SAMs also permit extreme social isolation of certain prisoners, BOP should conduct a mental health screening of all those currently subject to SAMs; the seriously mentally ill should be relocated to an institution that can provide appropriate mental-health services.

**b. Communication Management Units**

After 9/11, BOP set up and began operating two Communication Management Units (CMUs) at federal prisons in Marion, Illinois, and Terre Haute, Indiana.<sup>61</sup> BOP opened these CMUs in violation of federal law requiring public notice-and-comment rulemaking.<sup>62</sup> The units severely restrict visitation privileges—for instance, prisoners in the CMU may receive fewer family visits per month than those in general population at even maximum-security prisons.<sup>63</sup> Many critics argue that this psychological punishment is arbitrary, and often the result of racial and religious profiling.<sup>64</sup> The criteria for placing prisoners in these extremely restrictive units remain so broad and ill-defined that they could apply to virtually anyone, inviting arbitrary, inconsistent and discriminatory enforcement.

**VI. BOP Should Share Its Current Plan for FCI Aliceville**

Earlier this year, BOP was enacting a plan to relocate approximately 1,000 women from a federal prison in Danbury, Connecticut—70 miles from New York City—to a new, \$250-million prison in Aliceville, Alabama, a small town 110 miles southwest of Birmingham.<sup>65</sup> The plan would leave only 200 federal prison beds for women in the northeast.<sup>66</sup> BOP planned to convert the vacated units at Danbury into more space for male prisoners. Last month, however, BOP suspended the relocation in the face of criticism from elected officials and the public.

Because of the remote location of the Aliceville facility, contact with family through visits would be severely limited. As Senator Chris Murphy noted, the “transfer would nearly eliminate federal prison beds for women in the Northeastern United States and dramatically disrupt the lives of these female inmates and the young children they often leave behind.”<sup>67</sup> Maintaining

relationships is crucial, and can be even more difficult for women prisoners than for men. One lawyer noted, in response to the proposed relocation that [w]omen get fewer visits in jail, they become alienated from families and children, husbands and boyfriends move on<sup>68</sup>

The general public has a significant interest in prisoners' ability to stay connected with loved ones while serving a sentence. Maintaining important relationships helps former prisoners successfully reenter their communities after they are released. Upon release from prison, people who maintain strong family contact were shown to be more successful at finding and keeping jobs, and less likely to recidivate.<sup>69</sup> Disrupting the ability to visit a parent in prison, as the contemplated move would do in countless cases, can also victimize the children of incarcerated people.

BOP's plans to relocate many women from Danbury to Aliceville were criticized in the media and by a group of 11 senators in a high-profile public letter to BOP Director Charles Samuels.<sup>70</sup> As a result, plans to open Aliceville and relocate many women from Danbury have recently been suspended.<sup>71</sup> However, BOP currently describes Aliceville as a "low security institution for female inmates" that is "currently undergoing the activation process."<sup>72</sup> If the move occurs and the prison opens as originally planned, BOP will be the cause of hundreds of families being torn apart irreparably. We urge the Committee to put BOP on the record on this issue and urge members to oppose the relocation of women prisoners from Danbury to Aliceville.

<sup>1</sup> About the Bureau of Prisons, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/about/index.jsp>.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 39, United States Government Accountability Office, Report to Congressional Requesters (May 2013) [hereinafter GAO Report].

<sup>4</sup> See, e.g., Angela Browne, Alissa Cambier, Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED'L SENTENCING REPORTER 46-47 (2011).

<sup>5</sup> *Solitary Confinement Should Be Banned in Most Cases*, UN Expert Says, UN News Centre, Oct. 18, 2011, <https://www.un.org/apps/news/story.asp?NewsID=40097>.

<sup>6</sup> See DANIEL P. MEARS, URBAN INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS ii (2006).

<sup>7</sup> Highlights of GAO-13-4929, at 1 (May 2013).

<sup>8</sup> See GAO Report, *supra* note 3, at 2.

<sup>9</sup> See GAO Report, *supra* note 3, at 5, 6, 7-10.

<sup>10</sup> See *id.* at 7-8, 60 (describing disciplinary and administrative segregation conditions).

<sup>11</sup> From October 2007 through February 2013, the total prisoner population in BOP facilities increased by about six percent, yet the total prisoner population in segregated housing units increased approximately 17 percent. GAO Report, *supra* note 3, at 14.

<sup>12</sup> *U.S. Bureau of Prisons To Review Solitary Confinement*, REUTERS, Feb. 4, 2013, <http://www.reuters.com/article/2013/02/05/us-usa-prisons-solitary-idUSBRE91404L20130205>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See generally GAO Report, *supra* note 3.

<sup>16</sup> See GAO Report, *supra* note 3, at 33-34.

- <sup>17</sup> See *id.* at 39 (outlining studies that document that adverse and long-lasting effects of solitary confinement on mental health); *id.* at 40 (citing BOP's own admission, in a Psychology Services Manual, that solitary confinement can have adverse effects on mental health).
- <sup>18</sup> See Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES, March 11, 2012, <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all> (noting that violence actually decreased after Mississippi closed its notorious supermax unit).
- <sup>19</sup> See JOHN J. GIBBONS AND NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 55 (2006) (citing a study from Washington state that linked long-term solitary confinement to higher recidivism rates), available at [http://www.vera.org/sites/default/files/resources/downloads/Confronting\\_Confinement.pdf](http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf).
- <sup>20</sup> U.S. Immigration and Customs Enforcement Regulation 11065.1: Review of the Use of Segregation for ICE Detainees (Sept. 4, 2013) [hereinafter ICE Regulation 11065.1].
- <sup>21</sup> See Fact Sheet: Detention Management, Nov. 10, 2011, <http://www.ice.gov/news/library/factsheets/detention-mgmt.htm>.
- <sup>22</sup> ICE Regulation 11065.1, *supra* note 20, at Section 2 (Policy) and Section 5.1 (Extended Segregation Placements).
- <sup>23</sup> ICE Regulation 11065.1, *supra* note 20, at Section 5.2 (Segregation Placements Related to Disability, Medical or Mental Illness, Suicide Risk, Hunger Strike, Status as a Victim of Sexual Assault, or other Special Vulnerability).
- <sup>24</sup> ICE Regulation 11065.1, *supra* note 20, at Section 7.5.4 (Detention Monitoring Council).
- <sup>25</sup> ICE Regulation 11065.1, *supra* note 20, at Section 5.2.4 (requiring notification of a detainee's attorney, if applicable, when a vulnerable detainee is placed in segregation).
- <sup>26</sup> ICE Regulation 11065.1, *supra* note 20, at Section 5.1.
- <sup>27</sup> Garance Burke & Laura Widcs-Munoz, *Immigrants prove big business for Prison Companies*, ASSOCIATED PRESS (Aug. 2, 2012), available at <http://news.yahoo.com/immigrants-prove-big-business-prison-companies-084353195.html>.
- <sup>28</sup> See Letter from Center for Constitutional Rights et al. to Rep. Sheila Jackson Lee 1 (Dec. 18, 2012) (citing the U.S. Senate's Lobbying Disclosure Electronic Filing System for the fact that Corrections Corporation of America has spent millions of dollars lobbying against the passage of various Private Prison Information Acts since 2005).
- <sup>29</sup> THE SENTENCING PROJECT, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION, at 4 (July 2012); Prison Population Declined In 26 States During 2011, PR Newswire (Dec. 17, 2012), available at <http://www.marketwatch.com/story/prison-population-declined-in-26-states-during-2011-2012-12-17>.
- <sup>30</sup> See FY 2014 Performance Budget Congressional Submission, Salaries and Expenses 86, U.S. Dept. of Justice, Federal Prison System, available at <http://www.justice.gov/ind/2014justification/pdf/bop-sc-justification.pdf> ("The BOP requests \$26.2 million to procure 1,000 contract beds to house low security male criminal aliens.").
- <sup>31</sup> Illegal reentry cases are prosecuted subject to 8 U.S.C. § 1326 – Reentry of removed aliens. See *US: Prosecuting Migrants is Hurting Families*, HUMAN RIGHTS WATCH (May 22, 2013), <http://www.hrw.org/news/2013/05/22/us-prosecuting-migrants-hurting-families>.
- <sup>32</sup> See Letter from Center for Constitutional Rights et al., *supra* note 28, at 1.
- <sup>33</sup> Forrest Wilder, "The Lawsuit West of the Pecos," Texas Observer (Dec. 8, 2010), available at <http://www.texasobserver.org/forrestforthepecos/the-lawsuit-west-of-the-pecos>.
- <sup>34</sup> Judith Greene & Alexis Mazon, PRIVATELY OPERATED FEDERAL PRISONS FOR IMMIGRANTS: EXPENSIVE, UNSAFE, UNNECESSARY 7, Justice Strategies (Sept. 13, 2012), available at <http://www.justicestrategies.org/sites/default/files/publications/Private%20Operated%20Federal%20Prisons%20fo%20Immigrants%209-13-12%20FNL.pdf>. See also Associated Press, *FBI reports Mexican group "Paisas" started prison riot in Adams County* (Aug. 13, 2012) ("FBI spokeswoman Deborah Madden said Paisas are a loosely affiliated group within the prison, without ties to organized gangs."), available at <http://blog.gulfive.com/mississippi-press-news/2012/08/fbi-reports-mexican-group-paisas.html>.
- <sup>35</sup> See Prison Rape Elimination Act (Sexual Violence in Correctional Facilities), Bureau of Justice Statistics (last visited May 31, 2013), available at <http://www.bjs.gov/index.cfm?ty=tp&tid=20> (listing Bureau of Justice Statistics data gathered since the act's passage).
- <sup>36</sup> NAT'L. PRISON RAPE ELIMINATION COMM'N, NAT'L. PRISON RAPE ELIMINATION COMM'N REP. 18 (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.
- <sup>37</sup> See Press Release, Department of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html> (summary of regulations).

- <sup>38</sup> 42 U.S.C. 15601 §8(b) (2003). *See also* Memorandum from the President of the United States Implementing the Prison Rape Elimination Act (May 17, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/05/17/prcsidential-memorandum-implementing-prison-rape-elimination-act>.
- <sup>39</sup> <https://www.federalregister.gov/articles/2012/06/20/2012-12427/national-standards-to-prevent-detect-and-respond-to-prison-rape>
- <sup>40</sup> 28 C.F.R. § 115.41(b); 28 C.F.R. § 115.241 (b).
- <sup>41</sup> 28 C.F.R. § 115.41(c)(7).
- <sup>42</sup> 28 C.F.R. § 115.42 (c) (“In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.”).
- <sup>43</sup> *Id.*
- <sup>44</sup> 28 C.F.R. § 115.42 (d).
- <sup>45</sup> 28 C.F.R. § 115.42 (e).
- <sup>46</sup> 28 C.F.R. § 115.42 (e).
- <sup>47</sup> The reports referenced in this paragraph come from prisoners, by mail, to legal and human-rights organization that advocate for PREA compliance, including the ACLU, National Center for Lesbian Rights (NCLR), National Center for Transgender Equality (NCTE), Just Detention International (JDI), Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal, and Sylvia Rivera Law Project (SRLP).
- <sup>48</sup> 28 C.F.R. § 115.15 (c)
- <sup>49</sup> 28 C.F.R. § 115.15 (b) and 28 C.F.R. §115.215(b)
- <sup>50</sup> 28 C.F.R. § 115.15 (a)
- <sup>51</sup> 28 C.F.R. § 115.15 (d)
- <sup>52</sup> 28 C.F.R. § 115.43 (a).
- <sup>53</sup> 28 C.F.R. § 115.43 (c).
- <sup>54</sup> 28 C.F.R. § 115.43 (b).
- <sup>55</sup> 28 C.F.R. § 115.43 (b).
- <sup>56</sup> See Bureau of Justice Assistance, BJA PREA Audits, Aug. 29, 2013 (on file with the ACLU).
- <sup>57</sup> See Memorandum for Chief Officers from Newton E. Kendig and Charles E. Samuels, Jr., U.S. Dept. of Justice, Federal Bureau of Prisons, at 2 (May 31, 2011), available at <http://www.glad.org/current/pr-detail/federal-bureau-of-prisons-makes-major-change-in-transgender-medical-policy/>.
- <sup>58</sup> The reports referenced in this paragraph come from prisoners, by mail, to legal and human-rights organization that advocate for compliance with GID-treatment requirements, including the ACLU, National Center for Lesbian Rights (NCLR), National Center for Transgender Equality (NCTE), Just Detention International (JDI), Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal, and Sylvia Rivera Law Project (SRLP).
- <sup>59</sup> 28 C.F.R. § 501.3(d); *see also* Rights Groups Issue Open Letter on Upcoming NYC Trial of Syed Fahad Hashmi and Severe Special Administrative Measures, Apr. 23, 2010, <https://ccrjustice.org/newsroom/press-releases/rights-groups-issue-open-letter-upcoming-nyc-trial-syed-fahad-hashmi-and-sev>.
- <sup>60</sup> 28 C.F.R. § 501.3.
- <sup>61</sup> See Carrie Johnson and Margot Williams, “Guantanamo North”: Inside Secretive U.S. Prisons, NPR (March 3, 2011), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons>.
- <sup>62</sup> See Letter from David C. Fathi et al. to Sarah Qureshi, Rules Unit, Bureau of Prisons, June 2, 2010, at 1-2 (submitting comments to Notice of Proposed Rulemaking and noting that CMUs had already been in operation prior to the commencement of the notice-and-comment process), available at <https://www.aclu.org/files/assets/2010-6-2-CMUComments.pdf>.
- <sup>63</sup> See Johnson, *supra* note 61.
- <sup>64</sup> See Scott Shane, *Beyond Guantanamo, a Web of Prisons for Terrorism Inmates*, N.Y. TIMES, Dec. 10, 2010, available at <http://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html?pagewanted=all> (noting that the CMUs are “Muslim-majority”).
- <sup>65</sup> See Judith Resnik, *Harder Time*, SLATE, July 25, 2013, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/07/women\\_in\\_federal\\_prison\\_are\\_being\\_shipped\\_from\\_danbury\\_to\\_aliceville.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/women_in_federal_prison_are_being_shipped_from_danbury_to_aliceville.html)
- <sup>66</sup> *Id.*
- <sup>67</sup> Karen Ali, *Federal Prison Officials Will Answer Questions Before Moving Women*, CONN. LAW TRIBUNE, Aug. 16, 2013,

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[http://www.cilawtribune.com/PubArticleCT.jsp?id=1202615866626&Federal\\_Prison\\_Officials\\_Will\\_Answer\\_Questions\\_Before\\_Moving\\_Women\\_&stretum=20130716182512](http://www.cilawtribune.com/PubArticleCT.jsp?id=1202615866626&Federal_Prison_Officials_Will_Answer_Questions_Before_Moving_Women_&stretum=20130716182512).

<sup>68</sup> *Id.*

<sup>69</sup> See Resnik, *supra* note 65 (“Being moved far from home limits the opportunities of women being moved out of Danbury; it hurts them in prison and once they get out. Recent research from Michigan and Ohio documents that inmates who receive regular visits are less likely to have disciplinary problems while in prison and have better chances of staying out of prison once released.”).

<sup>70</sup> See Letter from Chris Murphy, Senator, et al. to Charles E. Samuels, Jr., Director, Federal Bureau of Prisons (Aug. 2, 2013), available at <http://www.murphy.senate.gov/record.cfm?id=345491>.

<sup>71</sup> See Ali, *supra* note 67.

<sup>72</sup> FCI Aliceville, Federal Bureau of Prisons, <http://www.bop.gov/locations/institutions/ali/> (last visited Sept. 15, 2013).

GAO REPORT REVEALS MULTIPLE WAYS TO END THE  
WASTE OF MILLIONS ON UNNECESSARY OVER-  
INCARCERATION

REPORT ON BEHALF OF THE  
FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Thomas W. Hiller, II  
Federal Public Defender, Western District of Washington  
Michael Nachmanoff  
Federal Public Defender, Eastern District of Virginia  
Co-Chairs, Legislative Expert Panel

Stephen R. Sady,  
Chief Deputy Federal Public Defender, District of Oregon

April 4, 2012

**FACT SHEET: GAO REPORT REVEALS THE  
BOP'S UNDERUTILIZATION OF COST-SAVING PROGRAMS**

The Government Accountability Office (GAO) has performed an important service in its study on the Bureau of Prisons' ability to reduce incarceration costs. The report can be used as a starting point for identifying ways to reduce prison over-crowding, reduce the risk of future recidivism, and save millions of taxpayer dollars every year. The BOP's underutilization of available programs that would reduce over-incarceration and future recidivism falls into several general categories.

First, the GAO identified three statutory programs that, if fully implemented, would save taxpayer dollars that are now being wasted on unnecessary incarceration:

- The BOP underutilizes the residential drug abuse program (RDAP) incentive for nonviolent offenders. If inmates had received the full 12-month reduction from 2009 to 2011, the BOP would have saved up to \$144 million. Much more would be saved if all statutorily eligible prisoners were allowed to participate.
- The BOP underutilizes available community corrections so that inmates serve an average of only 4 months of the available 12 months authorized by the Second Chance Act. Just by increasing home confinement by three months, the BOP could save up to \$111.4 million each year.
- The BOP underutilizes available sentence modification authority for "extraordinary and compelling reasons," depriving sentencing judges of the opportunity to reduce over-incarceration of deserving prisoners whose continued imprisonment involves some of the highest prison costs.

Second, the GAO confirmed that amending the good time credit statute to require that inmates serve no more than 85% of the sentence would better calibrate actual time served with the assumptions underlying the sentencing guidelines consulted at sentencing. Both the Department of Justice and the BOP favor the amendment. After the release of about 3,900 inmates in the first fiscal year, the BOP would continue to save about \$40 million a year once the amendment was enacted.

Third, the GAO identifies cost savings that the BOP could realize simply by using available rules for executing and calculating sentences. For example, the BOP unilaterally abolished the shock incarceration program, spending unnecessary millions by replacing sentence reductions and increased home detention with prison time for nonviolent offenders with minimal criminal history. The BOP also fails to treat defendants' time in immigration custody as "official detention," an unnecessary policy that increases custody costs by creating dead time. The BOP should act immediately to end these and other unnecessary and wasteful policies.

**FEDERAL PUBLIC DEFENDER  
Western District of Washington**

*Thomas W. Hillier, II  
Federal Public Defender*

April 4, 2012

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Bobby Scott  
Ranking Member  
Subcommittee on Crime, Terrorism, and Homeland Security  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C. 20510

Re: Response to GAO Report on BOP Underutilization of Statutory  
Authority To Reduce Prison Over-Crowding and Incarceration Costs

Dear Senator Leahy and Congressman Scott:

Thank you for your request for our comments on the Government Accountability Office's February 2012 report on the Bureau of Prisons' authority to reduce inmates' time in prison.<sup>1</sup> The GAO report can be used as a starting point to identify the numerous areas in which the BOP is systematically underutilizing available programs under statutes Congress enacted. If the BOP fully implemented the programs, it would reduce prison overcrowding and save millions in taxpayer dollars each year. By implementing – and in some cases expanding – available programs, and in a few instances by securing new authority through legislative changes, the BOP can achieve major cost savings not only without compromising public safety, but increasing public safety by reducing the risk of future recidivism and by reducing overcrowding of federal prisons that are operating at 137% of capacity.

You charged the GAO to determine two things:

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<sup>1</sup> Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012).

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1. To what extent does the BOP utilize its authorities to reduce a federal prisoner's period of incarceration; and
2. What factors, if any, impact the BOP's use of these authorities?

The GAO analyzed statutes, BOP policies, program statements and guidance, conducted interviews and site visits, and obtained and analyzed data and research, including costs and projections. It also interviewed subject matter experts and reviewed literature.

The GAO identified the universe of BOP discretionary authority available to reduce time in custody:

- Residential Drug Abuse Program (RDAP) – 18 U.S.C. § 3621(e)
- Residential Reentry and Home Detention – 18 U.S.C. § 3624(c)
- Good Conduct Time (GCT) – 18 U.S.C. § 3624(b)
- Modification of an Imposed Sentence – 18 U.S.C. § 3582(c)
- Shock Incarceration Program – 18 U.S.C. § 4046
- Elderly Offender Pilot Program – 42 U.S.C. § 17541(g)
- Sentence Computation Authority to Allow Concurrent Service of State and Federal Sentences – 18 U.S.C. § 3584
- Credit for Time Served in Custody – 18 U.S.C. § 3585(b)

The GAO highlighted a number of statutory authorities that, if fully utilized, could save hundreds of millions of dollars a year that are now being wasted on unnecessary incarceration. Below we describe each area in which the GAO found that the BOP is underutilizing its authority to reduce sentences, suggest potential solutions, and estimate the cost savings. For solutions that involve only administrative action, the BOP should promptly implement the solutions as a condition of receiving increased appropriations. For the few solutions that would require legislative action, Congress should act as soon as practicable to provide the BOP with the ability to reduce expenditures.

The following is an outline of the principle areas in which the BOP is either underutilizing available statutes or should be provided further authority to reduce over-incarceration. The changes recommended here would not only reduce time spent in federal prison and save hundreds of millions of taxpayer dollars, but they would also result in policies that better serve the goal of reducing the risk of future reoffending and its attendant social and institutional costs.

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**A. The BOP Should Fully Implement the RDAP Sentence Reduction and Make the Incentive Applicable to All Statutorily Eligible Inmates.**

In 1990, Congress created the in-prison residential substance abuse treatment program (RDAP) to address two leading causes of recidivism – alcoholism and drug addiction. When very few prisoners volunteered for the program, Congress in 1994 enacted an incentive of a sentence reduction of up to one year for successful completion of the program, which resulted in greatly increased participation.<sup>2</sup> The reduction is available only to prisoners convicted of a nonviolent offense.

According to a rigorous study conducted by the BOP in coordination with the National Institute on Drug Abuse, RDAP is extremely effective in providing prisoners the tools to return to their communities and to live law-abiding, sober lives.<sup>3</sup> While RDAP itself reduces recidivism, earlier release into the community also promotes reduced recidivism because it allows prisoners to return to work sooner, to strengthen family ties,<sup>4</sup> and to remove themselves from the criminogenic effects of imprisonment.<sup>5</sup> In short, the more inmates who participate in the program and the sooner they are released, the better.

However, the GAO reports that only a fraction of the inmates who successfully complete the RDAP program receive the full 12-month sentence reduction allowed by statute, and some do not receive any reduction at all. GAO Report at 13. The GAO reports that only 19% of inmates

<sup>2</sup> 18 U.S.C. § 3621(e)(2); 74 Fed. Reg. 1892, 1893 (Jan. 14, 2009) (“[T]he early release is [ ] a powerful incentive, as evidenced by over 7000 inmates waiting to enter treatment . . .”).

<sup>3</sup> Federal Bureau of Prisons, *Annual Report on Substance Abuse Treatment Programs Fiscal Year 2011: Report to the House Judiciary Committee* 8 (2011) (prisoners who complete the RDAP are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within three years after release); accord Federal Bureau of Prisons, *Federal Prison Residential Drug Treatment Reduces Substance Use and Arrests After Release* (2007).

<sup>4</sup> The Sentencing Commission’s research and substantial other research demonstrates that employment and family ties and responsibilities predict reduced recidivism. U.S. Sent’g Comm’n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); U.S. Sent’g Comm’n, *Recidivism and the “First Offender”* 8 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 4-6, 54 (1994), [http://www.bop.gov/news/research\\_projects/published\\_reports/recidivism/creprecid87.pdf](http://www.bop.gov/news/research_projects/published_reports/recidivism/creprecid87.pdf); USSC, *Symposium on Alternatives to Incarceration* 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (employment program reduced recidivism by 33%); see also *id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.); Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 *Int’l J. Offender Therapy & Comp. Criminology* 95, 99-100 (2002) (“The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.”); Phyllis J. Newton, Jill Glazer, & Kevin Blackwell, *Gender, Individuality and the Federal Sentencing Guidelines*, 8 *Fed. Sent’g Rep.* 148 (1995) (“[T]he better family ties are maintained[,] the lower the recidivism rate,” and “children left without parents burden society.”);

<sup>5</sup> See U.S. Sent’g Comm’n, Staff Discussion Paper, *Sentencing Options Under the Guidelines* (1996) (recognizing the “criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties”).

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who successfully completed the program in fiscal years 2009 to 2011 received the maximum reduction available under BOP policy, and 1% did not receive any reduction at all. GAO Report at 13. The average reduction was only 8 months. GAO Report at 14. While the GAO noted that BOP policy limits the amount of reduction by sentence length,<sup>6</sup> this cap is not required by statute. Thus, the percentage of inmates who received the full 12 months as allowed *by statute* was actually less than 19%.<sup>7</sup>

Moreover, contrary to BOP's description of "eligible" inmates, GAO Report at 13, the BOP categorically bars entire categories of prisoners from receiving the reduction even though they are otherwise statutorily eligible to receive it. The BOP does not permit inmates with detainees to participate in RDAP. It also categorically excludes inmates who were not convicted of a violent offense, but rather were drug offenders whose federal sentencing guideline level was increased because a weapon "was possessed," or who were previously convicted of a minor violent offense, no matter how long ago.

#### RECOMMENDATIONS

- The BOP should take the steps necessary to ensure that all inmates who successfully complete RDAP receive the full 12-month reduction, regardless of sentence length. This would save over \$45 million a year in prison costs alone, with additional societal savings realized through reduced recidivism, better employment prospects, and stronger family ties.
- The BOP should rescind its categorical rule excluding inmates with detainees from participating in RDAP. This would save *at least* another \$25 million a year, likely much more.
- The BOP should rescind its categorical rules excluding (1) inmates convicted of possession of a firearm and those convicted of a drug offense who received an enhancement under the guidelines because a weapon "was possessed" and (2) inmates previously convicted of an offense involving violence, no matter how minor or how old. This would save many more millions in prison costs, and would likely result in similar rates of reduced recidivism and increased societal benefits.

Each of these recommendations is explained in more detail below.

<sup>6</sup> BOP Program Statement 5331.02, § 10 (Mar. 16, 2009) (an inmate serving a sentence of 30 months or less may receive a reduction of no more than 6 months, and an inmate serving a sentence of 31-36, no more than 9 months).

<sup>7</sup> The exact figure cannot be ascertained from the numbers reported by the GAO or through other sources.

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**I. Unnecessary delay resulting in inmates not receiving the full 12-month reduction**

The GAO reports that “[w]hile eligible prisoners can participate in RDAP in time to complete the program, few receive the maximum sentence reduction.” GAO Report at 10. According to the BOP, the reason the average reduction was only eight months, rather than the full 12 months available under § 3621(e), is that “by the time they complete RDAP, they have fewer months remaining on their sentences than the maximum allowable reduction.” GAO Report at 14. While current BOP policy recommends that an inmate’s eligibility screening process begin no less than 24 months before the inmate’s projected release date, “some inmates may have to wait for clinical interviews, for program slots to open, or both.” GAO Report at 14. The BOP explained that as a result of these system-wide delays and limited program slots, there is a significant backlog of inmates on long waitlists, preventing some inmates from participating in the program soon enough to receive the maximum sentence reduction, or from participating at all. GAO Report at 14, 34. Further, while those on the waitlists are prioritized by projected release date, BOP chooses not to include the potential sentence reduction in the projected release date for nonviolent offenders eligible for the sentence reduction. GAO Report at 34. As a result, inmates enter the program too late to receive the maximum reduction allowed. These policies and practices result in significant underutilization of the sentence reduction authorized by 18 U.S.C. § 3621(e).

In the past, the BOP made eligibility determinations whenever a prisoner made a request,<sup>8</sup> but the BOP now delays eligibility determinations, resulting in applications and eligibility interviews late in a prisoner’s term of imprisonment. Early determinations of eligibility would allow the BOP sufficient time to plan to send prisoners to facilities with room in their programs, avoiding the queues for eligibility determinations noted by the GAO.

These delays are exacerbated by the BOP’s omission of the potential RDAP sentence reduction for nonviolent offenders in calculating projected release date. The BOP acknowledges it could change this practice and include the potential RDAP sentence reduction in the projected release date in order to ensure that those eligible would “enter the program sooner and in enough time to receive the maximum reduction.” GAO Report at 34. But doing so, it says, would prevent some inmates – those who are eligible for RDAP but not eligible for a sentence reduction – from participating in the program by being continually displaced on the list by those eligible for the reduction. GAO Report at 34. The BOP says that the statute prevents it from displacing anyone determined to be in need of treatment. However, when asked by GAO for documentation that eligible prisoners would be displaced, BOP was unable to provide any. GAO Report at 35.

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<sup>8</sup> BOP Program Statement 5330.10 (May 25, 1995); *Wade v. Daniels*, 373 F. Supp. 2d 1201, 1204 (D. Or. 2005) (relying on the BOP’s 1995 policy, which required it to evaluate early release eligibility at the time of the inmate’s request to enter the program).

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Failure to prioritize offenders eligible for the reduction in sentence – as the BOP did for the first decade of the program – unnecessarily delays entry of prisoners eligible for the incentive and significantly shortens the awarded sentence reduction. It is also contrary to the congressional directive that the BOP “prioritize the participation of nonviolent offenders in the Residential Drug Abuse Treatment Program (RDAP) in a way that maximizes the benefit of sentence reduction opportunities for reducing the inmate population.”<sup>9</sup> Though the BOP’s methodology has been upheld as a valid administrative interpretation of the statute, at least one circuit court has recognized that the “BOP’s administration of RDAP, combined with the program’s insufficient capacity, has created a troubling situation that calls for a legislative or regulatory remedy.”<sup>10</sup> The former BOP Director has also called for “the full 12 months allowed by statute.”<sup>11</sup>

The BOP should determine whether, by allowing inmates with detainers to participate in RDAP, other statutorily eligible inmates would in fact be displaced. At the very least, the BOP should return to its old rule and alter the timing of its eligibility screening and prioritize its waitlists so that those inmates eligible for a sentence reduction receive the maximum available reduction.

If the BOP fully implemented the sentence reduction in these simple ways, savings would be substantial. In fiscal years 2009 through 2011, 15,302 inmates successfully completed the program and were eligible for the sentence reduction. GAO Report at 13. These inmates received an average sentence reduction of eight months, whereas the maximum available reduction was 11.6 months.<sup>12</sup> With the annual cost of imprisonment at \$28,284, the BOP would have saved \$144,267,256 – over \$45 million a year – by providing nonviolent offenders the maximum sentence reduction for successful completion of the program.<sup>13</sup>

## 2. Categorical exclusion of statutorily eligible inmates with detainers

The GAO relies on the BOP’s 2009 and 2010 annual reports to Congress for the statement that “during fiscal years 2009 and 2010 all eligible inmates who expressed interest in

<sup>9</sup> Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010: Conference Report to Accompany H.R. 3288, H.R. Rep. No. 111-366, at 673 (2009), reprinted in 2010 U.S.C.C.A.N. 1105, 1181.

<sup>10</sup> *Close v. Thomas*, 653 F.3d 970, 976 (9th Cir. 2011).

<sup>11</sup> *Commerce, Justice, Science, and Related Agencies Appropriations for 2012: Hearings Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 112th Cong. 369 (2011) (Statement of Harley G. Lappin, Director, Federal Bureau of Prisons).

<sup>12</sup> The maximum average reduction would be 11.6 months rather than 12 months because a small number of inmates who completed the program were eligible for a reduction of only 6 or 9 months due to the length of their sentences as result of a change in BOP’s rules in 2009. GAO Report at 14 n.21.

<sup>13</sup> This is the product of the number of qualifying inmates, times 1/3 for the average four months lost, times the average annual cost of incarceration. See *Annual Determination of Average Cost of Incarceration*, 76 Fed. Reg. 57,081 (Sept. 15, 2011) (annual cost of incarceration is \$28,284 in fiscal year 2010).

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RDAP were able to participate in the program in time to complete it before their release from BOP custody.” GAO Report at 13. In fact, however, BOP does not allow all statutorily “eligible prisoners” to participate in RDAP. In 2009, the BOP declared for the first time that statutorily “eligible prisoners” with detainers could no longer participate in residential drug treatment at all, significantly narrowing the class of inmates deemed “eligible” by the BOP and thereby making it appear as though the BOP is closer to fulfilling its statutory mandate than it really is.

In 1994, Congress required that, by 1997, the BOP shall “provide residential substance abuse treatment” to “all eligible prisoners.”<sup>14</sup> Congress defined “eligible prisoner” as a person with a substance abuse problem who is “willing to participate in a residential substance abuse treatment program.”<sup>15</sup> Congress did not require as a condition of participation in residential treatment that the prisoner must also be able to participate in community corrections. As initially promulgated in 1995, the BOP’s rules specifically provided for early release eligibility for all persons who successfully completed the residential program and then succeeded in *either* community corrections *or* transitional programming within the institution.<sup>16</sup> This meant that nonviolent United States citizens with state detainers and nonviolent aliens with immigration detainers could receive treatment and a sentence reduction upon successful completion of the program.

This sensible policy has been disrupted by two ill-considered decisions. In 1995, the American Psychiatric Association wrote to the BOP suggesting that, for better outcomes, inmates should receive more than the proposed minimum of one hour per month of institutional transitional treatment.<sup>17</sup> In response, the BOP acknowledged that it may be able to increase the availability of transitional services at an institution, but said “it cannot duplicate . . . the environment of community-based transitional services.”<sup>18</sup> It then promulgated a new rule that only those inmates who complete transitional services in a halfway house or while on home detention could be considered for the sentence reduction.<sup>19</sup> As a result, prisoners with detainers were ineligible for the sentence reduction, but could still participate in residential treatment.<sup>20</sup>

In June 2000, the American Psychiatric Association reacted with alarm when it realized that its comment had been used to justify denying the sentence reduction for a sizeable portion of the federal prison population – those with detainers. It provided a new comment to the BOP

<sup>14</sup> 18 U.S.C. § 3621(c)(1)(C).

<sup>15</sup> 18 U.S.C. § 3621(e)(5)(B).

<sup>16</sup> BOP Program Statement 5330.10, ch. 6, at 2 (May 25, 1995) (repealed 2009); see 28 C.F.R. § 550.56 (1995).

<sup>17</sup> Letter from Melvin Shabsin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons (July 18, 1995), available at <http://or.fid.org/Alternatives%20to%20Incarceration/Page%2010.pdf>.

<sup>18</sup> 61 Fed. Reg. 25,121 (May 17, 1996) (amending 28 C.F.R. § 550.58).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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objecting to the misuse of its 1995 comment and explaining that “transitional services can be established within a prison setting that can improve the outcome related to successful completion of a residential drug treatment program” and that this can be accomplished by “increasing the minimum requirement for transitional services within the institution from the original minimum of one hour per month.”<sup>21</sup> The Association explained that it did not “mean to present an either/or choice of one hour per month within the institution or full participation in the community-based program.”<sup>22</sup> The BOP did not modify its position.

In 2009, the BOP altered the RDAP participation criteria to completely exclude from residential treatment all prisoners with detainers or outstanding charges, regardless of their status as “eligible prisoners” within the meaning of statute. It accomplished this in a roundabout way by promulgating a rule stating that in order to participate in RDAP, inmates must be able to complete the residential re-entry (RRC) component of the program.<sup>23</sup> Because inmates with detainers are ineligible for placement in RRCs, they are ineligible to even participate in RDAP. GAO Report at 30-32.<sup>24</sup>

As a result, a significant proportion of inmates are excluded from participating in RDAP. Based on its analysis of BOP data, the GAO reports that 24,436 inmates in 2011, or approximately 11.3%, were ineligible for placement in a RRC in 2011 due to a detainer. GAO Report at 1, 31. But even this number may not fully reflect the actual number of inmates with detainers. According to BOP statistics, 26.7% of inmates are non-citizens.<sup>25</sup> Nearly half of defendants sentenced in fiscal year 2010, over 40,000, were non-citizens.<sup>26</sup> It is safe to say that most were convicted of a deportable offense and therefore have an immigration detainer. Notably, the number of inmates with detainers steadily *increased* each year in the three years examined by the GAO.

Whatever the actual number of inmates with detainers, BOP officials recognize that its policy deeming inmates with detainers ineligible for placement in RRCs is a “chief reason” that RDAP is underutilized. GAO Report at 30. BOP itself estimates that 2,500 aliens would participate in RDAP each year if it changed this policy, which it says would save \$25 million per

<sup>21</sup> Letter from Steven M. Mirin, M.D., Medical Director, American Psychiatric Association, to Kathleen M. Hawk Sawyer, Director, Bureau of Prisons, at 2 (June 21, 2000); *see also* Drug Abuse Treatment and Intensive Confinement Programs: Early Release Consideration, 65 Fed. Reg. 80,745, 80,746-47 (Dec. 22, 2000) (describing the Association’s letter and adopting 1996 interim rule as final).

<sup>22</sup> *Id.* at 80,747.

<sup>23</sup> 28 C.F.R. § 550.53 (b)(3) (effective Mar. 16, 2009).

<sup>24</sup> *See* BOP Program Statement 5531.02 (Mar. 16, 2009) (Early Release Procedures Under 18 U.S.C. § 3621(e)). “According to BOP,” the GAO reports, “inmates with detainers are deemed inappropriate for placement in community corrections due to the increased risk of escape and for those with immigration detainers, the likelihood of deportation.” GAO Report at 30.

<sup>25</sup> *See* Quick Facts About the Bureau of Prisons, <http://www.bop.gov/news/quick.jsp#2>, last visited Mar. 29, 2012.

<sup>26</sup> U.S. Sent’g Comm’n, 2011 Sourcebook of Federal Sentencing Statistics, tbl. 9 (2011) (48% non-citizens).

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year. GAO Report at 32 & n.63. This figure no doubt underestimates the actual savings because it is based on the BOP's policy of limiting the sentence reduction based on sentence length, as explained above, and its discretionary rules excluding inmates based on prior convictions and guideline enhancements, which are not required by statute, as explained below.

BOP told the GAO that transitional treatment within an institution is "ineffective because the inmate remains sheltered from the partial freedoms and outside pressures experienced during an RRC placement." GAO Report at 32, but the GAO does not appear to have verified this statement. In fact, when the BOP changed its rule in 2009, it said nothing about transitional treatment being "ineffective."<sup>27</sup> Indeed, the American Psychiatric Association specifically clarified that transitional treatment within an institution "will result in better outcomes than no participation in such treatment."<sup>28</sup>

Tellingly, and despite its purported reasons for denying eligibility to inmates with detainers, the BOP is considering changing this policy and allowing those with detainers to complete RDAP without the RRC component and receive the sentence reduction. GAO Report at 32. If the BOP allowed nonviolent offenders to complete the transition portion of the sentence in prison, as it did in 1995, a large population of persons who pose the least risk to public safety – nonviolent offenders who will be immediately deported upon completion of their sentences – would be eligible for release twelve months earlier, saving at least \$25 million of unnecessary incarceration a year, and likely much more. The BOP should act forthwith on restoring the sentence reduction for prisoners with detainers.

### **3. Unnecessary categorical bars on sentence reductions for other inmates convicted of a nonviolent offense**

By statute, all inmates convicted of a "nonviolent" offense and who have been identified as having a substance abuse disorder are eligible to participate in RDAP. The BOP has exercised its discretion to categorically bar from receiving the sentence reduction prisoners who were convicted of mere possession of a firearm and those convicted of drug trafficking who receive a two-level increase under the Sentencing Guidelines because a gun "was possessed."<sup>29</sup> The BOP also excludes prisoners convicted of a nonviolent offense who have prior violent convictions, regardless how old.<sup>29</sup> The BOP does not appear to have engaged in rigorous data-

<sup>27</sup> See 74 Fed. Reg. 1892 (Jan. 14, 2009) (explanation and promulgation of final rule).

<sup>28</sup> Letter from Melvin Shabsin, M.D., Medical Director, American Psychiatric Association, to Kathleen Hawk, Director, Bureau of Prisons, at 2 (July 18, 1995).

<sup>29</sup> Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 62 Fed. Reg. 53, 690 (Oct. 15, 1997); BOP Program Statement 5330.10 (Oct. 7, 1997); Drug Abuse Treatment and Intensive Confinement Center Programs: Early Release Consideration, 65 Fed. Reg. 80,745 (Dec. 22, 2000); 28 C.F.R. § 550.55(b) (Mar. 16, 2009); BOP Program Statement 5531.02 (Mar. 16, 2009) (Early Release Procedures Under 18 U.S.C. § 3621(e)); BOP Program Statement 5162.05, § 4(b) (Mar. 16, 2009) (Categorization of Offenses).

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based rulemaking in creating these exclusions of otherwise statutorily eligible nonviolent offenders.

In contrast, the Sentencing Commission excludes possession of a firearm by a felon from the category of offenses that are deemed “crimes of violence.”<sup>30</sup> It also excludes, for purposes of calculating criminal history, convictions that are ten or fifteen years old, relying on the Parole Commission’s validated, empirical data demonstrating that certain sentences over ten years old should not count for criminal history points because they do not contribute to predicting the risk of re-offending.<sup>31</sup> It has also determined that old prior convictions for actual crimes of violence do not in fact predict future recidivism.<sup>32</sup> Thus, there is no apparent reason why the BOP should exclude nonviolent offenders with prior convictions that do not even count at sentencing and do not predict future recidivism. As a result of litigation in one circuit, hundreds of prisoners in those categories have successfully participated in the program and re-entered the community earlier than they otherwise would have.<sup>33</sup> But those who have not succeeded in such challenges remain excluded.

The BOP should critically examine the rationale for these exclusions by considering (1) the data on recidivism and relapse for excluded prisoners compared with those who receive the sentence reduction; (2) the reduction in overcrowding and cost savings that would be realized by including additional statutorily eligible prisoners; and (3) cost savings realized by reducing the risk of re-offending through the RDAP program. Comparing recidivism rates may reveal that those who fall in these categories but who nevertheless received treatment and a sentence reduction (such as those in the Ninth Circuit) have the same or similar reduced rate of recidivism as everyone else who participates in RDAP. In other words, those convicted of mere possession of a firearm or who received the two-level enhancement under the drug guideline because a weapon “was possessed” or whose prior convictions are so old they do not count for criminal history purposes at sentencing do not in fact pose a significantly greater risk to public safety when released early after successfully completing the RDAP program. Indeed, the Sentencing Commission recently debunked dire predictions that the early release of thousands of inmates convicted of crack offenses as a result of the 2007 guideline amendment would cause serious public safety problems. In fact, recidivism rates were not statistically different for crack

<sup>30</sup> U.S. Sent’g Guidelines Manual § 4B1.2 cmt. (n.1).

<sup>31</sup> *Id.* § 4A1.2(e); U.S. Sent’g Comm’n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score 3-4* (2005).

<sup>32</sup> U.S. Sent’g Comm’n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score 1, 11* (2005).

<sup>33</sup> For example, in the Ninth Circuit, the BOP has provided the RDAP sentence reduction to inmates pursuant to Circuit-wide operations memorandums in response to the abrogation of the 1995 Program Statements, *see Downey v. Crabtree*, 100 F.3d 662 (9th Cir. 1996); *Davis v. Crabtree*, 109 F.3d 566 (9th Cir. 1997), the 1997 regulation, *see Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), and the 2000 final rule, *see Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008); *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009). The validity of the 2009 version of the rule, which was implemented without empirical study or other data-based support, is pending before the Ninth Circuit in *Peck v. Thomas*, No. 11-35283.

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offenders who were released early and those who were not, even for those “with weapon involvement.”<sup>34</sup>

Even without entirely eliminating these categorical exclusions, the BOP could save millions of taxpayer dollars just by narrowing them. There is no apparent reason why a person with a nonviolent conviction *must* be eliminated from the program for possession of a hunting rifle, or for pawning a firearm, or for having a bullet without a gun. Nor is it clear why very old convictions involving violence *must* exclude an inmate from participating in RDAP. As shown above, these categorical exclusions are not required by statute and are not linked to increased risk of reoffending. They also discourage inmates from completing a program shown to *reduce* recidivism. Instead, the BOP should presumptively permit individuals falling in these categories to participate in RDAP, but may exclude an individual determined to be too great a risk based on an individualized assessment.

**B. The BOP Should Fully Implement The Second Chance Act's Provision for Up to Twelve Months of Pre-Release Community Corrections Under 18 U.S.C. § 3624(a).**

The GAO found that the BOP “refers eligible prisoners to community corrections, but has not assessed home detention to determine potential cost savings.” GAO Report at 15. While the BOP does refer some eligible prisoners to community corrections, the GAO report makes clear that the BOP significantly underutilizes community corrections, costing hundreds of millions of taxpayer dollars and denying inmates the opportunity to improve their chances for successful reentry. According to its analysis of BOP data, the BOP permits prisoners eligible for community corrections an average of only *four* of the twelve months available under the Second Chance Act.

As the GAO notes, the Second Chance Act of 2007 doubled the amount of time – from six to twelve months – that an inmate may serve in pre-release community corrections at the end of the sentence. GAO Report at 15 n.24. But the BOP has not promulgated regulations, as Congress required, to effectuate this increase.<sup>35</sup> As reflected in the attached comment by the Federal Defenders, the BOP has instead relied on an informal internal policy limiting community corrections placement to six months, which essentially maintains the pre-Second Chance Act policies that sharply limited community corrections. Attachment A. Indeed, the GAO found that of the 29,000 prisoners transferred to community corrections in 2010, over 60% were placed in halfway houses only and served an average of just over three months. GAO Report at 16-17. The remainder received a combination of halfway house followed by home detention, serving together an average of just over five months, or received home detention only, serving an average less than four months. GAO Report at 17. While inmates generally may serve up to six

<sup>34</sup> See U.S. Sent'g Comm'n, *Memorandum: Recidivism Among Offenders With Sentence Modifications Made Pursuant To Retroactive Application of 2007 Crack Cocaine Amendment 10* (May 31, 2011), (comparing recidivism rates for crack offenders “with weapon involvement” and those without, and finding no statistically significant difference).

<sup>35</sup> 18 U.S.C. § 3624(c)(6).

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months of home detention,<sup>36</sup> only a tiny fraction serve that long, with the average time served just over three months. GAO Report at 16-17. Overall, inmates serve an average of less than four months in community corrections. GAO Report at 17.

#### RECOMMENDATIONS

- The BOP should abandon the informal six-month limitation on community corrections and promulgate a regulation that includes a presumption of maximum available community corrections, limited only by considerations of individualized risk and resources.
- To maximize the duration of community confinement, the BOP should include as part of this new regulation a description of studies and analyses it considered in arriving at criteria for the exercise of individualized discretion.
- The BOP should direct earlier placement of inmates in RRCs to maximize the ensuing home confinement component of community corrections.
- To maximize savings, the BOP should follow its policy to ensure that more higher-security inmates are placed in RRCs, and more minimum-security inmates are placed directly to home-confinement and for longer periods.

Contrary to the BOP's suggestion, adopting these changes would save hundreds of millions of dollars, assuming the BOP follows its own policies regarding priority of placement in RRCs. The BOP told the GAO that "housing inmates in community correction was more costly, on a *per diem* basis, than housing inmates in minimum- and low-security facilities." GAO Report at 18. Using BOP data, the GAO found that the daily cost of housing an inmate in "community corrections" is \$70.79, while it costs \$69.53 and \$57.56 to house inmates in a minimum- or low-security facility, respectively. GAO Report 18-19. But the term "community corrections" as used here by the GAO refers only to placement in an RRC, which costs \$70.79 per day. GAO Report at 18, 20. As the GAO noted, the BOP recognizes that higher security inmates "are more likely to benefit from RRC placement" in terms of reduced recidivism, and since 2010 has recommended that staff prioritize those most likely to benefit, *i.e.* higher security inmates, for placement in RRCs. GAO Report at 17. In other words, the BOP's policy is to reserve for RRC placement those higher security inmates who would benefit most from it in terms of reduced recidivism, and for these inmates, RRC placement costs *less* than incarceration. GAO Report at 19.

<sup>36</sup> Home confinement is available for six months for sentences of 60 months or more and for 10% of sentences of less than 60 months. 18 U.S.C. § 3624(c)(2).

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At the same time, while the BOP has not ascertained the actual costs of home detention, it told the GAO that it pays contractors 50% of the per diem rate for RRC placement, GAO Report at 20, which, at the average rate of \$70.79 for RRC placement, is \$35.39 per day. BOP data suggests that most of the inmates placed directly to home detention are minimum- and low-security inmates, *see* GAO Report at 18 & n.30, which means that the current cost of home detention should be significantly *less* than incarceration. Assuming the BOP pays the contractor \$ 35.39 per day, six months in home detention for a minimum-security inmate costs \$6,370, while housing that same inmate in an institution for six months costs \$10,359, a difference of nearly \$4,000. GAO Report at 18 & fig.3. The BOP also recognizes that if it increased the number of minimum-security inmates placed directly in home detention, more higher security inmates could be placed in RRCs. GAO Report at 18. Both actions would cost *less* than incarceration.

The GAO indicated that it was unable to accurately weigh the costs and benefits of supervising inmates in home detention and recommended that the BOP obtain information regarding the actual costs of home detention. GAO Report at 36. But some information regarding potential savings is already available. In a 2011 memorandum, the Administrative Office estimated the average yearly cost of supervision by probation officers at \$3,938, or \$10.79 per day,<sup>37</sup> which necessarily includes supervising those on home detention. If the BOP paid RRC contractors \$10.79 a day for home detention, the BOP could save up to \$58.8 million a year by increasing average home detention by just one month,<sup>38</sup> while increasing the average home detention by three months would save about \$176.5 million a year. Even under the current presumptive rate paid by BOP for home detention (50% the RRC per diem rate), if the BOP were to increase the home detention component of community corrections by an average of just three months, it would save up to \$111.4 million every year.<sup>39</sup>

**C. Changes to the BOP's Treatment of Good Time Credit Would Save Hundreds of Millions of Dollars.**

A number of changes to the BOP's approach to good time credit under 18 U.S.C. § 3624(b) would save hundreds of millions of taxpayer dollars.

<sup>37</sup> Administrative Office, Memorandum from Matthew Rowland to Chief Probation Officers, *Cost of Incarceration and Supervision* (June 3, 2011).

<sup>38</sup> The monthly cost of imprisonment is \$2357 (1/12 of the \$28,284 annual costs); the monthly cost of home confinement is about \$328 (1/12 of the \$3,938 yearly cost of supervision by probation officers). The difference between them is \$2,029 per month. Multiplying that difference by 29,000, the number of prisoners released in 2010 to community corrections, equals \$58,841,000.

<sup>39</sup> The monthly cost of imprisonment is \$2357 (1/12 of the \$28,284 annual costs); the monthly cost of home confinement is about \$1076 (\$35.39 multiplied by 365 and divided by 12). The difference between them is \$1,281 per month. Multiplying that difference by 29,000, the number of prisoners released in 2010 to community corrections, equals \$37,149,000.

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### RECOMMENDATIONS

- Congress should pass the legislation proposed by the BOP so that the full 54 days of good time credit will be awarded for each year of imprisonment imposed. This change would save approximately \$40 million in the first year alone.
- The BOP should assure that an inmate's disability, which may impair his ability to participate in educational classes or complete the 240-hour general education program, does not result in a loss of good time credit and unnecessary costs of extended incarceration.
- The BOP should change its methodology for calculating good time credit so that fractions for partial credit are rounded *up*, thereby rewarding the good behavior, treating prisoners fairly, and saving taxpayer dollars.
- The BOP should either promulgate rules to implement good time for sentences adjusted to reflect concurrent state sentences under § 5G1.3(b), or Congress should enact a legislative fix.

Each recommendation is explained in more detail below.

#### **I. Method of calculating good conduct time**

The GAO reports that most inmates receive the maximum good time credit allowed under the BOP's methodology, but the BOP's methodology results in a maximum of only 47 days of good time credit earned per year of sentence imposed, rather than the 54 days stated in 18 U.S.C. § 3624(b). GAO Report at 23. While its methodology was upheld by the Supreme Court,<sup>40</sup> the BOP recognizes that the extra seven days served as a result of its calculations cost taxpayers millions of unnecessary tax dollars. The BOP informed the GAO that it supports amending § 3624(b) and has submitted a legislative proposal to Congress "such that 54 days would be provided for each year of the term of imprisonment originally imposed by the judge, which would result in inmates serving 85 percent of their sentence." GAO Report at 24.

As noted by the GAO, the Sentencing Commission established the sentencing guidelines on the assumption that defendants would serve 85% of the sentence, and thus on the assumption that serving 85% of the sentence will be sufficient to serve the "need to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). In contrast, the BOP formula requires no less than 8.71 years in prison on a 10-year sentence, or 87.1% of their sentence, for no reason related to sentencing purposes. GAO Report at 24. By calculating the good time credit so that inmates serve 85% of the sentence originally imposed, the proposed legislative fix

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<sup>40</sup> *Barber v. Thomas*, 130 S. Ct. 2499 (2010).

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would better calibrate sentences served with the guidelines and policies set forth by the Sentencing Commission, and the purposes of sentencing set forth by Congress.

It would also be consistent with Congress's understanding of the 85% rule. In 1995, then-Senator Joseph Biden described bipartisan support for the law requiring states to demonstrate that state prisoners "serve not less than 85% of the sentence imposed" as a condition of federal assistance. 42 U.S.C. § 13704(a) (2000).<sup>41</sup> He described this 85% rule in terms identical to the legislation the BOP now seeks: "In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to prison for at least 85% of that time – 8.5 years, which is what the law mandates. You can get up to 1.5 years in good time credits, but that is all."<sup>42</sup>

As recognized by Justice Kennedy, calculating good time so that inmates earn the full 54 days and serve 85% of their sentence would not only treat more fairly those "who have behaved the best" and better serve the purposes of the statute, but it would also save "untold millions of dollars."<sup>43</sup> The BOP provided estimates to the GAO showing that if the BOP increased the good time credit by seven days, 3,900 incarcerated inmates would be released in the first fiscal year after the change, saving approximately \$40 million in that year alone. GAO Report at 25. Over the next several years, the savings would amount to hundreds of millions of dollars.

## 2. Inmates with disabilities

The GAO notes that inmates who have not earned a high school diploma or made "satisfactory progress" toward a diploma or equivalent degree receive 12 fewer good time credits per year. GAO Report at 21. The reality is that many federal prisoners are mentally ill, or have learning disabilities or language impediments. The statute requires the BOP to consider an inmate's educational efforts in awarding good time credit,<sup>44</sup> but the BOP should assure that an inmate's disability, which may impair his ability to participate in educational classes or complete the 240-hour general education program, does not result in denial of good time credits. The twelve days saved multiplied by each year of a sentence for all prisoners with serious educational problems would result in significant savings.

<sup>41</sup> 140 Cong. Rec. S12314-01, 12350 (daily ed. Aug. 23, 1994) (statement of Sen. Biden) ("So my Republican friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money unless they keep their people in jail for 85 percent of the time *just like we do at the Federal level* in a law written by yours truly and several others.") (emphasis added).

<sup>42</sup> 141 Cong. Rec. S2348-01, S2349 (daily ed. Feb. 9, 1995) (statement of Senator Biden).

<sup>43</sup> *Barber v. Thomas*, 130 S. Ct. 2499, 2512 (2010) (Kennedy, J., dissenting).

<sup>44</sup> 18 U.S.C. § 3624(b).

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### 3. Partial days

Although not addressed by the GAO, the BOP should address another small way in which sentences are unnecessarily extended. Under the BOP's formula for implementing good time credit, credit is earned based on time *served*, rather than sentence imposed, with each day served earning 0.148 of a day of credit, which is the fraction of 54 days that can be earned on each of the 365 days in a year.<sup>45</sup> So, for example, after seven days served, an inmate earns one full day of credit ( $0.148 \times 7 = 1.036$ ). However, in calculating the amount of time remaining that must be served in the final year, the BOP rounds *down* to the nearest whole number any fraction of a day.<sup>46</sup> As the BOP explains in its Program Statement:

Since .148 is less than one full day, no GCT can be awarded for one day served on the sentence. Two days of service on a sentence equals .296 ( $2 \times .148$ ) or zero days GCT; three days equals .444 ( $3 \times .148$ ) or zero days GCT; four days equals .592 ( $4 \times .148$ ) or zero days GCT; five days equals .74 ( $5 \times .148$ ) or zero days GCT; six days equals .888 ( $6 \times .148$ ) or zero days GCT; and seven days equals 1.036 ( $7 \times .148$ ) or 1 day GCT. The fraction is always dropped.<sup>47</sup>

By its rule that "the fraction is always dropped," the BOP denies any credit on partially earned days. Given that it is likely that virtually all prisoners will earn a fraction of good time in their last year under the BOP's formula, and will have their good time credit rounded *down* by one day, and given that approximately 4,500 prisoners are released from BOP custody every year, the single days lost add up to 12.3 years, which at the average incarceration cost per year of \$28,284, amounts to about \$347,893 wasted every year. With the stroke of a pen, the BOP could change the rule to provide for rounding up, thereby rewarding the good behavior, treating prisoners fairly, and saving taxpayer dollars.

### 4. Concurrent state sentences

A problem with the implementation of the federal good time credit statute arises when a judge adjusts a sentence pursuant to § 5G1.3(b) of the sentencing guidelines to account for a "period of imprisonment already served on [an] undischarged term of imprisonment" and to achieve full concurrency of the state and federal sentence. For example, under this provision and the statutes governing concurrency and credit for time served (18 U.S.C. §§ 3584, 3585), a person charged in both state and federal court with the same gun offense, and who has already served part of the state sentence in state custody, will receive a reduction at the time of

<sup>45</sup> BOP Program Statement 5880.28, at 1-44-45 (Feb. 21, 1992) (Sentence Computation Manual) ("The GCT formula is based on dividing 54 days (the maximum number of days that can be awarded for one year in service of a sentence) into one day which results in the portion of one day of GCT that may be awarded for one day served on a sentence. 365 days divided into 54 days equals .148.").

<sup>46</sup> The only exception is if the formula does not produce a number equal to the number of days remaining to be served. Under these circumstances, the BOP rounds up. *Id.*

<sup>47</sup> *Id.*

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sentencing in federal court to account for the time already served on the concurrent state sentence. This is because, as the Sentencing Commission explained, the BOP will not credit time against a federal sentence that has been credited against another sentence, even if the sentencing judge intends the time to be served concurrently.<sup>48</sup> To harmonize the statutes and the guidelines, courts have held that state concurrent time served prior to the federal sentencing constitutes “imprisonment” that counts toward service of even a mandatory minimum sentence pursuant to the adjustment under § 5G1.3(b).<sup>49</sup>

When the federal good time credit statute is considered in conjunction with § 5G1.3(b), the period of time served concurrently on the state sentence should, assuming good behavior by the prisoner, result in the good time credits against that period of “imprisonment.” As he does for time spent in pre-trial custody on federal charges, regardless whether in a state or federal institution, the inmate should receive good time credits for time served on the state sentence in state custody equal to the amount he would have gotten had he served the state concurrent time in federal prison. By ignoring the period of time that was already served by the prisoner and that was effectively credited against the federal sentence by virtue of § 5G1.3, similarly situated prisoners serve varying times of actual custody, even when the total sentence intended by the judge is identical, based on the timing of sentencing.

A simple example illustrates the unwarranted differences resulting from accidents of timing. Defendants A, B, and C each were charged in both state and federal court with being a felon in possession of a firearm. Each was sentenced to 60 months in prison in state court. Each was sentenced to 115 months in federal court for the same offense, to be served concurrently with the state sentence. With maximum good time credits, the same 115-month term would vary depending on the time of the imposition of sentence in each jurisdiction:

Defendant A was sentenced in the federal court before having served any state time. He will serve his entire 60-month state sentence while serving his federal sentence. He will serve 115 months in exclusive BOP custody, less 451 good time credits, or 3,047 days in custody.

<sup>48</sup> 18 U.S.C. § 3585(b) (requiring credit for pretrial custody in official detention “that has not been credited against another sentence”).

<sup>49</sup> See, e.g., *United States v. Rivers*, 329 F.3d 119, 122-23 (2d Cir. 2003) (“the effect of an adjustment is similar to that of a credit”); *United States v. Dorsey*, 166 F.3d 558, 563 (3d Cir. 1999) (§ 5G1.3 harmonizes § 3584 and § 3585 to award credit on concurrent sentences because “[a] sentence cannot be concurrent if the random chance of when multiple sentences are imposed results in a defendant serving, contrary to the intent of the sentencing court, additional and separate time on one sentence that was meant to be served at the same time as another sentence”); *United States v. Campbell*, 617 F.3d 958, 961 (7th Cir. 2010) (the same analysis applies to both § 5G1.3(b) and § 5G1.3(c) because “[i]t is § 3584 that gives a sentencing court the discretion to impose a concurrent sentence, taking into consideration the factors set forth in § 3553(a)”; *United States v. Drake*, 49 F.3d 1438, 1440-41 (9th Cir. 1995) (to not harmonize the concurrent sentencing statutes would “frustrate the concurrent sentencing principles mandated by other statutes” (quoting *Kiefer*, 20 F.3d at 877)).

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Defendant B was sentenced in federal court after having already served 21 months on his concurrent state sentence. The judge adjusted his 115-month sentence downward by 21 months under § 5G1.3 -- to 94 months -- and he will serve the remaining months on the state sentence while serving his federal sentence. He will serve 94 months in exclusive BOP custody, less 369 good time credits, or 3,129 days in custody, or 76 more days than Defendant A.

Defendant C was sentenced in federal court after having served nearly all of the 60 months on his concurrent state sentence. The judge adjusted his 115-month sentence by the full 60 concurrent months under § 5G1.3 -- to 55 months. He will serve 55 months in exclusive BOP custody, less 216 good time credits, or 3,282 days in custody, or 229 more days than Defendant A.

There is simply no legitimate reason for identical defendants, who commit identical crimes, to serve different terms of actual custody. As the Supreme Court has stated, "We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing."<sup>50</sup>

To be sure, the Ninth and Second Circuits recently upheld the BOP's policy of not awarding good time credit for time served on a concurrent state sentence that was the basis for an adjustment under § 5G1.3.<sup>51</sup> However, both courts did so based on an interpretation of "term of imprisonment" under 18 U.S.C. § 3624(b), the good time statute, that is both inconsistent with the courts' interpretation of "imprisonment" in the context of § 3584(a) and § 5G1.3 regarding concurrency (including the Ninth Circuit's own), and inconsistent with the Supreme Court's interpretation of "term of imprisonment" for purposes of calculating good time credit under *Barber v. Thomas*.<sup>52</sup> Petitions for certiorari have been filed in both cases.

The BOP should either promulgate rules to implement good time for sentences adjusted under § 5G1.3(b), or Congress should enact a legislative fix. Awarding good time credits for time spent in concurrent state custody would not only lead to more fair results, it would save the money for every unnecessary day served, which adds up. If the BOP awarded good time credits just to Defendant C, above, for the 229 unnecessary days served, it would save taxpayers \$17,749.

**D. The BOP Underutilizes Sentence Reductions Under 18 U.S.C. § 3582(c)(1)(A).**

The GAO reports that the BOP "has authority to motion the court to reduce an inmates' sentence in certain statutorily authorized circumstances, but that authority is implemented infrequently, if at all." GAO Report at 25. Changes in the way the BOP implements one of

<sup>50</sup> *United States v. Wilson*, 503 U.S. 329, 335 (1992).

<sup>51</sup> *Schleining v. Thomas*, 642 F.3d 1242, (9th Cir. 2011); *Lopez v. Terrell*, 654 F.3d 176 (2d Cir. 2011).

<sup>52</sup> *Barber*, 130 S. Ct. at 2501 (holding that "term of imprisonment" unambiguously means the actual time served in prison for the federal offense).

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these authorities would result in further savings, while further investigation may be required for another.

#### 1. Extraordinary and compelling reasons

Under 18 U.S.C. § 3582(c)(1)(A), the BOP may file a motion with the court to reduce a term of imprisonment if, after considering applicable factors under § 3553(a), the court finds “extraordinary and compelling reasons” that warrant such a reduction, and the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” But the BOP has motioned sentencing judges for such a reduction in exceedingly few cases.<sup>53</sup> The BOP’s infrequent use of this authority stems from unnecessarily restrictive BOP policies that keep prisoners in custody despite “extraordinary and compelling reasons.”

As the GAO notes, the BOP has historically interpreted “extraordinary and compelling circumstances” as limited to cases in which the inmate “has a terminal illness with a life expectancy of 1 year or less or has a profoundly debilitating medical condition.” GAO Report at 25. The BOP’s regulation requires “*particularly* extraordinary and compelling reasons,”<sup>54</sup> which in practice arose only when the prisoner was almost dead. In fact, in 14.9% of cases, the prisoner died before receiving a ruling from the court.<sup>55</sup>

In 2006, the Sentencing Commission finally implemented Congress’s 1987 directive to promulgate a general policy statement governing the exercise of judicial discretion in deciding motions for sentence reduction for “extraordinary and compelling reasons” under § 3582(c)(1)(A).<sup>56</sup> In 2007, the Commission expanded the list of criteria that may warrant early release to include terminal illness with no limit on life expectancy; a “permanent physical or medical condition,” or “deteriorating physical or mental health” due to aging “that substantially diminishes the ability” of the inmate to care for himself in an institution and for which treatment “promises no substantial improvement”; and the death or incapacitation of the only family member capable of caring for the inmate’s minor children.<sup>57</sup> Though belated, the Sentencing Commission established this policy in the exercise of its delegated power to establish

<sup>53</sup> Of 89 requests for early release filed from calendar year 2009 through 2011, 55 were approved by the BOP director. GAO Report at 26.

<sup>54</sup> 28 C.F.R. § 571.61 (emphasis added).

<sup>55</sup> Judy Garret, Deputy Dir., Office of Information, Policy & Public Affairs, Federal Bureau of Prisons (May 2008), available at <http://or.fd.org/ReferenceFiles/3582cStats.pdf>.

<sup>56</sup> See GAO Report at 25 n.46 (noting the directive at 28 U.S.C. § 994(t)); 28 U.S.C. § 994(t) (directing the Commission to “describe what should be considered compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”); see U.S. Sent’g Guidelines Manual § 1B1.13 (2006) (policy statement).

<sup>57</sup> See U.S. Sent’g Guidelines Manual § 1B1.13 cmt. (n.1(A)) (2011) (policy statement). The Commission’s commentary is non-exclusive: the motion can be based on factors “other than, or in combination with” its listed factors, which the Supreme Court has indicated should include unanticipated developments after sentencing “that produce unfairness to the defendant.” *Setser v. United States*, \_\_\_ S. Ct. \_\_\_, No. 10-7387, 2012 WL 1019970, at \*6-7 (Mar. 28, 2012).

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“sentencing policies and practices that [] assure the meeting of the purposes of sentencing” and that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.” 28 U.S.C. § 991(b)(1)(A), (C).

As the GAO noted, however, the BOP has not changed its written policy to include the criteria developed by the Commission and which govern judicial consideration of a motion under § 3582(c)(1)(A). GAO Report at 25. While the GAO notes that the BOP says it is “reviewing two cases” that fall into the Commission’s expanded criteria, we do not actually know how many more inmates would *apply* for a reduction if the policy were amended to expressly include the Sentencing Commission’s criteria for sentence modification under this provision. By failing to amend its written policy to encompass the criteria deemed appropriate by the Commission, the BOP discourages applications and deprives sentencing judges of the opportunity to reduce the sentences of deserving prisoners and to reduce, for those with permanent medical conditions, some of the highest costs of incarceration.

The BOP further contributes to underutilization of this authority by filing a motion only when the BOP itself has determined that the motion should be granted. Under § 3582(c), however, the *court* is to exercise its discretion in determining whether and by how much to grant a motion “after considering the factors set forth in [] § 3553(a).” The BOP takes the position that because it is the only party authorized to file such motions, it controls whether the court’s discretion is ever triggered in the first place. A recent Oregon case illustrates the problem. Phillip Smith received a 156-month sentence for dealing less than half an ounce of methamphetamine. With approximately 29 months left on his sentence, Mr. Smith was diagnosed with terminal leukemia. The BOP repeatedly refused to file a motion to reduce his sentence, not because Smith did not qualify even under the BOP’s brink-of-death standard, but because its “compassionate release” committee determined that his criminal history did not warrant relief. But it is the *court* that decides whether the “need to protect the public from further crimes of the defendant” will or will not be adequately served by early release.<sup>58</sup> By determining itself whether a motion should be granted, rather than simply whether a potentially meritorious motion should be *filed*, the BOP transformed a gatekeeping role into the role of final judge. In doing so, it circumvented Congress’s expectation that judges would decide, in the exercise of their discretion, the merits of a motion to reduce sentence.

In addition to increasing incarceration costs, the BOP’s failure to implement the Sentencing Commission’s broader definition of “extraordinary and compelling reasons” and its refusal to file potentially meritorious motions raises serious separation of powers issues. In effect, the Executive Branch, through the BOP, is usurping the authority of the Sentencing Commission, located in the Judicial Branch and to which Congress delegated the primary task of establishing policy regarding these sentence reductions. It is also usurping the discretionary judicial function of Article III judges by refusing to file motions unless the BOP has already

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<sup>58</sup> 18 U.S.C. § 3553(a)(2)(C).

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determined in its discretion that the motion should be granted. As the Supreme Court recently stated, “[t]he Bureau is not charged with applying § 3553(a).”<sup>59</sup>

#### RECOMMENDATIONS

- The BOP should immediately adopt the Sentencing Commission’s broader standard for deciding what constitutes “extraordinary and compelling reasons.”
- The BOP should exercise no more than a reasonable gatekeeping function by simply notifying the sentencing judge when such reasons for sentence modification arguably appear.

By relying on robust judicial review where circumstances have significantly changed, the BOP can substantially expand the use of this statutory program for sentence reduction, thereby checking unnecessary growth in the prison population and avoiding substantial costs for medical services, with no danger to public safety.

#### **2. Inmates sentenced to mandatory life under 18 U.S.C. § 3559(c)**

The BOP also has the authority to file a motion for a reduction in sentence for an inmate who is at least 70 years old and has served at least 30 years in prison pursuant to a sentence imposed under § 3559(c), and the BOP has determined that the inmate “is not a danger to the safety of any other person or the community” considering the factors set forth at § 3142(e).<sup>60</sup> The reduction must also be “consistent with the applicable policy statement” issued by the Sentencing Commission, but the Commission has not issued a policy statement governing such motions. According to the BOP, it has never had an inmate in its custody meeting these criteria. However, it is not clear whether this is because there are no inmates convicted under § 3559(c) who are over 70 and have served at least 30 years on their sentence, or because the BOP has determined that every such inmate poses a danger.

#### RECOMMENDATION

- The GAO should carefully examine the BOP’s assertion that there are no inmates meeting the criteria for early release under this provision in determining whether this may be an additional area that could be better utilized for increased cost savings.

<sup>59</sup> *Setser, supra*, at \*5.

<sup>60</sup> 18 U.S.C. § 3582(c)(1)(A)(ii).

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**E. The BOP Should Reinstate the Congressionally Approved Shock Incarceration Program.**

As noted by the GAO, the BOP discontinued its shock incarceration program – known as boot camp – in 2005. The program, authorized by 18 U.S.C. § 4046, allowed for a sentence reduction of six months and extended community corrections for nonviolent offenders with minimal criminal histories who successfully completed the program. As described by the GAO,

Throughout the typical 6-month program, inmate participants were required to adhere to a highly regimented schedule of strict discipline, physical training, hard labor, drill, job training, educational programs, and substance abuse counseling. BOP provided inmates who successfully completed the program and were serving sentences of 12 to 30 months with a sentence reduction of up to 6 months. All inmates who successfully completed the program were eligible to serve the remainder of their sentences in community corrections locations, such as RRCs or home detention.

GAO Report at 27-28. The GAO reports that, according to the BOP, the BOP discontinued the program “due to its cost and research showing that it was not effective in reducing inmate recidivism.” GAO Report at 27. The GAO reports that “a study of one of BOP’s shock incarceration programs, published in September 1996, found that the program had no effect on participants’ recidivism rates.” GAO Report at 28. The BOP also cited “other evaluation findings and the cost of the program,” GAO Report at 28, but apparently did not say what those other findings are or provide the cost of the program.

In 2005, the Director of the BOP sent a memorandum to federal judges, prosecutors, probation officers, and federal defenders stating that, due to budget constraints and supposed studies showing the program was not effective, the program was being eliminated, effective immediately. In subsequent litigation, these representations turned out to be questionable. The BOP’s assistant director of research and evaluation testified that no new studies had been conducted regarding the efficacy of the federal boot camp program; that the state studies the BOP relied on did not address federal boot camps, which limit eligibility and require follow-up in community corrections; and that the change went into effect with little internal discussion. In fact, the study of the Lewisburg boot camp, cited by the GAO, found that those who graduated from the boot camp program had a rearrest rate of only 13.0 % during the first two years in the community, slightly less than similar minimum-security inmates otherwise eligible for the program but who did not participate in it.<sup>61</sup> The study reported that the 13.0% re-arrest rate for boot camp graduates “is substantially lower than that for graduates in similar programs run by State correctional systems,”<sup>62</sup> and described the program as having “demonstrated success

<sup>61</sup> Miles D. Harer & Jody Klein-Saffran, BOP Office of Research and Evaluation, *Evaluation of Post-Release Success for the First 4 Classes Graduating from the Lewisburg Intensive Confinement Center*, at 1 (Nov. 15, 2006).

<sup>62</sup> *Id.* at 6.

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regarding low rearrest rates.<sup>63</sup> It reported that program participants were more likely to have made pre-release employment plans, and that such plans “had a significant and dramatic effect in reducing recidivism.”<sup>64</sup>

Regarding costs, the study estimated that the BOP would save almost \$10,000 in incarceration costs for each inmate who participated in the boot camp program and whose sentence was reduced by the full 6 months, and over \$2,500 for each inmate whose sentence was reduced by 3 months.<sup>65</sup> While the bulk of inmates transferred into the program were not eligible for a sentence reduction, they were eligible for earlier release to a halfway house and home detention.<sup>66</sup>

In addition to cost savings from shorter periods of incarceration, the study found that “the program also has the benefit of returning very low risk offenders sooner to their families and their jobs,” contributing to “inmate family stability, which criminological research shows to be a key element in reducing juvenile delinquency and crime among future generations.”<sup>67</sup> The study suggested that the BOP *expand* the program and inform eligible inmates sooner of the opportunity to participate in it, both to provide an incentive for good behavior and to allow earlier placement in halfway houses for those who participate in the program but who are not eligible for the sentence reduction.<sup>68</sup>

The boot camp program was well received by almost all participants in the federal system. The Sentencing Commission promulgated a guideline addressing it at § 5F1.7, in Part 5 of Chapter 5 (“Sentencing Options”). Both the statutory authorization in 8 U.S.C. § 4046 and the guideline at USSG § 5F1.7 remain in force.

#### RECOMMENDATION

- The BOP should reinstate the federal boot camp program to restore a congressionally favored sentencing option that shortens prison terms, prepares inmates for employment, and returns inmates to their families and communities sooner.

Doing so would also save money. As explained above, home detention costs less than incarceration for minimum-security inmates, who have less need for transitional placement in a halfway house. Minimum-security inmates who complete the boot camp program should have even less need for transitional halfway house time. By reducing the sentence of a minimum-security inmate by six months and then by placing her directly into home detention for the full

<sup>63</sup> *Id.* at 7.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* 1-2 & tbl. 2

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 7-8.

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six months at the end of her sentence, the BOP would save over \$14,000. GAO Report at 19. Although we do not know how many inmates would be eligible for a sentence reduction, even if there were only 1,000 eligible inmates per year, their successful completion of the boot camp program would save taxpayers over \$14 million.

**F. When a State Court Imposes a State Sentence To Run Concurrently with a Previously Imposed Federal Sentence, the BOP Should Execute the Sentences To Achieve Concurrency.**

Some inmates are prosecuted and sentenced in both federal and state court for the same offense. As noted by the GAO, the BOP has the authority to credit time served in a state institution toward an inmate's federal sentence, resulting in concurrent sentences. GAO Report at 28. In many instances, the federal court imposes its sentence before the state court imposes sentence, and does so without specifying whether the federal sentence is to be served consecutively or concurrently with any yet-to-be-imposed state sentence.<sup>69</sup> When the state court later imposes sentence, it may explicitly order it to be served concurrently with the federal sentence already imposed. However, the BOP presently has a policy that allows it to unilaterally reject a state court judge's determination that a state sentence should run concurrently with a previously-imposed federal sentence, creating what amounts to an expensive consecutive sentence imposed by no judge.<sup>70</sup>

In its recent decision in *Setser v. United States*, the Supreme Court emphasized principles of comity and respect for state court decisions. Although the federal court in *Setser* stated at the time of sentencing whether the federal sentence was to be served concurrently or consecutively with the anticipated state sentence, the Court indicated that, in the absence of such a statement, it would be disrespectful to a state's sovereignty for the BOP to decide, *after* the state court has expressly decided to run its sentence concurrently, not to credit the state time served against the federal sentence.<sup>71</sup> The Court suggested that the BOP has no business being engaged in what amounts to sentencing,<sup>72</sup> which is essentially what it is doing when it rejects a state court decision to impose a concurrent sentence. Indeed, the Supreme Court has long held that, in the spirit of comity and mutual respect, the federal government must credit state court judgments, which have equal validity in a system of dual sovereignties with equal sentencing rights.<sup>73</sup> The BOP's rules do not respect state judgments. The Executive Branch has no legitimate interest in

<sup>69</sup> See *Setser v. United States*, \_\_\_ S. Ct. \_\_\_, No. 10-7387, 2012 WL 1019970 (Mar. 28, 2011) (holding that the federal court has the authority to specify whether the federal sentence is to be served concurrently or consecutive to any anticipated state sentence).

<sup>70</sup> BOP Program Statement 5880.28, at 1-32A (June 30, 2007).

<sup>71</sup> *Setser*, 2012 WL 1019970, at \*6.

<sup>72</sup> *Id.*, at \*5 (rejecting an interpretation of § 3621(b) as giving the BOP "what amounts to sentencing authority"); *id.* at \*6 n.5 (noting that to the extent that the Executive may have had effective "sentencing authority" in its ability to grant or deny parole, the Sentencing Reform Act's "principle objective was to eliminate the Executive's parole power" (emphasis in original)).

<sup>73</sup> *Ponzi v. Fessenden*, 258 U.S. 254, 259-60 (1922).

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violating the rules of comity by undercutting a state concurrent sentence through the manner in which it executes the federal sentence.

#### RECOMMENDATION

- The BOP should execute the statute to fully credit a later state sentence that is imposed to run concurrently with a previously imposed federal sentence.

Non-judicial consecutive sentences create tremendous waste. The GAO reports that the BOP made what was functionally a judicial decision regarding concurrency in 538 such cases in fiscal year 2011, requiring consecutive sentences in the vast majority of these cases. GAO Report at 28-29. The 99 inmate requests for concurrency that were granted resulted in a total of 118,700 fewer days to be served in federal custody. At an average cost of \$77.49 per day of incarceration,<sup>74</sup> these decisions resulted in a savings of \$9.2 million.

An example of waste can be seen in a single example. A federal defendant pleads guilty in federal court to robbery and receives a 20-year federal sentence. The next day, he is released to state court where the state judge imposes a 20-year sentence for robbery, which the judge orders to run concurrently with the federal time, releasing him back to federal authorities. The BOP sends him back to state custody, where he completes the state sentence. Twenty years later, when he is released to the federal detainer, the BOP treats him as having just started his federal sentence. At current costs of incarceration, this *de facto* consecutive 20 year sentence, with maximum good time credits at the BOP's rate of 87.1%, would cost about \$492,144. In the aggregate, the BOP's *de facto* consecutive sentences not only disrespect state courts for no reason, but cost millions of taxpayer dollars.

#### **G. Congress Should Carefully Examine the BOP's Report on the Elderly Offender Pilot Program.**

As part of the Second Chance Act, Congress authorized the BOP to conduct the Elderly and Family Reunification for Certain Non-Violent Offenders Pilot Program.<sup>75</sup> Under that two-year pilot program, the BOP was authorized to waive the statutory requirements for community corrections under § 3624 and release some or all of certain eligible elderly offenders to home detention with the purpose of "determin[ing] the effectiveness of removing eligible elderly offenders from a Bureau of Prisons facility and placing such offenders on home detention until the expiration of the prison term."<sup>76</sup> The BOP was directed to "monitor and evaluate each

<sup>74</sup> Administrative Office, Memorandum from Matthew Rowland to Chief Probation Officers, *Cost of Incarceration and Supervision* (June 3, 2011).

<sup>75</sup> Pub. L. No. 111-199, § 231(g) (2007); 42 U.S.C. § 17541(g).

<sup>76</sup> 42 U.S.C. § 17541(g)(1).

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eligible elderly offender placed on home detention under [the pilot program], and shall report to Congress concerning the experience with the program at the end of the [pilot] period.”<sup>77</sup>

Under the Act, an “eligible elderly offender” is defined primarily by its many exclusions: The offender must be (1) not less than 65 years of age; (2) serving a term of imprisonment other than life; (3) whose term of imprisonment is “based on a conviction for an offense or offenses that do not include any crime of violence, sex offense, or other specified offenses”; (4) who “has served the greater of 10 years or 75 percent of the term of imprisonment”; (5) who “has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described [above]”; (6) “who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described [above]”; (7) “who has not escaped, or attempted to escape” from a BOP institution; (8) “with respect to whom the Bureau of Prisons has determined that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government”; (9) “who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.”

According to the BOP, only 71 inmates were transferred to home detention under the pilot program. The GAO does not report, however, how the BOP made eligibility determinations or which restrictions most impacted eligibility. The GAO reports that the BOP has not yet completed its report concerning its experience with the program, and that the GAO has “ongoing work looking at the results and costs of the pilot” and plans to report on it later this year. GAO Report at 26. At the same time, currently pending before Congress is the Second Chance Re-Authorization Act, S. 1231, which would lower the age of eligibility from 65 to 60, but would leave all other restrictions on eligibility in place.

#### RECOMMENDATION

- Congress should examine very carefully the BOP’s report regarding its experience with the pilot program, as well as any report submitted by the GAO on results and costs to the extent it is based on BOP determinations.
- Congress should consider removing some of the restrictions on eligibility to better address “the humanitarian and financial challenges of housing an aging prison population.”<sup>78</sup>

While some eligibility restrictions are driven by statute, others are driven by BOP discretionary determinations. As demonstrated throughout, the BOP often exercises its discretion in a manner that unnecessarily extends a term of incarceration.

<sup>77</sup> *Id.* § 17541(g)(4).

<sup>78</sup> 153 Cong. Rec. S4430, 4431 (Apr. 12, 2007) (remarks of Senator Kennedy).

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**H. The BOP Should Provide Credit for Post-Arrest Custody by Immigration Authorities Against the Sentence Imposed.**

The statute regarding credit for time served provides broad authority for counting time in pretrial “official detention” in connection with an offense.<sup>79</sup> However, in immigration cases, with no statutory authorization, the BOP implements the statute so that time in administrative custody of Immigration and Customs Enforcement (ICE) is not credited toward time served.<sup>80</sup> In the past ten years, the number of defendants sentenced for immigration offenses in federal court has increased nearly three-fold, from 11,689 in 2000 to 29,717 in 2011.<sup>81</sup> In many of these cases, prisoners are held in immigration custody while the federal criminal prosecution is arranged. Because the time in administrative custody follows ICE’s knowledge of the alien’s unlawful presence, the time easily falls within the scope of “official detention” in relation to the offense.

Nonetheless, the BOP has adopted a rule that categorically denies credit for time spent in administrative custody of the immigration service. The BOP has not articulated a reason for this rule in the administrative record, and there is no conceivable justification for it. At bottom, the rule unnecessarily extends the period of incarceration for large numbers of alien defendants at a cost of millions of wasted dollars. It also creates unwarranted disparity. For example, a bank robber who is first held in state custody for 30 days, then is released to federal custody when the state case is dismissed, receives full credit for the 30 days spent in state custody against the federal bank robbery sentence. But an undocumented alien who spends 30 days in ICE administrative custody before being charged in federal court for being illegally in the country does not receive credit against the federal sentence for the 30 days spent in ICE detention. The BOP’s rule also creates unwarranted sentencing disparities between similarly situated alien defendants, depending on the vagaries of custodial decisions that are irrelevant to the purposes of sentencing.

**RECOMMENDATION**

- The BOP should amend its rules to credit time served in administrative custody of the Immigration and Customs Enforcement.

**Conclusion**

The GAO Report provides an invaluable service in demonstrating huge waste from underutilization of ameliorative statutes. The GAO’s findings serve as an excellent starting point to identify actions the BOP can take, some facilitated by congressional action, that will both reduce the real dangers associated with overcrowding and save taxpayers hundreds of millions of

<sup>79</sup> 18 U.S.C. § 3585(b).

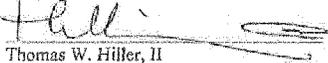
<sup>80</sup> BOP Program Statement 5880.28, at 1-15A (Feb. 14, 1997).

<sup>81</sup> U.S. Sent’g Comm’n, Sourcebook of Federal Sentencing Statistics, tbl.3 (2000); U.S. Sent’g Comm’n, Sourcebook of Federal Sentencing Statistics, tbl. 3 (2011).

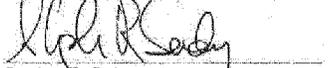
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dollars. The administrative and statutory changes recommended here will also promote reduced recidivism by allowing more inmates to participate in beneficial programs and to be released sooner into the community.

Very truly yours,



Thomas W. Hiller, II  
Federal Public Defender  
Western District of Washington  
Michael Nachmanoff  
Federal Public Defender  
Eastern District of Virginia  
Co-Chairs, Legislative Expert Panel



Stephen R. Sady  
Chief Deputy Federal Public Defender  
District of Oregon

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#### SUMMARY OF RECOMMENDATIONS

##### A. Residential Drug Abuse Program (RDAP) – 18 U.S.C. § 3621(c)

- The BOP should take the steps necessary to ensure that all inmates who successfully complete RDAP receive the full 12-month reduction, regardless of sentence length. This would save over \$45 million a year in prison costs alone, with additional societal savings realized through reduced recidivism, better employment prospects, and stronger family ties.
- The BOP should rescind its categorical rule excluding inmates with detainers from participating in RDAP. This would save *at least* another \$25 million a year, likely much more.
- The BOP should rescind its categorical rules excluding (1) inmates convicted of possession of a firearm and those convicted of a drug offense who received an enhancement under the guidelines because a weapon “was possessed” and (2) inmates previously convicted of an offense involving violence, no matter how minor or how old. This would save many more millions in prison costs, and would likely result in similar rates of reduced recidivism and increased societal benefits.

##### B. Residential Reentry and Home Detention – 18 U.S.C. § 3624(c)

- The BOP should abandon the informal six-month limitation on community corrections and promulgate a regulation that includes a presumption of maximum available community corrections, limited only by considerations of individualized risk and resources.
- The BOP should include as part of this new regulation a description of studies and analyses it considered in arriving at criteria for the exercise of individualized discretion to maximize the duration of community confinement.
- The BOP should direct earlier placement of inmates in RRCs to maximize the ensuing home confinement component of community corrections.
- To maximize savings, the BOP should follow its policy to ensure that more higher-security inmates are placed in RRCs, and more minimum-security inmates are placed directly to home-confinement and for longer periods.

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**C. Good Conduct Time (GCT) – 18 U.S.C. § 3624(b)**

- Congress should pass the legislation proposed by the BOP so that the full 54 days of good time credit will be awarded for each year of imprisonment imposed. This change would save approximately \$40 million in the first year alone.
- The BOP should assure that an inmate's disability, which may impair his ability to participate in educational classes or complete the 240-hour general education program, does not result in a loss of good time credit and unnecessary costs of extended incarceration.
- The BOP should change its methodology for calculating good time credit so that fractions for partial credit are rounded *up*, thereby rewarding the good behavior, treating prisoners fairly, and saving taxpayer dollars.
- The BOP should either promulgate rules to implement good time for sentences adjusted to reflect concurrent state sentences under § 5G1.3(b), or Congress should enact a legislative fix.

**D. Modification of an Imposed Sentence – 18 U.S.C. § 3582(c)**

- The BOP should immediately adopt the Sentencing Commission's broader standard for deciding what constitutes "extraordinary and compelling reasons."
- The BOP should exercise no more than a reasonable gatekeeping function by simply notifying the sentencing judge when such reasons for sentencing modification arguably appear.
- The GAO should carefully examine the BOP's assertion that there are no inmates meeting the criteria for early release under this provision in determining whether this may be an additional area that could be better utilized for increased cost savings.

**E. Shock Incarceration Program – 18 U.S.C. § 4046**

- The BOP should reinstate the federal boot camp program to restore a congressionally favored sentencing option that shortens prison terms, prepares inmates for employment, and returns inmates to their families sooner. Shorter prison terms mean less cost and greater chance for successful reentry.

**F. Elderly Offender Pilot Program – 42 U.S.C. § 17541(g)**

- Congress should examine very carefully the BOP's report regarding its experience with the pilot program, as well as any report submitted by the GAO on results and costs.

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- Congress should consider removing some of the restrictions on eligibility to better address the humanitarian and financial challenges of housing an aging prison population.
- G. Sentence Computation Authority to Allow Concurrent Service of State and Federal Sentences – 18 U.S.C. § 3584**
- The BOP should fully credit a later state sentence that is imposed to run concurrently with a previously imposed federal sentence.
- H. Credit for Time Served in Custody – 18 U.S.C. § 3585(b)**
- The BOP should amend its rules to credit time served in administrative custody of the Immigration and Customs Enforcement.

**ATTACHMENT A****FEDERAL PUBLIC DEFENDER**  
Western District of Washington

*Thomas W. Hillier II*  
*Federal Public Defender*

November 16, 2011

Thomas R. Kane  
Acting Director, Federal Bureau of Prisons  
c/o Rules Unit  
Office of General Counsel, Bureau of Prisons  
320 First Street, NW  
Washington, DC 20534

Re: Comment On Proposed Regulations  
Pre-Release Community Confinement  
76 Fed. Reg. 58197-01 (Sept. 20, 2011)

Dear Director Kane:

This letter is to provide comment on behalf of the Federal Public and Community Defenders regarding the proposed regulation implementing the pre-release community confinement provision of the Second Chance Act (SCA). The Defenders represent the indigent accused in almost every judicial district of the United States pursuant to authorization in 18 U.S.C. § 3006A. The Defenders viewed as a very favorable development the bipartisan support for the SCA's increase of available pre-release community corrections from six to twelve months in 18 U.S.C. § 3624(c). We anticipated that the increased utilization of halfway houses and home detention would promote our clients' more successful reintegration into the community through earlier family reunification, establishment of employment, treatment in the community, and separation from the negative aspects – and dangers – of prison life. The increased length of reentry programming would also reduce prison over-crowding, resulting in safer prisons and lower prison costs.

In contrast to the optimism generated by the SCA's statutory shift in favor of more pre-release community confinement, the Defenders have been disappointed in the Bureau of Prisons (BOP)'s failure to implement meaningful change by continuing the informal rule that effectively limits pre-release community confinement to six months. The proposed regulation does nothing to correct the BOP's failure to effectuate Congress's directive that the optimum duration of community corrections should be addressed by regulation and that the available period of community corrections for individual prisoners should be doubled from six to twelve months. Our comments address three aspects of the new regulation. First, the regulation appears to violate Congress's requirement that the BOP "shall" promulgate regulations to ensure that the length of community corrections is "of sufficient duration to provide the greatest likelihood of successful reintegration into the community." 18 U.S.C. § 3624(c)(6)(C). Second, the regulation should presume that the maximum period of community corrections should be provided, absent individualized factors disfavoring community corrections for a particular prisoner. Third, the regulation implementing the SCA should reject the

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current informal limitation to six months of community corrections, absent extraordinary circumstances, which is unsupported by empirical evidence and, in effect, nullifies the SCA's increase in the available time in community corrections.

**A. The Proposed Regulation Does Not Comply With The Congressional Instruction To Address The Optimal Duration Of Pre-Release Community Corrections.**

An essential component of the SCA's change in reentry policy was the doubling of the available pre-release community corrections – halfway houses and home detention – from six to twelve months. 18 U.S.C. § 3624(c). The same statute required that, within 90 days of enactment, the BOP “shall” implement the reforms to the pre-release community placement statute through the formal procedures provided under the Administrative Procedure Act (APA). 18 U.S.C. § 3624(c)(6) (“The Director of the Bureau of Prisons *shall* issue regulations” regarding the “sufficient duration” of community corrections) (emphasis added)). “[D]iscretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.” *Bennett v. Spear*, 520 U.S. 154, 172 (1997). Here, Congress used the mandatory word “shall.” The BOP must follow procedural requirements for an exercise of discretion to be lawful: “[T]he promulgation of [the] regulations must conform with any procedural requirements imposed by Congress” because “agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which assure fairness and mature consideration of rules of general application.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) (citations omitted).

The SCA explicitly refers to the need for reentry policies to be empirically based. 42 U.S.C. § 17541(d). Congress's intention that the BOP engage in notice-and-comment rule-making effectuates this approach by giving the public and interested organizations, like the Defenders, the opportunity to provide input regarding the duration of community corrections. See *Chrysler Corp.*, 441 U.S. at 316 (“In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.”); see also Conf. Rep. to Consolidated Appropriations Act of 2010, 155 CONG. REC. H13631-03, \*H13888 (daily ed. Dec. 8, 2009) (directing the BOP to consult with the public and experts regarding reentry issues). Congress also made the judgment that agencies must do more than simply repeat statutory language: agencies are required to articulate their rationale and explain the data upon which the rule is based. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962). Nevertheless, the proposed regulation provides none of the material required for informed rule-making. Instead, the BOP issued the informal memoranda with no support in best practices, no social science studies, and no articulated rationale with any support in the literature. The proposed regulation appears to be unlawful because it fails to address a critical question that Congress determined should be addressed by fair and neutral rule-making, not by administrative fiat.

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**B. The Regulation Should Incorporate A Presumption of Maximum Community Corrections In Order To Promote Successful Reentry And To Save Taxpayer Money.**

The SCA's amendment of § 3624(c) rests on three assumptions apparent from the legislation: the amount of available time in community corrections should be doubled; the likelihood of successful reentry will be enhanced by earlier reintegration through family reunification, employment, and treatment in the community; and the costs of incarceration can be ameliorated by greater utilization of community resources for those determined not to create substantial risks in the community. The proposed regulation does nothing to further these legislative goals. The BOP should promulgate a regulation that furthers the SCA's reentry goals by presumptively permitting the maximum time available for community corrections, with less time depending on individualized safety factors and availability of facilities.

Congress's intent that placements be longer is reinforced by the Consolidated Appropriations Act of 2010, which provides:

Because BOP has indicated that approximately \$75,000,000 is required to implement fully its Second Chance Act responsibilities, the conferees expect the Department to propose significant additional funding for this purpose in the fiscal year 2011 budget request, including significant additional funding for the enhanced use of Residential Reentry Centers (RRC) as part of a comprehensive prisoner reentry strategy. The conferees also urge the BOP to make appropriate use of home confinement when considering how to provide reentering offenders with up to 12 months in community corrections.

155 CONG. REC. at H13887. Congress thus clearly expressed its continued intention that the BOP fully use its authority to place federal prisoners in the community for as long a period as appropriate to ensure the greatest likelihood of successful reintegration – including greater utilization of halfway houses and home confinement. Congress has indicated that funding considerations will not be tolerated as an excuse for failing to implement fully BOP's responsibilities under the SCA. The six month limit is inconsistent with the statutory instruction to enhance and to improve utilization of community confinement for federal prisoners.

By increasing pre-release community corrections, the BOP can substantially reduce prison over-crowding in facilities that are currently at about 137% of capacity. With greater over-crowding, the danger to both prisoners and correctional officers increases. At the same time, the agency can save scarce resources, redirecting them toward more effective rehabilitative programs. With the exception of foreign nationals, almost all of the 217,363 federal prisoners are eligible for community corrections under the SCA (about 26% of federal prisoners are aliens with immigration holds), with about 45,000 transferred to the community each year.

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Besides the greater freedom at stake, enormous savings are available. For one year, incarceration in prison costs about \$28,284.00; in a halfway house \$25,838.00; and home detention about \$3,000.00.<sup>1</sup> So if prisoners were transferred from prison to home confinement even one month earlier, the BOP could save about \$94.8 million each year.<sup>2</sup> By increasing the average time in home detention by three months, the BOP would save about \$284.4 million every year. Similarly, the cost to keep prisoners in halfway houses rather than in prison for an additional month would save about \$9.2 million.<sup>3</sup> The difference for three months would be \$27.6 million. And these savings would multiply with each additional year that the SCA is fully implemented. The proposed regulation does not address either the financial or human costs associated with maintaining the status quo.

The BOP should honor both the spirit and letter of the rule-making process. The regulation should be precise so that the public has a meaningful opportunity to comment. The Defenders suggest that the final regulation include, or at a minimum address, the following:

- \* A presumption of maximum community confinement to facilitate reentry and to save money, with less time based on individual risk factors and resource availability;
- \* A description of any studies and analyses considered in arriving at criteria for the exercise of discretion to maximize the duration for community confinement to achieve successful reintegration;
- \* Early placement of prisoners in residential reentry facilities to maximize the home confinement component of community corrections.

In times like these when prisoners are facing great obstacles to successful reintegration, the BOP, through its policies and regulations, should strive to make the difficult transition easier. The SCA provides a clear message that up to the full available year of community corrections should be

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<sup>1</sup> Annual Determination Of Average Cost Of Incarceration, 76 Fed. Reg. 57081 (Sept. 15, 2011); Memorandum from Matthew Rowland to Chief Probation Officers Cost of Incarceration (May 6, 2009).

<sup>2</sup> With 1/12 of the \$3000 yearly cost of home confinement equaling \$250 for one month, subtracted from one month of prison at \$2357 (1/12 of the 28,284 annual costs), equals \$2,107, multiplied by 45,000, the number of prisoners released each year to community corrections, equals \$94,815,000.

<sup>3</sup> The difference every month of \$204.00, multiplied by the 45,000 prisoners released equals \$9,180,000.

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utilized to reach the greatest likelihood of success on supervised release. The BOP should promulgate a regulation to achieve the SCA's goal by presuming that the prisoner should receive the maximum available community corrections, limited by individualized assessments regarding public safety and available community resources.

**C. The Six-Month Informal Rule Should Be Rejected.**

The need for a regulation regarding the duration of community corrections is especially acute because, in the absence of a regulation on the subject, the default directive is the BOP's informal six-month rule under memorandums to staff and program statements. The only rationale for the six-month rule proffered by the BOP related to the supposed optimum time in a halfway house. In fact, the evidence presented in the case in which Judge Marsh invalidated the earlier regulation established that the six-month norm was based on erroneous assumptions. Most glaringly, the evidence disclosed that the Director of the BOP erroneously believed there were studies supporting the rule, but the BOP's own records established that no such studies exist:

- The Director claimed that "our research that we've done for many years reflects that many offenders who spend more than six months in a halfway house tend to do worse rather than better. The six months seems to be a limit for most of the folks, at which time if they go much beyond that, they tend to fail more often than offenders that serve up to six months."<sup>4</sup>
- The BOP's research department could not back up the Director's claim, stating "I am trying to find out if there is any data to substantiate the length of time in a 'halfway house' placement is optimally x number of months. That is, was the '6-month' period literally one of tradition, or was there some data-driven or empirical basis for that time frame? . . . I've done a lot of searching of the literature, but so far have not found anything to confirm that the '6-months' was empirically based."<sup>5</sup>

Because the BOP had no meaningful experience with community corrections greater than six months, the erroneous assumption regarding "research" was especially prejudicial. Rather than being

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<sup>4</sup> United States Sentencing Commission, *Symposium On Alternatives To Incarceration*, at 267 (July 15, 2008).

<sup>5</sup> *Sacora v. Thomas*, CV 08-578-MA, CR 48-9 (D. Or. Mar. 1, 2010) (exhibit in support of memorandum of law).

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based in empirical research, the six-month rule may simply be a vestige of litigation positions that have been superseded by the SCA.<sup>6</sup>

Even if the erroneous belief regarding halfway house studies had not been debunked, the SCA could still have been implemented to make a difference: even with a six-month limit on the duration of halfway house placements, earlier placement would allow for up to six months of additional time in home detention under § 3624(c)(2). The SCA clearly permits such a change, which would result in significant savings. More importantly for prisoners, earlier community corrections would enable them to accelerate their reintegration into the community through family reunification, work, treatment, and other appropriate community-based programming. The proposed regulation fails to address this aspect of the SCA, leaving intact the informal and unsupported six-month rule.

The six-month informal rule is also irrational because its “extraordinary justification” exception is indistinguishable from “extraordinary and compelling reasons” under 18 U.S.C. § 3582(c). The informal rule states that pre-release community corrections exceeding six months may be permitted only with “extraordinary justification.” Program Statement 7310.04 at 8 (Dec. 16, 1998). But under § 3582(c), the BOP is supposed to alert the district court by filing a motion to reduce the sentence for “extraordinary and compelling reasons.” The informal rule, by using an indistinguishable standard, creates an irrational and unworkable system in which BOP personnel, instead of permitting more than six-months of community corrections, should be mooting the question by moving the district judge to reduce the sentence.

### Conclusion

An essential component of the SCA is the doubling of the available time for pre-release community corrections. By essentially maintaining the pre-SCA status quo, and by failing to promulgate a regulation on the optimal duration for community corrections, the BOP misses the opportunity to implement Congress’s intent that reentry be eased by increased custody in the community, with its concomitant promotion of family unity, community-based treatment, and employment in the prisoner’s home region. The Defenders speak in one voice in encouraging the BOP to implement the SCA by promulgating a regulation on the duration of pre-release community

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<sup>6</sup> Starting in 2002, the BOP has argued that no community confinement could exceed six months. The pre-SCA litigation depended on two things: the discretion to place prisoners in community confinement under 18 U.S.C. § 3621(b); and the six-month limitation on pre-release custody under the former § 3624(c). With the SCA, Congress has reaffirmed the BOP’s authority to place prisoners in community confinement at any time and expanded the pre-release custody to twelve months. Thus, the informal six-month rule no longer has any basis in the relevant statutes.

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corrections that abandons the informal six-month limitation and presumes the maximum available community corrections, limited only by individualized safety and resource considerations.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hillier", with a long horizontal line extending to the right and ending in a small arrowhead.

Thomas W. Hillier, II  
Federal Public Defender

TWH/mp

September 18, 2013

The Honorable Jim Sensenbrenner  
Chairman, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Louie Gohmert  
Vice Chairman, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Robert C. "Bobby" Scott  
Ranking Member, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

**RE: Hearing on Oversight of the Federal Bureau of Prisons**

Dear Chairman Sensenbrenner, Vice Chairman Gohmert, and Ranking Member Scott:

We are writing to express our support for actions that can be taken by the Federal Bureau of Prisons (BOP) to reduce unnecessarily lengthy incarceration and costs in the federal prison system. Several of our organizations are dedicated to promoting a fair and just criminal justice system and have been engaged in research and advocacy at the federal and state levels for several decades. We welcome this opportunity to draw on our extensive experiences to share lessons on how to achieve effective reform. Given limited resources, we urge the BOP to prioritize evidence-based policies and programs that would reduce the population and cost of the federal corrections system without compromising public safety.

**Introduction**

A report by the Congressional Research Service (CRS) found that the number of people confined under the BOP's jurisdiction grew from about 25,000 in 1980 to nearly 219,000 in 2012 – an increase, on average, of about 6,100 individuals each year.<sup>1</sup> Despite disproportionate investment

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<sup>1</sup> Congressional Research Service, "The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options," by Nathan James (R42937; Jan. 22, 2013).

in prison capacity in recent decades, our federal system remains severely overcrowded. Funding for BOP now makes up a quarter of the Department of Justice (DOJ) budget.

As Attorney General Eric Holder said recently to a gathering of the American Bar Association, “Widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable. It imposes a significant economic burden – totaling \$80 billion in 2010 alone – and it comes with human and moral costs that are impossible to calculate.”

We now have a generation of evidence-based reforms throughout the country that have reduced prison populations and costs at the state level without adverse impacts on public safety. BOP can replicate this success using its existing authority by adopting the practices described below.

#### **Residential Drug Abuse Treatment Program**

The BOP can and should expand the use of its Residential Drug Abuse Treatment Program (RDAP). Congress mandated that the BOP make available substance abuse treatment for each person in BOP custody with a “treatable condition of substance addiction or abuse” and created an incentive for people convicted of nonviolent offenses to complete the program by authorizing a reduction of incarceration of up to one year. However, the full cost-saving benefits of RDAP are not currently being realized. For example, according to a Government Accountability Office (GAO) report that assessed the program, from 2009 to 2011 only 19% of those who qualified for a 12-month sentence reduction after completing the program received the maximum sentence reduction. On average, eligible RDAP graduates received only an eight-month reduction.<sup>2</sup>

BOP also has an opportunity to significantly expand the eligible pool benefiting from a sentence reduction and further increase savings and reduce overcrowding. For example, BOP should revise its definition of “violent offender” to exclude people whose offense involved mere possession of a firearm, rather than actual violence. Moreover, because BOP policy requires completion of RDAP in a community corrections facility, those with detainees are barred from residential placement and cannot benefit from RDAP’s sentence reduction. Many of those disqualified are low-level undocumented immigrants. According to BOP estimates, changing BOP policy to allow completion of RDAP by this population alone would save \$25 million each year because of reduced time in prison.<sup>3</sup> We are encouraged that the BOP is considering this policy change and urge you to support participation by undocumented immigrants.

#### **Compassionate Release**

Unless one of several rare exceptions applies, a court may not revisit a sentence once a conviction is finalized.<sup>4</sup> One of those exceptions is when the BOP Director asks the court to

<sup>2</sup> Government Accountability Office, Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates’ Time in Prison 13-14 (2012), available at <http://www.gao.gov/products/GAO-12-320> (hereinafter “GAO Report”).

<sup>3</sup> GAO Report at 35.

<sup>4</sup> See 18 U.S.C. § 3582.

reduce a sentence because “extraordinary and compelling” reasons warrant such a reduction.<sup>5</sup> For many years, the Bureau limited “extraordinary and compelling circumstances” to those cases where the prisoner had a terminal illness with a life expectancy of one year or less or had a profoundly debilitating medical condition.<sup>6</sup> However, the U. S. Sentencing Commission promulgated a guideline in 2007 that delineated additional circumstances a court could take into account, including “the death or incapacitation of the inmate’s only family member capable of caring for the inmate’s minor child or children or any other reason determined by the Director.”<sup>7</sup> This summer, BOP set forth additional guidelines, expanding eligibility to the parents of minor children contemplated by the Commission and extending eligibility to certain other prisoners, including revised criteria for elderly inmates who did not commit violent crimes and who have served significant portions of their sentences.<sup>8</sup>

We are heartened by the expanded grounds announced by the BOP, but concerned that, until now, the sentence reduction authority has been rarely invoked. We urge the Bureau to take full advantage of the new guidelines to identify and bring to the court’s attention all worthy cases that meet the outlined criteria.

#### **Community Confinement**

The BOP is obligated by law to ensure people in federal prison have an opportunity to spend a portion of time at the end of their sentences “(not to exceed 12 months) under conditions that will afford [them] a reasonable opportunity” to prepare to return to society.<sup>9</sup> The statute provides that the BOP may transfer eligible people to contract residential re-entry centers (RRCs), also called halfway houses, and, up to the lesser of 6 months or ten percent of the term of imprisonment, in home confinement for up to the one-year total that Congress provides in the Second Chance Act.<sup>10</sup>

The Second Chance Act sponsors understood the role that halfway houses play in the management of the federal prison population and explicitly rejected the Bureau’s alteration of policies in 2002 and 2005 limiting halfway house use, and expanded the law’s guarantee of consideration for pre-release programming from six to 12 months. The Second Chance Act specifically amended the law governing RRC transfers to instruct the BOP to ensure that placement in community corrections be “of sufficient duration to provide the greatest likelihood of successful reintegration into the community.”<sup>11</sup> Stays in RRCs alone in 2010 averaged only 95 days and people released to RRCs and home detention averaged only 4.5 months.<sup>12</sup> Although the

<sup>5</sup> See 18 U.S.C. § 3582(c)(1)(A).

<sup>6</sup> GAO Report at 25.

<sup>7</sup> See U.S.S.G. § 1B1.13, app. note A.

<sup>8</sup> BOP Program Statement No. 5050.49

<sup>9</sup> 18 U.S.C. § 3624(c)(1).

<sup>10</sup> Second Chance Act of 2007, Pub. L. No. 110-199, § 251 (2008).

<sup>11</sup> 18 U.S.C. § 3624(c)(6).

<sup>12</sup> GAO Report at 17, Tbl. 2.

BOP has begun to give staff more discretion about how much time people must serve in halfway houses, who should be placed in a halfway house, and who may be placed directly on home confinement, much more needs to be done to ensure that people benefit from the full 12-month reentry period. While the BOP cites high costs and lack of space, the 2012 GAO report notes that the BOP failed to clarify the cost of RRC beds and home detention services and that it provided “no road map” as to how to secure this information.

The limited use of RRCs and home detention is an area where the BOP can improve the implementation of Second Chance Act directives. We urge you to ascertain up-to-date costs and savings possible under the program; to ask the BOP why its use of halfway houses and home detention has been so sparing; and determine what the BOP might need to implement the directives in the Second Chance Act.

#### **Conclusion**

Federal prison populations and costs cannot truly be addressed without Congressional action to reduce the number of people entering federal prison each year. For example, the U.S. Sentencing Commission concluded that certain mandatory minimum penalties, which apply too broadly, are excessively severe, and are applied inconsistently, have led to an explosion in the federal prison population and spending on federal prisons.<sup>13</sup> Nevertheless, the Administrative changes described above would both save money and promote successful reentry, increasing public safety. We urge you to use your influence to promote these policies.

Sincerely,

Drug Policy Alliance  
Families Against Mandatory Minimums (FAMM)  
The Leadership Conference on Civil and Human Rights  
National African American Drug Policy Coalition, Inc.  
Open Society Policy Center  
The Sentencing Project  
United Methodist Church, General Board of Church and Society

cc: Members of the U.S. House of Representatives Subcommittee on Crime, Terrorism,  
Homeland Security, and Investigations

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<sup>13</sup> U.S. Sentencing Commission, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 367-69 (2011), available at [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RIC\\_Mandatory\\_Minimum.cfm](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RIC_Mandatory_Minimum.cfm).

The Leadership Conference  
on Civil and Human Rights

1629 K Street, NW 202.466.3311 voice  
10th Floor 202.466.3435 fax  
Washington, DC www.civilrights.org  
20006



September 19, 2013

The Honorable Jim Sensenbrenner, Chairman  
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Louie Gohmert, Vice Chairman  
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Robert C. "Hobby" Scott, Ranking Member  
Subcommittee on Crime, Terrorism, Homeland Security, and Investigations  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

**RE: Hearing on Oversight of the Federal Bureau of Prisons**

Dear Chairman Sensenbrenner, Vice Chairman Gohmert, and Ranking Member Scott:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 210 national organizations to promote and protect the civil and human rights of all persons in the United States, we write to express our support for the expanded use of evidence-based policies and programs by the Federal Bureau of Prisons (BOP) to reduce overcrowding and the costs of incarceration in the federal prison system. We urge you to use your influence with the BOP to promote policy changes to three critical programs: the Residential Drug Abuse Treatment Program (RDAP), Compassionate Release and Community Confinement.

A recent report by the Congressional Research Service (CRS) found that the federal prison population has grown since 1980 by an alarming 790 percent, from approximately 25,000 people to more than 219,000 people. The agency's facilities are operating at almost 140 percent capacity. The president's FY 2014 budget request for BOP was \$6.9 billion, accounting for more than 25 percent of the Department of Justice's (DOJ) entire budget.

The Leadership Conference believes the nation can no longer afford to incarcerate such large numbers of people for such long prison sentences. Criminal justice reform models employed by state and local governments have proven that there are a number of evidence-based reforms that can reduce both costs and the prison population without a negative impact on public safety. These reforms and policy changes are discussed below.

- Officers**
- Chair**  
Jed E. Lohman  
National Partnership for  
Women & Families
- Vice Chair**  
Lisa White John  
National Congress of American Indians  
Thomas A. Sawyer  
Mexican American Legal  
Defenders and Educational Fund  
Hilary Shelton  
NSACP
- Secretary**  
Barry Riedel  
AARP  
**Treasurer**  
Lisa A. Souters  
American Suburban and Small  
County & Municipal Officials
- Executive Committee**  
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Child Rights Under Law  
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Michael S. Reagan  
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International Union, UAW  
Elizabeth MacDonnell  
League of Women Voters of the  
District of Columbia  
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Jason Morgan  
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Tory Shott  
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Athena Rocco  
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of Reform Judaism  
Shirley Smith  
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Executive Vice President & COO  
NSACP Liaison

September 19, 2013  
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#### Residential Drug Abuse Treatment Program

We urge the BOP to exercise its authority to expand the use of the RDAP. Congress mandated that the BOP make available substance abuse treatment for each person in BOP custody with a “treatable condition of substance addiction or abuse” and created an incentive for people convicted of nonviolent offenses by authorizing a one-year sentence reduction upon completion of the program. However, according to a Government Accountability Office (GAO) report that assessed the program, from 2009 to 2011 only 19 percent of those who qualified for a 12-month sentence reduction after completing the program received the maximum sentence reduction. On average, eligible RDAP graduates received only an eight-month reduction.<sup>1</sup> Expansion of the use of RDAP to allow for the maximum sentence reduction would significantly impact costs and overcrowding.

Moreover, the BOP also has an opportunity to expand significantly the eligible pool benefiting from a sentence reduction and further increase savings and reduce overcrowding. For example, the BOP should revise its definition of “violent offender” to exclude people whose offense involved mere possession of a firearm, rather than actual violence. Further, the BOP should revise its policy to allow completion of the RDAP by those with detainees, who in many instances are low-level undocumented immigrants. Currently, BOP policy requires placement in a community corrections facility to complete the RDAP, which disqualifies this population. According to BOP estimates, changing BOP policy in this area alone would save \$25 million each year due to reduced time in prison.<sup>2</sup> We are encouraged that the BOP is considering this policy change, and urge you to support participation of undocumented immigrants in the program.

#### Compassionate Release

The Sentencing Reform Act of 1984 gave the BOP authority to request that a federal judge reduce an inmate’s sentence for “extraordinary and compelling” circumstances. This practice is also known as compassionate release. The request can be based on either medical or non-medical conditions that could not reasonably have been foreseen by the judge at the time of sentencing. While consistency and the finality of sentences are an important goal of the criminal justice system, judicial discretion and review is equally as important to ensure the fairness of punishment and that the system continues to serve the purpose of justice. Congress recognized the importance of ensuring that justice be balanced with mercy when it created compassionate release.<sup>3</sup> It is the U.S. Sentencing Commission’s responsibility to determine the definition of “extraordinary and compelling” circumstances and it has addressed this in its policy statements.

Under 18 U.S.C. § 3582(c) (1) (A) (i), the BOP has authority to petition for compassionate release. Yet the BOP has been reluctant to use this authority in a manner consistent with the Sentencing Commission’s current policy statement. Even though the Commission promulgated a more expansive interpretation of “extraordinary and compelling,” the BOP issued regulations reiterating a very narrow “terminal illness/total disability” standard for seeking reduction of a prison term under this statute, inconsistent with the Sentencing Commission’s definition. The Commission’s definition does not require “total” disability and also allows for consideration of a family member’s death or inability to care for minor children or any

<sup>1</sup> Government Accountability Office, Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates’ Time in Prison 13-14 (2012), available at <http://www.gao.gov/products/GAO-12-320> (hereinafter “GAO Report”).

<sup>2</sup> GAO Report at 35.

<sup>3</sup> FAMM and Human Rights Watch, *THE ANSWER IS NO: Too Little Compassionate Release in US Federal Prisons* (December 2012)

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other reason determined by the Director. The BOP has administered its far narrower test in fewer than 30 cases each year.<sup>4</sup>

According to the Department of Justice's recent letter to the Sentencing Commission, DOJ is in the process of reviewing and modifying aspects of the "Reduction in Sentence" program, has issued new medical criteria for evaluating requests, and is considering non-medical criteria.<sup>5</sup> Although the Department's comment signals steps in the right direction, we urge the BOP to not only evaluate amending its policy statement, but also to continue to work to bring its compassionate release policy in line with that of the Sentencing Commission's, and to improve the application process to include basic procedures to ensure fair and reasoned decision making. Ultimately, the BOP should align its policy with that of the Sentencing Commission, which would provide more opportunities for resentencing under these circumstances and provide resource saving sentence reductions.

#### Community Confinement

Under current law, the BOP is required to ensure people in federal prison have an opportunity to spend a portion of time at the end of their sentences "(not to exceed 12 months) under conditions that will afford [them] a reasonable opportunity" to prepare to return to society.<sup>6</sup> The statute provides that the BOP may transfer eligible people to contract residential re-entry centers (RRCs), also called halfway houses, and, up to the lesser of 6 months or ten percent of the term of imprisonment, in home confinement, for up to the one-year total that Congress provides in the Second Chance Act.<sup>7</sup>

Understanding the important role that halfway houses play in the reentry process, the Second Chance Act specifically amended the law governing RRC transfers to instruct the BOP to ensure that placement in community corrections are "of sufficient duration to provide the greatest likelihood of successful reintegration into the community."<sup>8</sup> In 2010, stays in RCC's averaged only 95 days and people released to RRCs and home detention averaged only 4.5 months.<sup>9</sup> Although the BOP has begun to give staff more discretion in how much time people must serve in halfway houses, in determining who should be placed in a halfway house, and who may be placed directly on home confinement, much more needs to be done to ensure that people benefit from the full 12-month reentry period. While the BOP cites high costs and lack of space, the 2012 GAO report notes that the BOP failed to clarify the cost of RRC beds and home detention services and that it provided "no road map" as to how to secure this information.

The limited use of RRCs and home detention is an area where the BOP can improve the implementation of Second Chance Act directives. We urge you to ascertain up-to-date costs and savings possible under the program; to ask the BOP why its use of halfway houses and home detention has been so limited; and to determine what the BOP might need to implement the directives in the Second Chance Act.

In sum, reductions in the federal corrections populations and costs cannot truly be addressed without Congressional action to reduce the number of people entering federal prison each year. The Leadership

<sup>4</sup> *Id.* at 2

<sup>5</sup> U.S. Department of Justice Annual, Criminal Division, Annual Report to U.S. Sentencing Commission Commenting on its proposed priorities for the guideline amendment year ending May 1, 2014. <http://www.justice.gov/criminal/61a/docs/2013annual-letter-final-071112.pdf>

<sup>6</sup> 18 U.S.C. § 3624(c)(1).

<sup>7</sup> Second Chance Act of 2007, Pub. L. No. 110-199, § 251 (2008).

<sup>8</sup> 18 U.S.C. § 3624(c)(6).

<sup>9</sup> GAO Report at 17, Tbl. 2.

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Conference urges Congress to consider the overall aims of the criminal justice system to not only deter and punish but also rehabilitate, while working to alleviate the problems of mass incarceration, disparities in sentencing, and overspending. More specifically, we ask you to use your influence to urge the BOP to implement the administrative changes described above.

Thank you for your attention to our concerns. If you have any questions, please contact Sakira Cook, Senior Policy Associate, at [cook@civilrights.org](mailto:cook@civilrights.org) or (202) 263-2894.

Sincerely,

Handwritten signature of Wade Henderson in black ink.

Wade Henderson  
President & CEO

Handwritten signature of Nancy Zirkin in black ink.

Nancy Zirkin  
Executive Vice President

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Mr. SENSENBRENNER. Without objection, all Members will have 5 legislative days to submit additional written questions for the witness or additional materials for the record.

And without objection, the hearing is adjourned.

[Whereupon, at 11:02 a.m., the Subcommittee was adjourned.]

A P P E N D I X

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MATERIAL SUBMITTED FOR THE HEARING RECORD

**Questions for the Record submitted to the Honorable Charles E. Samuels,  
Jr., Director, Federal Bureau of Prisons\***

BOB GOODLATTE, Virginia  
CHAIRMAN

F. JAMES SENSENBRENNER, JR., Wisconsin  
HOWARD COBLE, North Carolina  
LAMAR SMITH, Texas  
STEVE CHABOT, Ohio  
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ONE HUNDRED THIRTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON THE JUDICIARY  
2138 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6216  
(202) 225-3951  
<http://www.house.gov/judiciary>

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October 31, 2013

Mr. Charles E. Samuels, Jr.  
Director  
Federal Bureau of Prisons  
320 First Street, NW  
Washington, D.C. 20534

Dear Mr. Samuels,

The Judiciary Committee's Subcommittee on Crime, Terrorism, Homeland Security and Investigations held a hearing on "Oversight of the Federal Bureau of Prisons" on Thursday, September 19, 2013 at 10:00 a.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the subcommittee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Alicia Church at [alicia.church@mail.house.gov](mailto:alicia.church@mail.house.gov) by December 2, 2013. If you have any further questions or concerns, please contact Robert Parmiter of my staff at [robert.parmiter@mail.house.gov](mailto:robert.parmiter@mail.house.gov).

Thank you again for your participation in the hearing.

Sincerely,



Bob Goodlatte  
Chairman

\*The Committee had not received a response to these questions at the time this hearing record was finalized and submitted for printing on April 2, 2014.

Questions for the Record for Director Charles E. Samuels, Jr.  
House Committee on the Judiciary  
Hearing on Oversight of the Federal Bureau of Prisons  
September 19, 2013

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**Questions from Chairman Sensenbrenner**

**Inmate Population**

1. You testified that approximately 50 percent of BOP's population is serving a sentence for drug trafficking. What percentage of BOP's population is serving a sentence for drug possession?
  - a. How many that are incarcerated for simple possession were originally charged with a higher offense (e.g., possession with intent to distribute or a drug trafficking offense)?
  - b. Is it fair to say that the majority of drug offenders in federal prison are dealers and traffickers?
  - c. Of the 50 percent that are there for drug trafficking offenses, how many would you consider to be "low-level, non-violent offenders"?
2. You testified that only 5 percent of your inmates are "violent offenders." However, your written testimony says 75 percent of medium-security and 90 percent of high-security inmates have a history of violence.
  - a. What percentage of BOP's total population are repeat offenders, or offenders with a history of violence?
  - b. Does BOP consider an inmate's history of violence when classifying the inmate as violent?

- c. Does BOP consider an inmate's history of violence when placing the inmate?
3. You testified that your high-security facilities are 53 percent overcrowded. Are high-security offenders typically repeat or violent offenders?
  - a. How many of your inmates are category 3 criminal history or higher?
  - b. How many of your inmates are incarcerated on gun charges?
4. What percentage are immigration offenders?
5. Isn't it true that in fiscal year 2012, nearly half of the individuals sentenced to federal prison were non-U.S. citizens?
6. You testified that 11 percent of inmates in BOP custody are there for immigration offenses. That's over 24,000 of your approximately 219,000 inmates. You also testified that 26 percent of your inmates – nearly 57,000 inmates – are non-U.S. citizens.
  - a. What do you mean by "immigration offenses"? Please provide a breakdown of what those "immigration offenders" are actually incarcerated for.
  - b. How many of the immigration offenders are currently in removal proceedings?
    - i. If those inmates, or a large chunk of them, were deported, would that help alleviate the crowding problem?
    - ii. Do you have agreements with ICE to house their detainees?
    - iii. Is that generally short-term, or only until ICE picks them up for removal?

- c. BOP recently proposed using \$26.2 million to buy an additional 1,000 contract beds to house low-security male criminal aliens.
  - i. By how much will this alleviate crowding at low-security BOP-operated facilities?
  - ii. Does BOP plan to expand bed-space at existing contracted facilities or open a new competitive bidding process for contract bed-space?
- 7. Your testimony talks about the "Smart on Crime" initiative and corresponding changes to BOP's Compassionate Release policy.
  - a. What are those changes? You testified they will have a "modest" effect – what does that mean? By how much do you anticipate they will reduce your population?
- 8. Your testimony talks about expansion of RDAP to 81 institutions. What effect will that have on your population?
- 9. The Attorney General has reported that the U.S. prison population has grown by almost 800% since 1980, and federal prisons are operating at nearly 40% above capacity, estimating that overcrowding at the federal, state and local levels imposes a significant economic burden -- totaling \$80 billion in 2010.
  - a. Please explain how these economic costs were developed. Has BOP estimated costs due to overcrowding in 2012 and 2013? Has BOP projected these costs for 2014?
- 10. Following up on your appropriations testimony in April 2013, how would you describe BOP's interest and progress in working with Congress to alleviate crowding through legislative changes, such as expansion of compassionate release, additional sentencing

flexibilities within the federal court system, increasing good conduct time, changing drug sentencing laws, or other legislative changes?

11. BOP's recent budget proposal discusses alternatives to traditional incarceration, such as expanded home incarceration/monitoring programs. Which alternatives are you specifically proposing and how do they differ from existing options?
  - a. Which inmates will be eligible?
  - b. What outcomes do you anticipate through use of each specific alternative? Are there specific financial savings you envision?
12. To what extent does BOP measure the effectiveness of placing inmates in segregated housing units (e.g. SHUs, SMUs, ADX and "solitary confinement") in improving institutional safety? Why has BOP not completed a study to assess the impact of segregated housing units on inmates and institutional safety?
13. Can you explain the term "rated capacity" to me, as it relates to overcrowding?
14. If a prison is rated for triple bunking, would that triple-bunking still count as "crowding"?
15. Will the four prisons BOP has in the pipeline for activation solve the crowding problem?
  - a. If not, what effect will the new prisons have on crowding? How many more prisons would be necessary to bring the crowding down to zero?
16. A DOJ study in 2010 found that BOP's overall staff to inmate ratio was just over 5 to 1, but a September 2012 GAO report found that the actual ratio of on-duty correctional officers to inmates can be about 76 to 1. And, we have heard stories that oftentimes staff to inmate

ratios can reach well above 100 to 1, which puts corrections officers in very dangerous situations – as we tragically learned in Canaan recently. It seems to me like the huge gap between general staff ratios and supervising officer ratios implies that there are a lot of administrative and bureaucratic staff at BOP. Can you explain the enormous discrepancy between these numbers?

### **Budget**

17. While the number of federal inmates has increased over time, the percentage of DOJ's budget that is comprised of BOP costs appears to have kept up or surpassed that increase. In fiscal year 2013, approximately 25 percent of DOJ's budget went to BOP, and BOP's FY 2014 budget request contemplates another increase. And yet, BOP is still experiencing a crowding rate of nearly 40 percent.
  - a. Is the increase in inmates the only factor driving BOP's budget problems?
  - b. Where are there greater efficiencies to be gained in BOP's budgeting practices?
18. In the FY 2014 BOP budget, a number of offsets are cited for a total of almost \$100 million; these include one for Expanded Sentence Credits for Inmates (\$41 million) and one for Renegotiated Medical Costs (\$50 million). What is the likelihood that these assumed savings will occur?
  - a. Isn't the \$41 million in savings dependent on Congressional enactment of an Administration proposal to expand Good Conduct Time?
  - b. Why is that considered as savings in the budget if Congress has not yet passed the proposal?

19. The FY 2014 BOP Budget projects continued annual increases in the BOP prison population from the current level to about 236,000 in FY 2018.
  - a. At current average annual costs per prisoner (\$25,000), 15,000 fewer prisoners would translate to about \$375 million annually. Could these funds be freed up to expand education and drug abuse treatment programs and thereby possibly further reduce recidivism and even decrease total BOP population?
20. BOP's current population is over 219,000 inmates. If your population stopped growing today, would your costs continue to go up?
  - a. If so, how do you explain that?
  - b. If it's due to an aging population, does that mean there are issues with the delivery of medical services?
21. According to GAO, in FY 2011 your "medical" population was 200 inmates lower than it was in FY 2006 (five years earlier).
  - a. Were your medical costs higher in 2011 than in 2006? If so, how do you explain that?
  - b. What is BOP doing to achieve cost efficiencies in the delivery of medical services?
22. How many facilities contract with local hospitals for inmate medical care, rather than using internal BOP staff?
  - a. Are these contracts publicly and competitively bid?
  - b. Are your inmates eligible for Medicare?
23. Your 2014 budget discussed a number of Energy Saving Performance Contracts (ESPCs) and Energy Conservation Measures (ECMs) that have led to cost and energy savings at various institutions.

- a. Please discuss any current plans in place to expand the use of these or other similar measures, and anticipated cost savings from these efforts.
24. At our hearing on wasteful spending last year, Senator Coburn testified about how BOP spends \$1.3 million each year to make hardcopies of prisoner x-rays, even though most x-rays today are digital.
- a. Is this practice still going on?
  - b. Is BOP trying to identify ways like this to modernize its spending?
25. Many states have implemented prison-related initiatives that have helped them reduce costs. What has BOP learned from these?
26. Several states have implemented reforms in their prison facilities by significantly reducing or eliminating the use of special housing units (SHUs). Given the highly restrictive conditions of confinement and comparatively high costs of maintaining and holding inmates in segregated housing units, to what extent is BOP considering how such reforms to reduce the number of inmates in segregation may apply to BOP?
27. BOP's budget proposes \$28M for re-entry and recidivism programming. Please elaborate on your plans for this funding and discuss how projected reductions in recidivism may generate cost savings for the federal prison system.

**New Prison Construction/Thomson Prison**

28. One of BOP's recent budget submissions proposed about \$141 million to activate FCI Berlin, NH and FCI Aliceville, AL; and begin activation of FCI Hazelton, WV; USP Yazoo City, MS; and USP Thomson, IL.

- a. How much will crowding be reduced when all of these facilities are fully operational and at capacity?
  - b. To what extent will Thomson be used to address demands for more restrictive housing and provide additional housing for inmates in segregated housing (such as Administrative Maximum Security (ADX), Special Management Units, or Special Housing Units)?
29. The Department of Justice purchased Thomson Prison in 2012 despite the fact Congress opposed the purchase and the fact that DOJ already had four newly constructed Bureau of Prisons facilities awaiting full funding for operations.
- a. What is the status of Thomson prison? What are the expected costs and timeframes to renovate and activate the Thomson facility?
  - b. How much is it going to cost to secure this large, expensive investment each year while it sits empty, or partially empty?
  - c. How will Thomson alleviate the crowding problem?
  - d. What is the status of the other prisons? How will they alleviate the crowding problem?
30. According to POLITICO, in late 2012 the Obama administration said that Thomson would be used to ameliorate overcrowding amongst "administrative maximum security inmates and others who have proven difficult to manage in high-security institutions." However, according to GAO, in FY 2011 Florence ADX, the only administrative maximum facility in the federal system, was operating 8% below its rated capacity.

- a. Why did the Administration feel it was necessary to spend taxpayer dollars to address a problem that wasn't there?
- b. Couldn't the \$165 million the Obama Administration spent on Thomson have gone toward opening the other empty facilities, decreasing inmate to staff ratios, or expanding reentry and recidivism-reduction programs?

**Recidivism Reduction/Inmate Programs**

31. How much would it cost for BOP to establish enough programs so that every inmate in your custody is involved in programming at some level?
  - a. What would it cost to expand RDAP to include every inmate currently on the waiting list?
  - b. Isn't it true that, to be in RDAP, an inmate has to be diagnosed with a drug dependency? That is, RDAP is not just a program any inmate can sign up for?
  - c. Given that, in what areas is the Bureau planning to expand programming, in order to ensure inmates that do not have a drug dependency still are able to participate in programming that has a demonstrable effect on reducing recidivism?
32. You testified about other programs that have recently been implemented, including Resolve for female offenders with trauma-related mental illness, BRAVE for younger, newly-designated inmates or Skills for cognitively-impaired inmates.
  - a. Are efforts underway to assess the effects of these programs on recidivism, so they might become what RDAP is now?
33. BOP has requested additional funding - \$15 million, to be precise - to expand its Residential Drug Abuse Program (RDAP).

- a. How will this expansion reduce costs and reduce the inmate waiting list?
  - b. How many additional inmates will the program serve, and to what extent?
34. RDAP is staffed by personnel from BOP's Psychology Services department. However, you have a pretty serious vacancy issue there: in FY 2012, of the 569 psychology staff positions allocated, there were 118 vacancies—a vacancy rate of about 21 percent. How does BOP plan to address these vacancies in order to ensure that staff will be available for the expanded RDAP?
35. A BOP Office of Research and Evaluation (ORE) found that participants in BOP's pilot faith-based residential program called Life Connections were less likely to engage in serious misconduct while in the program and that recidivism and prison population sizes in Michigan had declined due to the success of comparable re-entry programs in its state prison system.
  - a. To what extent has BOP expanded on Life Connections or comparable re-entry programs, and does BOP anticipate that such programs could help reduce future prisoner populations?
36. In August, RAND released a major study that concluded education programs in prison for inmates had a marked impact on reducing recidivism.
  - a. To what extent is BOP able to provide educational training to prisoners prior to release; that is, what percent of inmates released from BOP custody have participated in such programs?
37. Both RDAP and Federal Prison Industries (FPI) have been proven to reduce recidivism. What challenges might BOP face in developing new programs that help to reduce recidivism?

- a. Would each program have to be vetted and peer-reviewed, since it would award time credits to inmates based on their participation in the programs? How long would the vetting and peer-reviewing take?
  - b. Who would develop the programs? Who would lead the programs in the facilities, once they've been implemented?
  - c. How much does BOP estimate it would cost to develop new recidivism-reduction programs?
38. Federal Prison Industries currently has a repatriation pilot program going on, involving products from places like China and South America.
- a. Can FPI get enough work via repatriation to keep it from competing with domestic companies?
  - b. Are there other plans for repatriating products?
    - i. Your testimony talks about 17 "potential opportunities" in addition to the current 17 pilot proposals. What are those other opportunities?
39. The OIG recently released a report on FPI management.
- a. OIG said it was unable to gauge how well FPI's job-sharing program was working, due to a lack of reliable data. What is BOP's assessment of the program?
  - b. The OIG report also noted that FPI had employed 37 inmates who were under a final order of deportation. How did that happen? Since FPI is only available to a very small percentage of inmates, shouldn't BOP be very selective in choosing who can participate?

- c. OIG also made several recommendations to solve the issues they identified. Are you aware of those? Will they be implemented?
- 40. How porous is FPI's mandatory source? That is, is it easy for a DoD contracting officer to purchase from a private sector company instead of from FPI?
- 41. Does FPI do more to help the private sector or hurt it?
- 42. What percentage of total annual federal contract dollars goes to FPI?

**Prison Rape Elimination Act**

- 43. What is the status of the BOP's implementation of the final PREA rule?
- 44. Why did it take the Department so long to develop a final rule, as mandated in PREA? The legislation was passed in 2003, but the final rule only became effective last year.
- 45. Is PREA binding on only BOP-operated facilities, or all federal facilities?
  - a. Are there any "loopholes" in coverage that need to be fixed?

