



**Written Testimony of the American Civil Liberties Union to the
Charles Colson Task Force on Federal Corrections**

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**Submitted by the
ACLU Washington Legislative Office
ACLU Criminal Law Reform Project
ACLU National Prison Project**

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The American Civil Liberties Union (ACLU) values the opportunity to provide testimony for the Charles Colson Task Force (“Colson Task Force”). For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU fights in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The Colson Task Force’s mandate is an urgent one – our nation’s detention facilities, jails, and prisons hold almost 2.5 million people on any given day,¹ at an annual cost to taxpayers of more than \$80 billion.² The U.S. criminal justice system disproportionately impacts African-Americans and Latinos, perpetuating a harmful legacy of racism that stretches back to our nation’s founding. It is time for change. Given the task force’s scope of interest, and in particular its focus on reducing the population in the federal Bureau of Prisons (BOP), we offer recommendations in five areas: prosecutorial practices, sentencing, solitary confinement, early release, and re-entry and collateral consequences.

I. Prosecutorial Practices

Federal prosecutors’ initial charging and prosecution choices for any given defendant not only set the course for that person’s ultimate fate; they also play a key role in determining the taxpayer resources that will be expended in the course of his or her sentence. In 2013, Attorney General Eric Holder issued a number of guidance memos to U.S. Attorneys – collectively known as the Smart on Crime Initiative – in an effort to focus federal resources on “fewer but the most significant cases” and reduce

unnecessary incarceration.³ Last month, the Attorney General reported preliminary data that indicates progress in this effort, particularly relating to drug offenses.⁴

Yet the Department of Justice (DOJ) has not yet addressed the other major category of federal prosecutions – those relating to immigration. Illegal entry and illegal re-entry are now the most prosecuted federal crimes in the United States. According to the Pew Research Center, the increase in illegal re-entry convictions in the past two decades accounts for 48 percent of the growth in total convictions in federal courts over the period. Private prisons, which are used almost exclusively to incarcerate non-citizens, including those convicted of illegal re-entry, hold more than 10 percent of the total BOP population.⁵

Recommendations: DOJ and U.S. Attorneys should continue to pursue the 2013 Smart on Crime Initiative's commitments and priorities. In addition, both DOJ and the Department of Homeland Security should decrease the pipeline into BOP and U.S. Marshals Service (USMS) facilities by returning immigration enforcement to civil authorities, and only considering criminal re-entry prosecutions for those individuals who have convictions for serious, violent felonies and whose sentences for those felonies were completed within the previous five years.⁶

II. Sentencing

Mandatory minimum sentences defeat the purpose of sentencing by reducing judicial discretion and instead handing it to prosecutors, who then use the threat of lengthy sentences to frustrate defendants seeking to assert their constitutional rights. At the federal level, harsh sentencing, including mandatory minimums, included in legislation such as the 1994 Violent Crime Control and Law Enforcement Act, have contributed to an unsustainable increase in the BOP population without any clear connection to an increase in crime control.⁷

Recommendations: Congress should repeal all mandatory minimum sentences for federal drug offenses. Short of repeal, Congress should 1) reduce all mandatory minimum sentences for federal drug offenses, 2) expand the federal safety valve to allow more people convicted of low-level drug offenses to avoid mandatory minimums,⁸ and 3) reduce the sentence for individuals with two prior felony drug convictions from life without parole.⁹ Congress should also reduce the sentencing disparity between crack and powder cocaine from 18:1 to 1:1, to be applied retroactively, or at least permit the Fair Sentencing Act to apply retroactively, and expand the availability of pre-sentencing probation to all first-time non-violent drug offenders.¹⁰ Finally, Congress should revise 18 U.S.C. § 924(c) to limit the unjust impact of “stacking” of multiple gun charges.¹¹

III. Solitary Confinement

Overcrowding in the BOP system is one factor contributing to excessive and inappropriate use of solitary confinement, widely recognized as a psychologically and physical harmful practice that is often unnecessary to maintain safety inside a facility. In May 2013, the Government Accountability Office issued a highly critical report on BOP’s use of solitary confinement.¹² In response, BOP agreed to an independent review of its use of solitary, the results of which were released on February 27.¹³ The review acknowledged BOP’s commitment to reducing its use of solitary, but also revealed significant problems in current practice, including the housing of seriously mentally ill individuals in isolation, inadequate mental health treatment and staffing and improper mental health diagnoses, the use of solitary for vulnerable individuals who should instead be held in protective custody, overly long stays in solitary, and the direct release of individuals from solitary without adequate re-entry preparedness.

Recommendations: As an important first step, BOP should implement the recommendations of the independent review (which are not binding). In order to create a more humane and effective

system, however, BOP should also adopt and implement a policy substantively comparable to the 2013 Immigration and Customs Enforcement (ICE) directive on the use of segregation in ICE facilities,¹⁴ and formally prohibit the use of solitary confinement for juveniles held under federal jurisdiction.

IV. Early Release

Reducing inmates' actual time in institutional custody can help reduce the number of people in the federal prison system, and at the same time incentivize good behavior and educational and rehabilitative efforts for the inmates themselves.

Recommendations: BOP should fully implement its updated policy regarding compassionate release for inmates in “particularly extraordinary or compelling circumstances that could not reasonably have been foreseen by the court at the time of sentencing”¹⁵ in order to realize its full potential to reduce the federal prison population. In addition, Congress should clarify the statutory language allowing an inmate to earn good time credit of up to 54 days per year¹⁶; this change would save approximately \$400 million over ten years, according to BOP.¹⁷ Finally, Congress should implement a proposal supported by BOP that would create a new good time credit earned for successful participation in recidivism-reduction programs.¹⁸

V. Re-entry and Collateral Consequences

Re-entry is a formidable challenge for individuals leaving prison. Not only must they adjust to freedom and an ever-changing society after years or decades on the inside, they must also contend with numerous legal barriers to rebuilding their lives. These barriers limit their access to housing, temporary support via the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF), higher education, and employment – barriers that increase the likelihood that even the most well-intentioned returning citizens could recidivate and re-enter the prison system.

Recommendations: Congress should limit the discretion of Public Housing Agencies and owners of federally assisted housing to deny housing to individuals with drug-related or other criminal histories, drug users, and alcohol users, except for those individuals who truly present a threat to public safety,¹⁹ as well as repeal 42 U.S.C. 1437d(1)(6), which requires a “no-fault eviction” of any family with a household member who is found to have engaged in “drug-related criminal activity on or off” the premises. Congress should also repeal the drug felon ban on TANF assistance and SNAP,²⁰ as well as 21 U.S.C. § 862b, which permits states to test TANF assistance recipients for drug use. Finally, Congress should restore access to Pell grants for individuals in federal and state prison and revisit statutory restrictions on access to federal financial aid for individuals with drug trafficking or possession records. To improve the reliability of the FBI criminal records system, relied on by public and private employers nationwide, Congress should adopt remedies similar to those contemplated in the Fairness and Accuracy in Employment Background Checks Act of 2013.²¹ In addition, it is essential that the federal government robustly fund effective re-entry programming for formerly incarcerated individuals, including counseling, substance abuse treatment, mentoring, job training, and education.²²

These recommendations to Congress and the administration, if implemented, would go a long way toward addressing our nation’s mass incarceration problem at the federal level. It is important to note that approximately 25,000 BOP beds, 11,000 USMS beds, and 20,000 ICE beds – including more than 1,000 new beds dedicated to the detention of children and their mothers²³ – are owned and operated by private prison companies.²⁴ The ACLU is opposed to for-profit incarceration and urges the federal government to end its contracts with private prison companies as soon as possible.

We thank the Task Force for consideration of our recommendations.

¹ This number includes almost 1.6 million individuals held in state and federal prisons, plus approximately 785,000 in county and city jails, 55,000 in U.S. Marshals custody, and 34,000 in U.S. Immigration and Customs Enforcement (ICE) detention facilities. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 NJC 247282 (2014), *available at* <http://www.bjs.gov/content/pub/pdf/p13.pdf>; TODD D. MINTON & DANIELA GOLINELLI, PH.D, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2013 – STATISTICAL TABLES (2014), *available at* <http://www.bjs.gov/content/pub/pdf/jim13st.pdf>; U.S. MARSHALS SERVICE, OFFICE OF PUBLIC AFFAIRS, FACT SHEET: FACTS AND FIGURES 2015, *available at* <http://www.usmarshals.gov/duties/factsheets/facts.pdf>. ICE does not publicly release its average daily population, but Congress funds ICE to maintain 34,000 beds daily. For more information, see *Eliminate the Detention Bed Quota*, NATIONAL IMMIGRANT JUSTICE CENTER, <http://www.immigrantjustice.org/eliminate-detention-bed-quota#.VO-1yfldUIJ> (last visited Feb. 27, 2015).

² U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (hereinafter SMART ON CRIME).

³ See generally SMART ON CRIME. See SMART ON CRIME at 2.

⁴ Eric Holder, Att'y General, Remarks at the National Press Club (Feb. 17, 2015), *available at* <http://www.justice.gov/opa/pr/attorney-general-holder-delivers-remarks-national-press-club>.

⁵ AMERICAN CIVIL LIBERTIES UNION, REFORM U.S. APPROACH TO BORDER PROSECUTIONS (2015), *available at* https://www.aclu.org/sites/default/files/assets/15_1_15_aclu_1325_1326_recommendations_final.pdf. (hereinafter REFORM U.S. APPROACH TO BORDER PROSECUTIONS). See also AMERICAN CIVIL LIBERTIES UNION, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM (2014), *available at* <https://www.aclu.org/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system>. Willacy County Correctional Facility, a 2,900-bed facility in Raymondville, Texas, and the site of an inmate uprising beginning on February 20, 2015, was one such private prison. For more information, see Carl Takei, *A Most Unsurprising Riot*, THE MARSHALL PROJECT (Feb. 24, 2015), <https://www.themarshallproject.org/2015/02/24/a-most-unsurprising-riot> (last visited Mar. 2, 2015).

⁶ For detailed recommendations relating to illegal entry and re-entry prosecutions, see REFORM U.S. APPROACH TO BORDER PROSECUTIONS.

⁷ DR. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CENTER FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), *available at* https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf.

⁸ 18 U.S.C. § 3553(f). Expansion of the federal safety valve should allow for people in Criminal History Category II (i.e. 2 or 3 criminal history points) to qualify.

⁹ Specifically, Congress should reduce the mandatory penalty for one prior conviction for a felony drug offense from 10 and 20 years respectively to 7 and 17 years or less, and for two prior convictions for a felony drug offense from life to 20 years or less. Congress should also limit the 851 enhancement to actual convictions of felony drug trafficking offenses within 10 years of the offense in question. For background, see AMERICAN CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES (2013), *available at* <https://www.aclu.org/sites/default/files/assets/111813-lwop-complete-report.pdf>.

¹⁰ Currently, pre-sentencing probation is available only to defendants who plead guilty to misdemeanor drug possession. See 18 U.S.C. § 3607(a) (permitting pre-judgment probation for an individual found guilty of simple possession only where that person has not previously been granted probation under § 3607 or previously been convicted of violating a Federal or State law relating to controlled substances).

¹¹ The real-life impact of 18 U.S.C. § 924(c) is illustrated in the story of Weldon Angelos. See *Weldon Angelos*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/weldon-angelos/> (last visited Feb. 27, 2015). To improve this provision, Congress should reduce the penalty for a “second or subsequent” offense and make it applicable only to prior convictions, and permit judicial discretion to impose concurrent sentences for multiple counts.

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-429, IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 2 (2013) (hereinafter GAO REPORT ON SEGREGATED HOUSING). “Segregated housing” refers to housing units in which prisoners are locked in their cells for approximately 23 hours a day, either alone or with a cellmate. GAO REPORT ON SEGREGATED HOUSING, at 6.

¹³ FEDERAL BUREAU OF PRISONS, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE (2013), *available at* http://www.bop.gov/resources/news/pdfs/CNA-SHURReportFinal_123014_2.pdf.

¹⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 11065.1: REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES (2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

¹⁵ *Public Hearing before the Charles Colson Task Force on Federal Corrections* (2015) (statement of Charles E. Samuels, Director of the Federal Bureau of Prisons), *available at* http://www.bop.gov/policy/progstat/5050_049.pdf.

¹⁶ 18 U.S.C. § 3624(b).

¹⁷ *Supra* n. 14.

¹⁸ *Supra* n. 14.

¹⁹ The relevant provisions are located at 42 U.S.C. §§ 13661 and 13662. The U.S. Department of Housing and Urban Development has already urged Public Housing Agencies and owners of federally assisted housing to balance legitimate concern for the safety of all residents with the importance of allowing formerly incarcerated individuals to reunite with their families, but it is not clear that this directive has led to measurable change in practice on the ground. *See* Letter from Shaun Donvovan, Sec’y of Housing and Urban Dev., & Sandra B. Henriquez, Assistant Sec’y for Public Housing and Indian Housing, to PHA Executive Director (June 17, 2011), *available at* http://csgjusticecenter.org/documents/0000/1130/HUD_letter.pdf; Letter from Shaun Donvovan, Sec’y of Housing and Urban Dev., & Carol J. Galante, Acting Assistant Sec’y for Housing to Owners and Agents, *available at* http://csgjusticecenter.org/documents/0000/1344/3.30.12_MFamily_properties_Reentry_memo_6_2_.pdf.

²⁰ 21 U.S.C. § 862a.

²¹ H.R. 2865, 113th Cong. (2013). The Accurate Background Check Act of 2013, H.R. 2999, 113th Cong. (2013), also presents a good model.

²² Congress should continue to authorize and appropriate funding for such programming via the Second Chance Act and other legislative vehicles.

²³ For more information on family detention, *see* Wyl S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?ref=magazine&r=2>; Richard Blumenthal, *Stop Locking Up Child Refugees*, THE HILL (Feb. 25, 2015), <http://thehill.com/opinion/op-ed/233659-stop-locking-up-child-refugees>; John Burnett, *How Will a Small Town in Arizona Manage an ICE Facility in Texas?*, NATIONAL PUBLIC RADIO (Oct. 28, 2014), <http://www.npr.org/2014/10/28/359411980/how-will-a-small-town-in-arizona-manage-an-ice-facility-in-texas>; Lindsay Nash, *The ‘Family-Friendly’ Myths of Family Detention Facilities*, AMERICAN CIVIL LIBERTIES UNION (Feb. 27, 2015), <https://www.aclu.org/blog/immigrants-rights/family-friendly-myths-family-detention-facilities>.

²⁴ U.S. DEP’T. OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATISTICS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Mar. 2, 2015); U.S. MARSHALS SERVICE, OFFICE OF PUBLIC AFFAIRS, FACT SHEET: FACTS AND FIGURES 2015, *available at* <http://www.usmarshals.gov/duties/factsheets/facts.pdf>; *Hearing on the State of Civil Rights at Immigration Detention Facilities Before the United States Commission on Civil Rights* (2015) (statement of Bob Libal, Executive Director of Grassroots Leadership), *available at* <http://grassrootsleadership.org/sites/default/files/uploads/USCCRwrittentestimony1.pdf>.