AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 111–411

EXPLORING THE NATIONAL CRIMINAL JUSTICE COMMISSION ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME AND DRUGS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JUNE 11, 2009

Serial No. J–111–31

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

56–273 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00001 Fmt 5011 Sfmt 5011 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

PATRICK J. LEAHY, Vermont, *Chairman*

HERB KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
BENJAMIN L. CARDIN, Maryland
SHELDON WHITEHOUSE, Rhode Island
RON WYDEN, Oregon
AMY KLOBUCHAR, Minnesota
EDWARD E. KAUFMAN, Delaware
ARLEN SPECTER, Pennsylvania

JEFF SESSIONS, Alabama
ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
TOM COBURN, Oklahoma

BRUCE A. COHEN, *Chief Counsel and Staff Director*
MATT MINER, *Republican Chief Counsel*

SUBCOMMITTEE ON CRIME AND DRUGS

ARLEN SPECTER, Pennsylvania, *Chairman*

HERB KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
BENJAMIN L. CARDIN, Maryland
AMY KLOBUCHAR, Minnesota
EDWARD E. KAUFMAN, Delaware

LINDSEY O. GRAHAM, South Carolina
ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JEFF SESSIONS, Alabama
TOM COBURN, Oklahoma

HANIBAL KEMERER, *Democratic Chief Counsel*
WALT KUHN, *Republican Chief Counsel*

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00002 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	4
Graham, Hon. Lindsey, a U.S. Senator from the State of South Carolina	5
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	1

WITNESSES

Bratton, William, Chief, Los Angeles Police Department, Los Angeles, California	5
Nolan, Pat, Vice president, Prison Fellowship, Lansdowne, Virginia	12
Ogletree, Charles J., Professor, Harvard Law School, Cambridge, Massachusetts	8
Walsh, Brian W., Senior Legal Research Fellow, The Heritage Foundation, Washington, D.C.	10
Webb, Hon. Jim, a U.S. Senator from the State of Virginia	2

SUBMISSIONS FOR THE RECORD

American Federation of Government Employees, AFL–CIO, Beth Mothen, Legislative and Political Director, Washington, DC., statement	28
Bratton, William, Chief, Los Angeles Police Department, on behalf of Major Cities Chiefs Association, Los Angeles, California, statement	31
Burnett, Arthur L., Sr., Senior Judge, National Executive Director, National African American Drug Policy Coalition Inc., Washington, DC., statement	43
Cowan, Jon, President, Third Way, Washington, DC., letter and attachment	61
Capazorio, Greg, President, Criminon International, Glendal, California, statement	75
Clarke, Harold W., Commissioner, Massachusetts Department of Correction, President, American Correctional Association and formal President, Association of State Correctional Administrators, Boston, Massachusetts, statement	79
Federal Cure, Incorporated, Mark A. Varca, J.D., Acting Chairman, Plantation, Florida, letter	84
Goodwill Industries International, Jim Gibbons, President and Chief Executive Officer, Rockville, Maryland, statement and attachment	85
Hawley, Ronald P., Executive Director, Search, The National Consortium for Justice Information and Statistics, Sacramento, California, statement	105
Human Rights Watch, David C. Fathi, Director, US Program, Washington, DC., letter and attachment	107
Hynes, Charles J., District Attorney, Kings County, Brooklyn, New York, statement	110
Just Detention International, Lovisa Stannow, Executive Director, Washington, DC., statement	113
Murray, Don, National Association of Counties, Washington, DC., statement	116
National Association of Criminal Defense Lawyers, John Wesley Hal, President, Washington, DC., statement	121
NCCD, Center for Girls and Young Women, Washington, DC., statement	123
Nolan, Pat, Vice president, Prison Fellowship, Lansdowne, Virginia, statement	125
Ogletree, Charles J., Professor, Harvard Law School, Cambridge, Massachusetts, statement	130
Rand Corporation, Greg Ridgeway, Santa Monica, California, letter	158

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

Page

Simmons, Russell, Co-Founder, Def Jam Records, Founder, Rush Communications, New York, New York, statement 159
Stewart, Julie, President, Families Against Mandatory Minimums, Washington, DC., ... 160
Walsh, Brian W., Senior Legal Research Fellow, The Heritage Foundation, Washington, D.C., statement 166
Webb, Hon. Jim, a U.S. Senator from the State of Virginia, statement 182

ADDITIONAL SUBMISSIONS FOR THE RECORD

Submissions for the record not printed due to voluminous nature, previously printed by an agency of the Federal Government, or other criteria determined by the Committee, list:

Rand Corporation, Technical report

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00004 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

EXPLORING THE NATIONAL CRIMINAL JUSTICE COMMISSION ACT OF 2009

THURSDAY, JUNE 11, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CRIME AND DRUGS,
Washington, DC.

The Committee met, pursuant to notice, at 3:01 p.m., Room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Subcommittee, presiding.

Present: Senators Klobuchar, Durbin, and Graham.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good afternoon, ladies and gentlemen. The hour of 3:00 having arrived, we will proceed with this hearing before the Subcommittee on Crime and Drugs of the Committee on the Judiciary.

Today we have a very important hearing to explore the legislation introduced by Senator Webb on the National Criminal Justice Commission, to take up a great many topics of great importance.

The Commission is structured to take up a comparison of United States incarceration policies with those of other similar political systems, including western Europe and Japan, take up the costs of incarceration policies, including those associated with gangs and drugs, the impact of gang activity in our country, drug policy and its impact on incarceration, crime sentencing and reentry, policies regarding mental illness, the historic role of the military as it impacts on these criminal law issues, and any other subjects which the Commission might deem appropriate.

Our criminal justice system continues to be one of perplexing complexity in terms of how we deal with it, a tremendous amount of violent crime, a tremendous amount of drug-related crime, very, very heavy statistics on incarceration. My work in the field has been extensive, and I have long believed that if we approached the criminal justice system with two principal objectives, that a great deal could be done to restrain it: with respect to career criminals who commit 70 percent of the crimes, separating them from society; with respect to the others who are going to be released, have realistic policies of rehabilitation, detoxification, literacy training, job training, reentry. We have an enormous problem on recidivism, which has a very high cost on property damage, and an even higher cost on human suffering.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00005 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

Senator Webb approached me some time ago, a few months ago, and told me about his ideas and asked if I would co-sponsor his legislation, and I did so gladly. He was looking for bipartisan support. I am sorry I cannot give that particular quality to him.

[Laughter.]

Senator SPECTER. But I can give him considerable support on the merits.

Senator Webb came to the Senate, with his election in 2006, with an extraordinary record: a graduate of the Naval Academy in 1968, a law degree from Georgetown in 1975, commended for his excellence at the Naval Academy. Chose the Marine Corps. Finished first in a class of 243. Got Marine Corps officers' basic training in Quantico, served in Vietnam in heavy combat, two Purple Hearts, heavily decorated with the Navy Cross and the Silver Star medal, two bronze medals. Served as Secretary of the Navy, so he has an extraordinary background coming to the position of U.S. Senator from Virginia.

Senator Webb, we look forward to your testimony. I put that in the plural because, as I stated to you earlier, you could either sit here and testify or you could sit there. You can sit there and then come up here and join me as we move to the next panel of witnesses.

The floor is yours.

STATEMENT OF HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WEBB. Thank you, Mr. Chairman. I would like to take about 5 minutes and just explain a little bit about my concerns in this area. I would begin by thanking you for being, originally, my lead Republican co-sponsor on this measure, and also for your leadership in calling this hearing and helping to move the legislation forward.

Also, Ranking Member Graham was an original sponsor on the bill. I think we had nine members of the Judiciary Committee who were sponsors on this legislation. I know full well your work in this area over many, many years, and appreciate your support in this endeavor. I look forward to continuing to work with this Subcommittee, and also the full Committee, and hopefully to move this legislation this year and to get to the business of the commission that we're attempting to form here.

Mr. Chairman, we find ourselves as a Nation in the midst of a profound, deeply corrosive crisis that we have largely been ignoring at our peril. The national disgrace of our present criminal justice system does not present us with the horrifying immediacy of the 9/11 attacks on the Twin Towers and the Pentagon, which in the end rallied our Nation to combat international terrorism. It is not as visibly threatening as the recent crash in our economy.

But the disintegration of this system day by day, year by year, and the movement toward mass incarceration with very little attention being paid to clear standards of prison administration or meaningful avenues of reentry for those who serve their time, is dramatically affecting millions of lives in this country. It's draining billions of dollars from our economy. It's destroying notions of neighborhood and family in hundreds, if not thousands, of commu-

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00006 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

nities across the country. Most importantly, it is not making our country a safer or a fairer place.

I believe it is in the interests of every American, in every community across this land, that we thoroughly examine our entire criminal justice system in a way that allows us to interconnect all of its different aspects when it comes to finding proper approaches and solutions to each different component part. I am convinced that the most appropriate way to conduct this examination is through a Presidential-level commission, tasked to bring forth specific findings and recommendations for the Congress to consider and, where appropriate, to act.

This particular piece of legislation is a product of long years of thought, research, and reflection on my part as an attorney, as a writer, including time as a journalist 25 years ago where I examined the Japanese prison system for a cover story for *Parade* magazine, and finally as a government official.

In the Senate, I am grateful that Senator Schumer and the Joint Economic Committee allowed us the venue of that committee to conduct hearings over the past 2 years on the impact of mass incarceration and of drugs policy. I also appreciate working with the George Mason University Law School to put together a comprehensive symposium that brought people from across the country and to talk about our drug policy, and also collaborating with a number of other institutions working on such issues, including The Brookings Institution.

Once we started examining this issue over the past 2 years, people from all across the country reached out to us, people from every political and philosophical perspective that comes into play, and from all walks of life. Since I introduce the National Criminal Justice Commission Act 2 months ago, we've seen an even greater outpouring of interest in, and support for, this approach. My office, just in the past 2 months, has engaged with more than 100 organizations, representing prosecutors, judges, defense lawyers, former offenders, advocacy groups, think tanks, victim rights organizations, academics, prisoners, and law enforcement officials. In the Senate, I am very grateful at this point that 28 of my colleagues have joined me on the bill—as I said, I believe 9 from the Judiciary Committee.

The goal of this legislation is to establish a national commission to examine and reshape America's entire criminal justice system, the first such effort in many, many years. Mr. Chairman, you laid out the areas that we believe should be focused on. I won't reiterate them here. I have a full statement that I would ask be submitted for the record at this point, if I may.

[The prepared statement of Senator Webb appears as a submission for the record.]

Senator WEBB. I would like to say that we worked, along with staff on this Committee, to bring a panel today that I think is truly extraordinary in its breadth and in its depth of understanding. It would be of great benefit for every American to consider what they're about to hear from this panel. Again, I appreciate you having moved this legislation as quickly as you have and called this hearing, and it is my earnest hope that we can enact this legislation by the end of this year.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00007 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

Thank you, Mr. Chairman.

Senator SPECTER. Senator Webb, thank you for that opening statement. I have already applauded your work in the initiation of the legislation, and join you in it. I believe it's going to receive widespread support. I can assure you that as Chairman of this Subcommittee I will move it promptly, and will press to have it moved by the full Committee, and press to have it considered by the full Senate and try to get it done. I think from a vantage point of mid-June, it could be done. A lot of work needs to be done in this field and this commission is a very, very good projection point. It's not a starting point, it's a projection point.

Let me welcome the arrival of Senator Durbin, and again express my thanks to him for yielding to me the gavel. He had been chairman of this——

Senator DURBIN. I thank the chair and am looking forward very much to the testimony you are going to receive from this panel. Thank you, Mr. Chairman.

Senator SPECTER. Senator Durbin, you've arrived just in time to question the witness. Senator Durbin, in lieu of questioning the witness, is now a fugitive.

[Laughter.]

Senator SPECTER. Would you care to make an opening statement?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FORM THE STATE OF ILLINOIS

Senator DURBIN. I'll just make a brief statement. Thank you, Mr. Chairman, for this Subcommittee hearing. When I handed the baton over, it was with the request that you honor my commitment to Senator Webb for this hearing, and Senator Specter quickly said, "But I'm already a co-sponsor of his bill." I said, "Well, then I think we're going to do quite well here."

I had an occasion a few weeks ago. We have an annual dinner with justices of the Supreme Court and I had an occasion to sit with one—I won't name names—and I said, now, if you were to pick a topic for the Crime Subcommittee of Judiciary, what would you pick, having given your life to law and being in the highest court of the land? He said, "You've got to do something about our corrections system. If you set out to design a system, you would never come up with what we have today."

I think it is a challenge to all of us to come up with a sensible way to keep America safe, yet to treat prisoners humanely and to do our very best to make sure that no additional crimes are committed. Recidivism means another crime and another victim, and we have to make certain that our system, as Senator Webb has led us into this conversation, really addresses so many aspects that need to be considered.

I've talked to Senator Specter about one of particular concern to me, and that is the question of mental illness and incarceration, both sides, the mentally ill who go into prison, how they are treated, if they are treated, and what happens in a prison that may aggravate or create mental illness.

Dr. Atil Gowonday wrote a recent article in *The New Yorker* about the impact of solitary confinement on people who are in pris-

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00008 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

on, most of whom were likely to be released, and in what psychological condition they go back into the world. It's time for an honest appraisal and I think Senator Webb's proposal for a Presidential look at this issue is long overdue, a commission that will take a look at every aspect of it, give us sound advice, and I hope that we have the political courage to follow it.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Durbin.

I will now call our panel. Chief Bratton, Professor Ogletree, Mr. Brian Walsh, Mr. Pat Nolan.

We've been joined by the distinguished Ranking Member of the Subcommittee, Senator Lindsey Graham. Senator Graham, would you care to make an opening statement?

STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. Thank you, Mr. Chairman, very quickly. I understand that Senator Webb testified. I regret I was not here when he was testifying. I have joined forces with him and other Senators to take a good, hard look at this. I want to applaud Senator Webb for bringing this to our attention. It's something he's been passionate about for a long time, I think. It's not about being tough on crime, it's just being smart as a Nation.

We have a lot of people in jail in this country, more than most, and we've got to figure out who needs to be there, and are there other ways when it comes to some prisoners. I believe there are alternatives out there available, and make sure that our criminal justice system is not over-burdened and overloaded with people that could maybe survive in some alternative system. So, I welcome this hearing, and thank you for holding it, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Graham.

Our first witness is the Chief of Police of Los Angeles, William J. Bratton, who also served as Chief of Police in New York City and in Boston. He comes to this witness table with very, very extensive experience in law enforcement. During his tenure at the Los Angeles Police Department, Part One crimes have been reduced by 33 percent and homicides have decreased by 41 percent. In New York City, he was commissioner, working with Mayor Guiliani's policy reforms and the unique Combat Stat Crime Tracking System.

He has a bachelor of science in law enforcement from Boston State University. He's a graduate of the FBI Executive Institute and is about to receive a very unusual title: Honorary Commander of the Most Excellent Order of the British Empire, one step below knighthood—and I'm sure it's just a stepping stone. Thank you for joining us, Chief Bratton. We look forward to your testimony.

STATEMENT OF CHIEF WILLIAM BRATTON, LOS ANGELES POLICE DEPARTMENT, LOS ANGELES, CALIFORNIA

Chief BRATTON. Chairman Specter and distinguished members of the Subcommittee, in my capacity as president of the Major City Chiefs Association and——

Senator SPECTER. Is your microphone on?

Chief BRATTON. Excuse me. My apologies, sir.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00009 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

Senator Specter, distinguished members of the Subcommittee, in my capacity as president of the Major City Chiefs Association and Chief of the Los Angeles Police Department, I am pleased to be able to contribute to the discussion and debate on what I view as some of the most important issues facing our society today.

The most important message that I want to leave with you is that we must focus on preventing crime before it occurs rather than respond to it after it does. This has been the focus of my entire career, from a rookie cop in Boston, to now chief of the Los Angeles Police Department.

One of the great failures of the President's Commission on Law Enforcement, Administration and Justice was the acceptance of the widely held belief at that time that police should focus their professionalization efforts on the response to crime and not the prevention of it. They mistakenly believe that the so-called societal causes of crime—racism, poverty, demographics, the economy, to name a few—were beyond the control and influence of the police.

They were wrong. Those causes of crime are, in fact, simply influences that can be significantly impacted by enlightened and progressive policing. The main cause of crime, human behavior, certainly is something that is a principal responsibility and obligation of the police to influence. The challenge in our democratic society is always to police constitutionally, consistently, and compassionately.

The main criminal justice concerns in 1965 seemed to revolve around the hostile relationship between police and the African-American community, organized crime, a dearth of research, problems with the growing juvenile justice system, gun control, drugs, individual rights of the accused, police discretion, civil unrest, and a broken and isolated correction system struggling to balance rehabilitation and custody issues. Sound familiar? Here we are, 40 years later.

The supervised population at the time was quoted as hovering around one million people. That number has now swollen to an estimated seven million. While we failed to effectively address the tremendous increase in crime and violence in the 1970s and 1980s, we finally started to get it right in the 1990s.

Young police leaders were encouraged and financed in their pursuit of education—and I am a product of an LEAA grant in the 1970s—and that exposure led to the change in the way we do business. We had been focused on a failed reactive philosophy, emphasizing random patrol, rapid response, and reactive investigations.

In the late 1980s, we began to move to a community policing model characterized by prevention, problem-solving, and partnership. We turned the system on its head and we were successful in driving significant crime reduction through accountability, measuring what matters, partnership with the community, and policing strategies that emphasized problem-solving, and broken-windows-quality-of-life initiatives.

We developed Comp Stat in New York, with its emphasis on accountability, and use of timely, accurate intelligence to police smarter, putting cops on the dots. The results, as reflected by the dramatic crime declines of that period, continue to this day in New York, Los Angeles, and many other major American cities.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00010 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

The main criminal justice concerns for policymakers today revolve around the threat posed by gangs rather than traditional organized crime, continued problems with the corrections system in general, and with the seemingly intractable problems of mass incarceration, a fractured and unrealistic national drug policy, and a lack of protection of the individual rights and treatment of the mentally ill.

George Kelling has noted, "The jailing and imprisonment of the mentally ill is a national disgrace that once again puts police in the position of having to do something about a problem created by bad 1960s ideology, poor legislation, poor social practice, and the failure of the mental health community to meet their responsibilities."

The Obama administration's new drug czar, Gil Kerlikowske, has said that he wants to banish the idea that the U.S. is fighting a war on drugs and a shift to a position favoring treatment over incarceration to try and reduce illicit drug use. I agree with Gil and would go a step further by suggesting that strong enforcement and effective prevention and treatment programs are not mutually exclusive, they actually go hand in hand. It is possible, from a responsible enforcement agenda, without driving incarceration rates through the roof.

This bill recognizes what cops know and what the experience of the past 40 years has shown, that we cannot arrest our way out of our gang and drug crime problem. We recognize that arrest is necessary to put hardened criminals away, however, we will fall far short of our overall goal if this is all we do.

Our problems are systemic, widespread and growing and only a singularly focused blue ribbon commission comprised of informed practitioners, scholars, policymakers, and civil rights activists can adequately address the calculated formulation of intervention and prevention strategies. America's system of justice is overworked and overcrowded. It is under-manned, under-financed, and very often misunderstood.

It needs more information and more knowledge, it needs more technical resources, it needs more coordination among its many parts, it needs more public support, it needs the help of community programs and institutions dealing with offenders and potential offenders. It needs, above all, the willingness to reexamine old ways of doing things to reform itself, to experiment, to run risks: it needs vision. This was true when it was penned 42 years ago by the President's commission, and I think we can all agree that it still holds true even more so today.

Thank you, sir.

Senator SPECTER. Thank you very much, Chief Bratton.

Our next witness is Professor Charles J. Ogletree, the Jesse Clemenco Professor of Law and Director of the Charles Hamilton Houston Institute for Race and Justice at the Harvard Law School. Professor Ogletree edited a book released in January entitled, When Law Fails: Making Sense of Miscarriages of Justice.

He was recently presented with a 2009 Spirit of Excellence Award from the ABA Commission on Racial and Ethnic Diversity, and served as Deputy Director of the DC Public Defender system. He has a bachelor's and MA in Political Science from Stanford, and a law degree from Harvard.

Welcome, Professor Ogletree. The floor is yours.

STATEMENT OF PROFESSOR CHARLES J. OGLETREE, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Professor OGLETREE. Thank you so much, Senator Specter and Senators Durbin and Graham. I'm very happy to be here today to speak on behalf of the Charles Hamilton Houston Institute for Race and Justice.

I just want to say a quick paraphrase. It was 42 years ago in a room like this that President Lyndon Johnson said about Thurgood Marshall, "It was the right time, the right place, the right person, the right thing to do." His words 42 years ago ring true today because it is the right time to look at the criminal justice system and reform it.

It's the right place—the center of Congress—and the right people—this body of Congress can make that happen—and it's the right thing to do, because the one thing we've learned in the course of examining our criminal justice system over many, many decades is that it has been a failure.

I hope that one major thing we can achieve is to retire the phrase "a war on crime" and replace it with the phrase "being smart on crime", because we've fought a war and we've been unsuccessful. We have too many people in prison, more than any other developed nation. Too many of them are black and brown and young. We have too much money being spent on punishment and not enough on treatment and early intervention.

Finally, we have not looked at real alternatives to the criminal justice system. I prepared an extensive report with data and research that I hope will be part of the record that will be considered as well. Also, this is a propitious time to think about this because you have never had, in my view, so many people on the same side on this issue.

For most of my career, I remember feeling like I'm crying out in the wilderness as the only one talking about repair in the criminal justice system. As I look at this table today, there are people with extensive experience who have come to the sensible view that what we are doing now is just not working. It's not working in terms of making safety a priority or thinking of alternatives so that people won't find themselves in the criminal justice system.

The other important thing is that Senator Durbin mentioned a member of the U.S. Supreme Court who he talked with. It's not difficult to figure out who that person might be, and that person is not just a "he". There aren't many "shes" there, but the reality is, there are a number of people who, every day, apply our criminal justice system and it's very difficult.

Yesterday I saw a dear friend of mine, Paul Freedman, a former prosecutor, a tough prosecutor, who is on the Federal District Court in Washington, DC, on his own volition, reacting to another Federal court judge, decided to impose a one-on-one penalty for crack cocaine and powder cocaine, because his point was, there's no sensible reason for me to do anything differently when I realize that what I've been doing for many years is just wrong. That's the judiciary taking it into its own hands.

At the same time, it's very important to think about the idea of a commission that has as its goal to figure out a system that is smart, creative, progressive, and forward-looking. The most important thing that I hope you'll hear over and over and over again with our testimony today, and I say it extensively in my report: it's a cost-effective way of doing it. You can be smart on crime and save a lot of money. We see that now when we think about the way that we're treating those who are mentally ill, treating those who are impoverished and under-educated, and they become the fodder for our criminal justice system.

Also, I want to say this in terms of the challenges we face today. Bill Bratton is a terrific police officer. I have known him from his days in Boston, New York, and Los Angeles. The one thing that he's always done is to stand up to fight crime, but also insist on fairness. The fairness means, let's come up with a policy that makes sense, not just for police officers who have to, every day, put on that uniform and defend all of us, but who also have the tools to make sure Senator Specter says focus on the most serious and important crimes and make sure we don't have our jails full of people who are largely non-violent drug users, and that money becomes exorbitant.

The final point I want to make here, and I'll be happy to answer questions later on, is that we at the Institute have approached this issue with the idea of providing information to those who are trying to solve this problem. When we look at one particular problem, the problem of gangs, we wrote a report more than a year ago called "No More Children Left Behind Bars", and I'd like to submit that as part of the record.

That became the impetus for Congressman Bobby Scott's new proposed bill, the Youth Promise Act. Our goal was to look at whether or not treatment and prevention should be priorities rather than simply punishment, and they are. They're cost-effective. They're effective in many, many ways, and I think it's the best way to go. Ultimately, as we know, we've heard it said before, in the words of Ohio Governor Ted Strickland. He said, "You don't have to be soft on crime to be smart in dealing with criminals." If we're driven by being smart and creative, we can solve this problem.

Thank you.

Senator SPECTER. Thank you, Professor Ogletree. The report you referenced will be made a part of the record, without objection.

[The report appears as a submission for the record.]

Senator SPECTER. We'll also move all of the testimony and all of the reports into the record, without objection.

Our next witness is Mr. Brian Walsh, Senior Research Fellow, Center for Legal and Judicial Studies of The Heritage Foundation, where he works on criminal law, and also on national security and civil liberties. He has recently released research on the so-called COPS program, Federal hate crimes legislation, and public corruption prosecutions. He had been an associate with Kirkland & Ellis. He has a bachelor of Science in Physics from the University of Colorado and a law degree from Regent University School of Law.

We appreciate your coming in today, Mr. Walsh, and the time is yours.

STATEMENT OF BRIAN W. WALSH, SENIOR LEGAL RESEARCH FELLOW, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, DC

Mr. WALSH. Chairman Specter and Ranking Member Graham, I appreciate this opportunity to address the National Criminal Justice Commission Act. As you said, criminal justice reform is a central focus of my research and reform work at The Heritage Foundation. I'll just note briefly that my views are my own and not those of The Heritage Foundation.

I commend and am encouraged by Senator Webb's attempts to date to overcome the political and ideological boundaries that have caused many of the problems in our criminal justice systems, and I appreciate the Senator's efforts to reach out across those same boundaries, seeking input to help improve and shape the Act.

Over the past few years, we've worked with hundreds of individuals and scores of organizations across the political spectrum in an attempt to build consensus for principled, nonpartisan criminal justice reform. My colleagues, allies and I have gathered substantial evidence that the criminal justice system is in great need of principled reform, particularly at the Federal level, and have come to a consensus that this reform should not be driven by partisan politics. We've heard a little bit already about the problem of being considered "soft on crime" and how difficult it is for legislative bodies to go against that stream.

And while I think improvements are needed to S. 714 to make it sufficiently principled and nonpartisan to garner widespread support, it does include positive provisions. In particular, the commission should undertake to identify just, effective alternatives to incarceration for some categories of first-time non-violent offenders, explore and report on the successes and failures that the States have encountered with drug courts for non-violent offenders charged with possessions of small amounts of drugs, and study effective programs for easing offenders' entry back into society after they are released from incarceration.

For the remainder of my time I will focus on the needed improvements to the bill. The goal of each improvement and each recommendation is to help ensure that the commission would investigate and report in a principled and nonpartisan manner, and that its findings and recommendations would be considered useful and authoritative by Americans across political and ideological boundaries.

First, the composition of the commission should be modified to ensure that the members of the commission adequately represent: 1) the diversity of views, backgrounds, and expertise needed to address all of the criminal justice issues covered by the commission; 2) the interests of the 50 States in protecting their sovereignty over criminal justice operations, a core State responsibility; and 3) the criminal justice interests and expertise of the executive branch. I've made further recommendations about that in my written statement.

Second, the Act includes unstated assumptions that are not necessarily well-founded. One such assumption is that incarceration rates need to decrease across the board. Section 6 of the Act would

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00014 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

direct the commission to make recommendations to reduce the overall incarceration rate.

While it may be true that some prison sentences are longer than necessary to fulfill the needs of justice, a directive to decrease the overall incarceration rate strongly suggests that all prison sentences are too long. This is simply not borne out by the best available evidence and does not take into account the recidivism problem, particularly with violent offenders, and the need to make sure that those who have committed violent crimes and are at high risk to recidivate are actually kept incarcerated where they are incapacitated from committing further crimes.

I have made similar recommendations about the drug policy—that the recent public discourse on national drug policy has been dominated by those who are broadly opposed to enforcement and often favor drug decriminalization. The Act itself appears to be premised on assumptions about drug enforcement policy that are not entirely well founded.

Nothing in the Act mentions, for example, the successes the States and the Federal Government have had in the fight against drug abuse, and my written statement briefly addresses the destructive effects of family drug abuse on children and the correlation between the criminal history of incarcerated offenders and their own history of drug abuse and dependence.

Although such facts do not justify all current drug policy, this information about the national fight against drug abuse should be granted its full weight by the commission in order for its drug policy recommendations to be granted the type of weight and authority that we would hope that they would warrant.

Finally, I just want to address that my greatest concern with the Act as currently written is that it does not guide the commission to address the many-faceted problems of over-criminalization, which include federalizing crime that should remain under the jurisdiction of State and local law enforcement, criminalizing conduct that no one would know is criminal unless they both scoured and understood tens of thousands of pages of statutory and regulatory law, and eliminating the intrinsic safeguard requiring proof beyond a reasonable doubt of criminal intent, which formerly protected from criminal punishment Americans who never intended to violate the law.

Working with the coalition that crosses political and ideological spectrum, we came to substantial consensus before the November elections about a proposal for both hearings and reform proposals in the House, in particular, and we hope that we will continue to be able to address those things in a principled, non-partisan manner.

The overall goal, again, of all of these recommendations is to make sure that the commission's work is widely respected and understood to be something that is not favoring a particular group or class of offenders, but all those Americans who could be subjected, and have been subjected, to criminal penalties. Our organization, working in concert with others, have catalogued a number of examples and stories of those who acted in ways that none of us would necessarily perceive as being criminal, and yet found themselves in Federal prison or State prison for substantial prison sentences.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00015 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

With that, I look forward to your questions, and thank you again.

Senator SPECTER. Thank you, Mr. Walsh.

Our final witness is Mr. Pat Nolan, vice president of the Prison Fellowship, who comes to the witness table with a really extraordinary record. He heads the Justice Fellowship, the wing of Prison Fellowship that seeks to reform the criminal justice system based on the Bible's principles of restorative justice. He served in the California State Assembly for 15 years and was the Republican leader for 4 years. He began his work on criminal justice reform, as noted in his volunteered information in his resume, after serving 29 months in Federal custody for accepting campaign contributions that turned out to be part of an FBI sting.

He authored a book released by Prison Fellowship on the role of the church entitled, When Prisoners Return. He has a bachelor's degree in Political Science and a law degree from the University of Southern California.

Thank you for coming in, Mr. Nolan. You present an extraordinary diversity of experience for the benefit of this Subcommittee. You may proceed.

STATEMENT OF PAT NOLAN, VICE PRESIDENT, PRISON FELLOWSHIP, LANSDOWNE, VIRGINIA

Mr. NOLAN. It's an honor to be included on this panel and to have a chance to address you. We strongly support Senator Webb's proposal for a National Commission on Criminal Justice. As you pointed out, I was very active on criminal issues in the California legislature, especially on victims' rights. I was an original sponsor of the Victim's Bill of Rights and received the Victim's Advocate Award from Parents of Murdered Children. But as you pointed out, my life took an unexpected turn, and after I was convicted of racketeering for a campaign contribution, I went to Federal prison and served in Federal custody for 29 months.

What I saw inside prison really troubled me. Little was being done to prepare the inmates for their return to society, and the skills that the inmates learned to survive inside prison made them more dangerous after they were released. My role at Prison Fellowship is to work with government officials to try to fix our broken criminal justice system. It's taken me to 35 States, where I have worked with Governors, attorneys general, secretaries and directors of corrections, and legislators to try to change the system.

I serve on the National Prison Rape Elimination Commission and I was a member of the Commission on Safety and Abuse in America's Prisons. I was appointed by Governor Schwarzenegger to his strike team on rehabilitation, and I currently serve on Virginia's Task Force on Alternatives to Incarceration.

I tell you all this because this work has given me a chance to see up close what is going on in our prisons. Frankly, it's not working. They're in crisis. First, I'd like to make three very important points. The first, is that our justice system needs to keep us safe. That's the priority, and that will result in fewer victims.

Second, we need prisons. There are some people that are so dangerous, they need to be incapacitated and separated from society, some of them for the rest of their lives.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00016 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

The third, is that the crisis in prisons wasn't created by corrections officials. There are dedicated corrections officers and law enforcement that are merely trying to implement the policies that they did not make. The report on the Commission on Safety and Abuse in America's Prisons put it well: many of the biggest so-called prison problems are created outside the gates of the correctional facility.

Congress and State legislatures have passed laws that dramatically increase prisoner populations without providing the funding, or even the encouragement, to confine individuals in safe and productive environments where they can be appropriately punished, and for the vast majority who are released, emerge better citizens than when they entered.

Our current policies have resulted in over-crowded prisons where inmates are exposed to the horrors of violence, including rape, infectious disease, separation from their family and friends, and despair. Most offenders are idle in prison, warehoused with little preparation to make better choices when they return to the free world. When they leave prison, they'll have great difficulty getting a job and it's very likely that the first incarceration won't be their last.

The Pugh Center on the States has chronicled the magnitude of the prison system and the challenges it faces: 2.3 million Americans behind bars as this very moment, 1 out of every 100 adult Americans. Including those that are under correctional supervision, another 5 million, that comes to 1 in every 31 adults is either in prison or being supervised on release. The cost to taxpayers is a whopping $68 billion.

On average, corrections are eating up 1 out of every 15 discretionary dollars at the States and the spending on corrections last year was the fastest-growing item in State budgets. We just can't sustain this continued growth of prisons. Corrections budgets are literally eating up State budgets, siphoning off money that could go for roads, schools, and hospitals.

But the dilemma we face is, how do we spend less on corrections while keeping our people safe? My work in the States has shown me that there are several that are doing a terrific job of that and that Senator Webb's legislation could be helpful to the others in doing the same thing.

Most social scientists agree that the drop in crime, some allege that it's only due to the mass incarceration. In reality, the experts agree about a quarter of it is, the rest is a variety of factors, many of which Chief Bratton has already talked about.

As I said before, we need prisons, but not for everyone that commits a crime. Prisons are meant for people we are afraid of, but we fill them with people we're just mad at. Check kiters can be safely punished in the community while holding down a real job, repaying their victims, supporting their families, and paying taxes. A drug addict who supports his habit with petty offenses needs to have his addiction treated. Sending him to prison, where less than 20 percent of the addicts get any treatment, does not change the inmate. When he's released, he'll still be an addict.

Our object should be to get him off drugs. Spending $30,000 a year to hold him in prison without any drug treatment is just plain

wasteful. We can learn a lot from New York City under the strong leadership of Chief Bratton. Most people are aware that the crime rate dropped dramatically in New York, far more than most other large cities.

For instance, the murders in New York dropped from 2,600 in 1990 to 800 in 2007. From 2,600 to 800. That's an astounding fact. Also, the one crime statistic that can't be fudged are bodies in the morgue. That was a real drop there.

What is not well known is that drop in crime occurred while New York was cutting its prison population, making better decisions about who they put in prison and for how long. They looked at the tipping point, where sentences do not buy any more public safety. That is really our object: how do we get the most public safety for the dollars that we have? Sadly, I don't think we're getting the bang for our buck from our corrections spending.

Several States have succeeded in separating the dangerous from low-risk offenders, and the results are impressive. They've shown it's possible to cut the cost of prisons while keeping the public safe. Last year, Texas—not exactly a soft-on-crime State—made sweeping reforms in their prison system. They reserved expensive prison beds for the dangerous offenders and treat the rest in community facilities, and they've taken the plans for building more prisons off the table, saving hundreds of millions.

Senator SPECTER. Mr. Nolan, how much more time would you like?

Mr. NOLAN. Okay. I have three quick things that I think are really important that the commission take up. The first, is to treat the non-dangerous mentally ill in community treatments. The police don't want to arrest these folks. They do what they call "mercy" bookings because they're on the street, but there are no beds to put them in. It's so much cheaper to keep them in a community treatment facility. It's about $29 a day versus $65 or so that it costs to keep them in prison. It also makes management of prisons impossible, or jails. How does a mentally ill person follow the orders.

The second thing is——

Senator SPECTER. Mr. Nolan, how much more time would you like?

Mr. NOLAN. It'll be like 2 minutes.

Senator SPECTER. OK.

Mr. NOLAN. The second thing is, have swift and certain sanctions for probation and parole violations. Now a vast number of prisoners going to prison are for parole violations, some of them serious, but a lot of them technical violations—they missed an appointment with their probation officer, they failed to report certain income, or they had a dirty UA. Sending them back to prison at a cost of $30,000 a year isn't the way to handle it.

The Pugh Center has studied a program in Hawaii by former Federal prosecutor, now a judge, Stephen Ohm that brings them in. If they have a dirty UA, they go straight to jail, but not for years, for 24 hours, to hit them up the side of the head. Some of these are knuckleheads that just can't follow the rules, and this is a way to say we're serious about it: get back in drug treatment, get back meeting your parole officer. The results have been dramatic in that they have 85 percent fewer missed appointments and 91 percent

fewer positive drug tests. So, it's working and it's saving the taxpayers a bundle.

The third thing is, match the parole supervision to the risk. Now a lot of States have every parolee being supervised. Instead, it should be focused on those that are a danger.

The last is a really ridiculous policy that limits mentors that work with prisoners inside prisons from staying in touch with them when they get out. Most of the States have this policy and it interrupts the very good relationships of the volunteers that are helping these inmates change their lives, it cuts them off from the very people that could protect them.

It's just astounding that the States would have that. These are the type of issues that the commission can address. The States desperately need the help looking at these things. They're so busy coping with the number of new prisoners that come in from these long sentences and stronger crimes so they can't look at these themselves. The commission can do that.

I thank you so much, Mr. Chairman, and Senator Webb and the other co-sponsors, for carrying the bill.

Senator SPECTER. Thank you, Mr. Nolan.

Chief Bratton, you commented about preventing crime and you have the unusual system of CompStat. I think this would be a good forum to explain that. Other chiefs may be listening to what we say here. Exactly how does it work and describe its success rate.

Chief BRATTON. The success in New York, which is fairly well known, which is now continuing in Los Angeles with many fewer police resources, is based on a system of timely, accurate intelligence, the idea that gathering up your crime information, both serious as well as minor—broken windows—every day, analyzing it, and as quickly as possible putting your police officers, whether in New York City with a lot of cops where I could cover all my dots all the time, or in Los Angeles I have to prioritize, where do I put my very small number of cops on what dots. The very act of staying on top of your crime information really allows you to rapidly respond to emerging patterns and trends and stop them at a second or third event rather than the 15th or 20th.

Then what we have also focused on is relentless follow-up, the idea that the Federal Government in particular, and to a lesser extent State and cities, are like "one-eyed Cyclops", to quote my friend Dean Esserman from Providence, that we look at an issue, we think we solve it, and we move on, and like the carousel, we never come back to it again.

In policing, we stay on crime all the time. It never goes away, so we never go away. So the CompStat model is very simplistic, if you will, but it works. But what fuels is it the idea, better to prevent the crime than expend resources, not just police resources, but societal resources. So the statistics that the gentleman to my left referenced, in New York City what was not widely known, was during the Guiliani time, my time as his commissioner, we purposely increased incarceration rates for a period of time to get the attention of the public and the criminal element, both serious and minor, and the prison population rose from 18,000 to 22,000, the capacity of Ryker's Island.

Right now, Ryker's Island houses around 11,000 inmates. There's almost as many corrections officers on Ryker's Island as there are prisoners. What happened? Police controlled behavior, both quality of life, broken windows, as well as more serious crime, CompStat, to such an extent we changed behavior. So the failed philosophy of the last Presidential crime commission that pointed police in the wrong direction for 30 years was that you, the police, society will figure out what to do about the causes of crime, you go work on the results of it. Well, we did that for 30 years and we saw the results: crime went through the roof, peaking in 1990 with huge increases, particularly fueled by crack.

The good news was that in the 1980s and the 1990s, American police, working with political leadership, yourself included, we got the crime bill of the 1990s, the first comprehensive omnibus crime bill, and we changed America. Violent crime went down 40 percent, overall crime 30 percent, and but for 9/11, which sucked up so many resources that had been focused on traditional crime, we would have kept it going down at an even more dramatic rate.

So the idea now going forward to the new commission is that certainly incarceration is a critical area, but if that's all you focus on, if you don't focus on police practices, if you don't focus on probation/parole practices, you are effectively going to end up 30 years from now where we were in the 1990s as a result of what occurred in the 1960s.

Senator SPECTER. Do you think the 1994 crime bill was effective?

Chief BRATTON. I'm sorry, sir?

Senator SPECTER. Do you think the Federal legislation in 1994, the crime bill, was effective?

Chief BRATTON. It was effective in some respects. I'm an example of that. Most of American police leadership today, my predecessor and my two successors in the Boston Police Department, for example, we all received educations in the 1970s as young police officers and sergeants entering the police business where we were exposed by going to college in the daytime, and at nighttime working as police officers. We didn't get wrapped up in the blue cocoon of that era, which was all about "hook'em and book'em". We understood that—the first book I ever read for a promotional exam was Herman Goldstein's Policing a Free Society. We ended up more progressive.

The leadership of American policing today, which created CompStat, quality of life policing, problem-solving policing, focus on prevention, and within five years, sir, we'll be into predictive policing. The next era is, we will be able to predict with great certainty where crime is going to occur and be more focused on preventing it. It's coming about because the focus back then had some good results. It provided leadership within policing that benefited the policing system and allows us to also appreciate that it's not all about us, it's about what part we play in the larger system. We are one element—only one element—but I would argue one of the most effective if we get it right.

Senator SPECTER. Professor Ogletree, you emphasized the treatment aspect. We call it a correctional system, but we all know it doesn't correct. The tremendous cost of recidivism. One of the factors which has been so difficult is to get sufficient public support

to make the system correctional on the steps of detoxication or literacy training or job training. What suggestion would you make to how you get sufficient public support to get the funding to do it?

Professor OGLETREE. Senator Specter, I think this is an idea where the public would actually support the idea of what I would call a sane criminal justice policy if the public understood something as simple as the collateral consequences of punishment. You don't only go to jail when you commit a crime in most cases, put aside minor crimes, but also you lose your right to vote, you lose your right to hold a license, you can't get a job, you can't travel, and you can't live in certain communities. Therefore, the only thing you do is return to crime, so the community is punished a second time because we haven't thought carefully about what to do with this person once they've served their time.

A couple of sensible things are going on with the mayor I know in Oakland, a former member of the Congress, Ron Dellums, and with another mayor, I know in Newark, Corey Booker. Both of them are making contact with corrections officials before people are released to get a sense of where they're going to go, what treatment they need. It's a form of the second chance, but the idea is that I don't want my community impacted by someone being released today whom I know can't get a job, doesn't have a license, doesn't have a place to live, and they'll be committing crimes within 48 to 72 hours. So reaching those people before they're released and working with corrections is one thing.

The second thing is to think about our policies that disenfranchise people in terms of working and to let the public know that we're not saying that we're going to give the best and most expensive jobs, the most revenue generating jobs to criminals. That's not the right idea. But the idea now is that someone who has a record can't get a job cutting grass or painting a fence. Okay. Not a child care center, not in certain sensitive areas, not in national security, fine. But the kinds of work that they could do where they would be taxpaying, wage-earning citizens is important.

I recall the line from Chief Justice Earl Warren's position on *Brown*. *Brown* had a lot of interesting things to say, but one thing said was that the most important thing was education. He said, "The very foundation of education is that it creates citizenship." People consider themselves citizens, which makes a big difference.

What I would suggest that we would have to do, and what this commission could do very effectively, is to figure out a way that people—like the old system, you have both a time of punishment, but also a time of treatment and release, and that we would make sure that we have a policy, a sane policy which enforces that.

Senator SPECTER. Professor Ogletree, in terms of attacking the underlying causes of crime, we talk about education, rehabilitation, realistic rehabilitation, job training, during your tenure in this field do you think we made any progress in the last three decades on the underlying causes of crime?

Professor OGLETREE. We have. To be fair, we have, because what we've done is to get people, on their own initiative with their own resources, to come up with creative alternatives for education. If you look at what is being done right in New York with the Harlem Enterprise Zone, you will see that this has taken a community that

would otherwise be viewed as crime, drugs, violence, but in fact Jeffrey has taken this community and said, you know, this is our community. We have to clean it up; we have to respect it. So people from parents to children are invested in it in some way that makes an enormous amount of difference.

At the same time, James Bell in Oakland has the Byrnes Institute which works with young people to make sure that we're very careful about things like expulsion and suspension, because when kids are out of school, all they do is commit crime. All of our laws that talk about curfews at 9, the crime is happening, as Chief Bratton will tell you, from 3 to 6, these latchkey kids who don't have anyone supervising them.

The third example that's a pretty significant one is resource-serious, but Chief Bratton will tell you, in Boston what we had was a voluntary effort of clergy, the Ten Point Coalition, the Black Minister Alliance, not meeting kids at the church, but going out on the streets of Boston in Dorchester, Mattapan, and Roxbury at midnight and talking to them, and taking them to have some coffee and so they had something to do. What I'm saying is that the community can address crime. It shouldn't be a burden just on police, just on the criminal justice system, but we have to use the resources that are already there.

If we can replicate examples of the Ten Point Coalition and the Black Minister Alliance in communities across this Nation, ministers, retired teachers, senior citizens, all of us have an interest in crime prevention, and we do that by telling children we love them, they do have some future, we can help them, and it doesn't cost the government money.

The idea is to make the community responsible for its own, but do that in a sense that gives the community some power to make sure that children have some alternatives other than the idea that all they can do is hang out in the streets because they can't get a job, they can't go to school, and they don't have many ideas of success within their homes.

Senator SPECTER. How important do you think mentoring is on that kind of community support?

Professor OGLETREE. It's critical. It's absolutely essential. You know that President Barack Obama and his wife Michelle Obama were my students, and I think about both of them. People see them and what they've done today, but Barack Obama is a guy whose father was largely absent from his life. His mother was pregnant as a teenager. He was moved around, not the country, but the world as a young kid.

Yet, he had mentors who kept him in check, who made him get away from bad influences, and led him to see that his life could be different. The same thing with Michelle: a father who was a working-class guy who had multiple sclerosis, but he took care of his children. I think mentoring is perhaps the most significant single factor.

And here is the point that we forget about: it's the problem that we don't appreciate the fact that mentoring has nothing to do with race and gender, that if we think, because I'm white I can't mentor a black kid from Harlem, or I can't mentor an Hispanic kid from

Houston, we're wrong. If we don't see this as our problem and our children and our community, that's the problem.

Mentoring should be a global effort by everyone that everyone can contribute, and that makes an enormous amount of difference for these children to see somebody who loves them, who has spent some time with them, and it's cost-effective because it lets people, like senior citizens, let kids know what it means to read a book, to think about a job, to be self-sufficient.

Senator SPECTER. Senator Klobuchar?

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you to our witnesses. Before I had this job I spent 8 years as a prosecutor in Hennapin County, heading up that office. I saw firsthand how the criminal justice system can work well, and then some of the issues that we have with it as well.

I will tell you that my experience—Minnesota has a lower incarceration rate than most States: we use probation more, we hang sentences over people's heads, we have a functioning drug court that has been improved and has some merit to it, I would say, but we also have focused in recent years strongly on tough sentences against people, felons who commit gun crimes and things like that.

So I will say that despite many people who completely decry our criminal justice system, I think there have been some improvements in recent years. I can tell you that I come from a city that was once called "Murderopolis" in the mid-1980s, and because of some tougher sentences, but also some more work on drug rehabilitation in our country, we actually saw vast improvements, a very strong decrease in the amount of murders, so no one is calling us "Murderopolis" anymore.

So I have interest in trying to make improvements, but also wanting to make sure that while we fix what is broken, that we're not going to hurt the good that has come out of some of the tougher sentences for certain crimes as we go ahead.

I had questions, first of all, for you, Mr. Bratton. I think we met once at a prosecutor's conference where I heard you speak back then many years ago. But I know you're a fan of community policing. I also think we could build on that with community prosecution. We did some of that in our county that was very successful. I do want to talk about whether you think this commission should also be looking into community policing.

Chief BRATTON. Community policing is, in fact, being quite frank with you, what saved America in the 1990s. The Federal Government entering into the partnership with State and local agencies for the first time in an effective way, the omnibus crime bill, some meaningful gun regulation, but its support of the concept of community policing, the emphasis on partnership, community, criminal justice system partnership within the system, prosecutors working with police, working with probation/parole, judges, et cetera, and the return to the focus on prevention of crime. What we focused on in the 1970s and 1980s was, as I was talking about earlier, was the response: response time, arrest rates, conviction rates, all important, but that's part of it.

The totality of it is, how do we prevent it in the first place? How do we prevent people from becoming drug addicts? How do we prevent people from being incarcerated? In the 1990s, we learned a

lot; the New York experience, CompStat, was a tool to facilitate community policing. We resourced appropriately on the police side of the house in that we had a lot of police, 100,000 more than we have now.

We also built a lot more prisons, but in the building of the prisons, when we filled them up as the police put them there, we in effect compounded the problem rather than, as policing was doing, reducing the problem in terms of the reduction of violence. There are too many people in jail that don't need to be there, many who could be in treatment centers, certainly the homeless, or what have come to be known as the homeless, the majority of whom are in fact having mental issues.

That half-million population in prison should not be there. They're only there because there's no place else to house them. Those half million in the 1960s and 1970s were in other forms of prison: they call them mental institutions. We literally dumped them from one place into another, and along the way a lot of them became the homeless populations we see on the streets.

So, effectively, your point that we not throw everything out, but examine what has been working, what is continuing to work, and what can we add to it, and let's get rid of what is not. There's a lot that is not working.

Senator KLOBUCHAR. OK.

Mr. Nolan, I appreciate your work. For many years I visited—I think 10 years—a woman who was incarcerated in Minnesota before I was a chief prosecutor. It got a little more difficult then. But she had killed her pimp, and I got a sense of the population. I went there about once a month and saw her and got to know some of the inmates in the facility. I will say that one of the things that I noticed, there were some people there with severe mental illness.

One of the things that you've suggested that Mr. Bratton just mentioned was to provide funding for providing more community health facilities where non-dangerous mentally ill people—I know we worked with the Mental Health Court for a while when I was a prosecutor to take some of the urinating in public cases, some of the cases that were non-violent, and tried to make sure that these people were taking medication, and working with them, and we had some success with that.

Could you talk a little bit about this idea of having a place that is different from the prison for people who are mentally ill to be incarcerated or to get treatment?

Mr. NOLAN. Yes. First of all, it's wonderful you've gone and visited the woman in prison. As I said, it's a lonely time, and anybody that wants to turn their life around, having somebody that comes and shows love for them and cares about them, gives them hope. So, thank you.

The mentally ill population, as Chief Bratton said, we closed our mental hospitals, but didn't build the community facilities that were promised to take care of them, so they ended up on the street and with the mercy bookings of the police, they ended up in jail. The idea is to get them in a stable environment. Ofttimes they're off their medications. If they're on their medications, getting three squares a day, they're totally functioning.

Senator KLOBUCHAR. Exactly.

Mr. NOLAN. They're not a danger to anybody. LAPD and LASO, the sheriff's office, have a great program, crisis intervention teams that are trained, specially trained officers that go out when a mentally ill person is found in front of Denny's worshipping the news rack, or whatever, that's the public nuisance. What it does, is free up the patrol officer to continue doing his work. These are specially trained and they try to defuse the situation. Then they've worked out contracts with local mental health facilities. They get first call on the beds. That's what the need is. They need a bed that can give them the acute care that they need, stabilize them, and then they can go to a regular mental health facility.

The problem is, they don't have enough money. I don't know about LAPD, but LASO has one shift, 8 hours out of the 24, and they've had to choose the times to have that special team just during 8 hours. The problem is, people don't act out during set times of the day. If they had 24-hour coverage, it would be much better.

The second thing, is that they have a bed to put them. I'll give you a quick story of an incident that shows how absurd this situation is. A deputy, before this program, arrested a mentally ill person. Again, they were causing a disturbance. He took them to the county hospital.

The L.A. county hospital refused to accept him and said, take him to jail. The deputy said, this man is not a criminal, he's sick. He belongs here. The hospital said, get off the property, we're going to arrest you for trespass if you stay here, and tried to arrest the deputy for trying to get the guy the treatment he needed. It became a big—the watch commander of the sheriffs and the commander at the hospital got involved and they defused the situation, but that's how absurd the situation was. You had a deputy that knew this man didn't belong in jail.

Also, the mentally ill are horribly abused in prison. They're taken advantage of, and then sometimes they also act out and abuse people. The last thing is, it just makes management impossible. Jails and prisons run on order, following set patterns. That's how they control the population. By definition, a mentally ill person can't follow the rules so they end up in detention, solitary confinement, which exacerbates their mental illness.

Senator KLOBUCHAR. Are you familiar with the Mental Illness Court that they had in Milwaukee where they actually have——

Mr. NOLAN. Yes.

Senator KLOBUCHAR. They have a place that people go and they take their medication, the sentence is hung over their heads.

Mr. NOLAN. Right.

Senator KLOBUCHAR. I think it was an interesting model to look at. So, again, for lower-level offenders.

Mr. NOLAN. That's exactly it. There are some mentally ill that need to be—Charlie Manson needs to be locked up.

Senator KLOBUCHAR. Thank you.

Mr. NOLAN. But a lot of folks don't.

Senator KLOBUCHAR. All right. I'll come back.

Senator SPECTER. Go ahead.

Senator KLOBUCHAR. You want me to keep——

Senator SPECTER. Yes.

Senator KLOBUCHAR. Okay. All right.

The other thing, Mr. Walsh, I want to thank you also for being here. I appreciated your testimony where—I don't know if you said it today, but in the written testimony where you talked about how State and local governments are responsible for 96 percent of those individuals that are either incarcerated or on parole.

As we look at this commission and the setting up of the commission, I'm very concerned that the people that are paying for 96 percent of this have a voice, because I can tell you what my impression was, being on the front line, managing an office of 400 people, is that the people in Washington love to put mandates down on us and put it in their brochures, and then we got stuck with all the work without any funding.

So could you talk a little bit about helping local governments have a voice with this commission?

Mr. WALSH. Yes. Thank you. And thank you for your interest in this, too. You know, the principle which I mention in my written statement is often called the Principle of Subsidiarity, which is that those government officials who are closest to the affected populations are typically in the best position, like you were as a prosecutor in Hennapin County, to know what the needs and the priorities should be for that particular community.

So often when drug policy is made or other policy is made at the Washington level, it doesn't necessarily reflect the values, the interests, and the priorities of the local community. So who those persons are who are ending up being incarcerated—or mental health, perhaps, issues that are being dealt with—in the population in that local community is being dictated by a very broad, and not necessarily very nuanced, policy that's being made in Washington.

So those who are on the ground, as I've learned in other experiences that I had, including doing Katrina relief where I was involved in getting the private sector on the ground very quickly right after the hurricanes hit, one of the things you learn is that the government officials who are closest to the situation are the ones who understand what is happening on the ground. They recognize it. It's very difficult for anyone in Washington to really see those nuances.

So from that standpoint, I think one of the things that the commission really needs is to have a robust representation from the States. It's good that the commission right now has two members who would be appointed, one by the chairman of the Democratic Governors Association, the other by the chairman of the Republican Governors Association. But it would be helpful to have language in the statute which specifically states that those interests need to be taken into account. And whether those members are appointed by Congress or, as I also recommend, that some of them be appointed by the executive branch, that those be people who are staunch proponents of the State and local law enforcement officials who right now comprise 91 percent of all of the law enforcement officials across the Nation.

So those are some of the ways that I think we can do it, but part of it is just elevating the discourse and making sure that we recognize that the States really do have the huge burden. One percent of the arrests, I think, in 2003 were made by Federal officials; 99

percent of the arrests were made by State and local officials. That's something that gets lost in the national publications, the national media.

It's important that we continue to bring that issue to the fore because otherwise we end up with some of the guidance that we were given—even, I hate to say it, but through the Sentencing Reform Act—from the Federal Government, which suggests that this is the best way, necessarily, to do sentencing.

A lot of the States will follow that in, sometimes, lock-step or rote, especially if there's money attached to it. So from that standpoint I think it makes a lot of sense to get the communities that Professor Ogletree was talking about well engaged and to have them well-represented, with their voices from the very beginning of the process—community leaders, ministers, others—talking about what they're really seeing and how to make sure that what we plan actually works.

Senator KLOBUCHAR. Right.

Then the other thing you commented about was just the sentencing, and how there are sentences that we should look at changing, and we had a good hearing here on the crack/powder disparity. I support changing that, and I think a number of the other Senators do as well. But I am concerned—I will be honest with this—I saw in our State some major improvements when it came to, especially, some of the Federal gun laws that went on the books that allowed for some of the worst criminals with guns, that allowed that to be up to the Federal level.

I think that was very helpful in many cases for us, even when they didn't go to the Federal level, the fact that those sentences were out there. It gave us some leverage to enforce the laws on the State basis. I think some of the changes in sexual assault law have been helpful, I think some of the changes in domestic abuse laws and those longer sentences have been helpful.

So some of the rhetoric surrounding this bill, that the entire system is broken, when in fact we have made strides in many areas, does bother me. It is not to say that we don't need changes to the criminal laws, we do. I come at it with these 8 years of experience of seeing the good side of using rehabilitation and having programs that work, but I also come at it as someone that has seen also the benefits of having some of the strength of a strong criminal justice system with those sticks out there.

Do you want to comment briefly on that?

Mr. WALSH. Yes, I would. I think you're right. In gun crime in particular, there's an instance where—I hate to say it again—there's a tenuous connection to interstate commerce in many instances for those Federal crimes. That doesn't mean that the States can't put in place the same type of laws, because they have wide latitude to criminalize gun possession in similar circumstances.

Now, the issue becomes, is there funding available and is there a mandate available? So one of the ways that we—and I think part of what the commission needs to do, is to recognize that the average person has gotten to the place where they do begin to look to Washington for all the solutions and to recognize that the State capital is often the place where those crimes can be put into place,

those offenses can be put into place, and then also look at how is money being allocated?

Some of the cost-savings measures that have been mentioned here could be reallocated for, like, gun enforcement, as an example. The benefit being that there is, again, a more nuanced approach and it's more tuned to the gun offenders in that particular State, that locality, whatever it is, and is not necessarily as harsh as some of the cases I saw when I clerked, for example, in the Federal court system, where basically an offender had a single shell casing or a few shell casings in a residence where he was staying, not even his shell casing. It was undisputed. But he either knew that they were there or had constructive possession of them and ended up spending time in prison because that supposedly was sufficient to show that he had possession.

So there's an instance where, at the State level, those types of stories, I think, have a greater impact on the electorate and they can begin to re-tune the policy. But I think mental illness is an other example. It is good for Washington to lead in terms of understanding what best practices are, doing the thorough investigations, and then bringing everyone to the table to begin to discuss it very openly.

Senator KLOBUCHAR. Yes. And I always just think about the effects that these changes will have, and I think there are some very good things we can do here. But I always remember, it's not going to be on the gated communities, it's not going to be where a lot of my colleagues live, it's going to be, the effects of these policies, good and bad, in the criminal justice system affect people in the Falwell neighborhood in north Minneapolis where they depend on us to make sure we're making the right decisions here.

I just want to end, because the Chairman has been so nice to let me go on here, with Professor Ogletree. Thank you very much for your work. I was very interested in your focus on patrol officers—we call them probation in our State—better monitoring using those compliance tools. We found that to be tremendously effective and a good use of resources, and they sometimes get left behind where someone, as long as they're monitored, it has been a big help to know and to use some of that sentence hanging over their head and to have probation officers, especially if they're willing to be out in the community.

Do you want to expand on that some more?

Professor OGLETREE. I agree. When I was practicing here, one of the great things was the great Probation and Parole Division, not with guns, but with the idea to help people get the jobs, make sure they kept their appointments, make sure they treated their families respectful, and it created a real partnership because you were in the halfway house. Right? You were out of jail, but if you didn't follow my rules strictly you would go back to jail. That was an important lever over their head.

I think we need a lot of those, not just the idea of probation and parole officers and other social workers and people in the community, but as I said earlier, we need the community to be invested in some reasonable way.

Here's the one thing that I would slightly disagree with on both the inferences, yours and Mr. Walsh's. Here's the problem. Every-

body has their own idea of how much to add to punishment, so you may want to do it on guns, someone else on sex offense, someone else on the elderly. What happens is, you get a 24-year-old who gets a sentence, not of 8 years, but of 30 years, and he comes out 54 years old, doesn't have a high school diploma, doesn't have a job, doesn't have a license.

Then he goes out, because he can't work, doesn't have a place to stay, and 3 weeks later he's back. You say, what happened? Well, no one did anything to prepare him for the life that he's going to experience. My sense is that we've got to think of not just the role of prosecutors, defense lawyers, and police, but who are the problem solvers? No one has that role in the criminal justice system. No one has to say, "my job is to resolve the problem, and my job is to do it in a smart and creative way."

It's being done by Chief Bratton and others, and police now are more creative about it. It's being done by judges, as I mentioned earlier, who are looking at the disparities between two penalties and saying, well, let me do what I think makes the most sense, and still be punitive.

One hundred and thirty months is still a lot of time, as opposed to 160, no one is walking free. But I think the real goal here is to figure out if we can have some group of people who can step back and say, our job is to solve this problem in a cost-effective way, and if we can't punish everyone as severely as we'd like, how can we make them accountable?

My sense is, you've got to get a job, you've got to go to work, you've got to earn a salary, you've got to pay your taxes, you've got to respect the community. I mean, there are a whole series of things that we think that can be done, and we've seen that happen. I should say, if you look at the testimony submission, virtually every single program that I mention in here is an organic one. Some community person said, I want to do this for these kids, and then they got a little bit of money, then they got a little State money, and then they got some Federal money.

So it was somebody locally who couldn't go to the mayor, the Governor, or the city council or the legislature, but somebody in Washington said, that's a very good idea, the youth bill. That's a very good idea, L.A. is best when kids are in school and staying off the streets. So my sense is that the Federal Government shouldn't tell the local government what to do, but it seems to me the Federal Government should find ways to support creative programs. It's a competition. You don't get it just because you're there, you have to prove to me that you're doing something that makes a substantive difference in the quality of life, not just of those in the criminal justice system, but those who are fearful of walking down the streets, shopping in the supermarket, living in the neighborhood. That's what we have to do to have a comprehensive and sane, and I would smart and creative, criminal justice policy.

Senator KLOBUCHAR. Very good. And I hope you didn't believe that I was against looking at this, because I come from a State which, I didn't always like to say, has the lowest incarceration rate in the country, but pretty much so. We use probation all the time in a very positive way, and I think a lot can be learned from that, especially at the Federal level. But one thing you mentioned that

I think is really important to note is that a lot of times politicians don't want to pretend people are going to get out, and some offenders should never get out, do never get out, but many offenders do get out.

I think the willingness to focus on that part of the time, what education they get when they're in prison—no one wants to say they're getting out, but they are, so the more we can do to equip them with those skills and to help them get jobs when they get out—we have a great program in the Twin Cities called Twin Cities Rise that has actual numbers.

This is one of these things that bugs me with programs, is a lot of times you have no idea what works and what doesn't. I think that we really need to have a focus on that as well. But they have the numbers to show that they're willing to take people in, train them, and get them out there in workforce. And certainly at this difficult time in the economy it's even harder for ex-inmates to come out and get jobs, and so I appreciate that focus, and it must be a focus of this commission. Thank you.

Professor OGLETREE. I should also say that you know Cathy Rickman, who is the co-chair with me of the Juvenile Justice Section of the Criminal Justice Section of the ABA, and we've been doing this very much. Donald Lewis, who's a classmate of mine, the new dean of Hamline——

Senator KLOBUCHAR. From Minnesota, yes.

Professor OGLETREE. All of us have been talking about, how do we do something for children? That is, we can't save everybody, but if we can prevent something early, that makes an enormous amount of difference. Minnesota is one of those States that we've seen as a model of intervening in people's lives at an early point and staying there until the problem is solved, and it's made a tremendous difference in the recidivism rate and the crime rate.

Senator KLOBUCHAR. Thank you. And I do think the other thing that made some difference, because we were called "Murderopolis", was that we had some tough sentences that we were able to use.

Professor OGLETREE. Right.

Senator KLOBUCHAR. And I think the key is to have it be a chisel and not a hammer in trying to get to the right place. We're never going to be perfect, but maybe because I had to play that voice in our State for so long, we have been called the land of not just 10,000 lakes, but 10,000 treatment centers.

Professor OGLETREE. Right.

Senator KLOBUCHAR. So I believe that it's important to have both, and I appreciate the work that you've all done. Thank you very much.

Senator SPECTER. Thank you, Senator Klobuchar.

We will make a part of the record letters, statements, and reports from The Rand Corporation, Human Rights Watch, National Association of Criminal Defense Lawyers, Council of Prison Locals, AFGE, AFL–CIO, Federal Cure, Inc., Crimeon International, Goodwill Industries International, Russell Simmons, Kings County D.A. Charles Hahns, Families Against Mandatory Minimums.

[The letters, appear as a submission for the record.]

[Annditional material is being retained in the Committee files, see contents.]

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00030 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

We thank you all very much, Chief Bratton, Professor Ogletree, Mr. Walsh, and Mr. Nolan.

That concludes our hearing.

[Whereupon, at 4:25 p.m. the Subcommittee was adjourned.]

[Submissions for the Record follow.]

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00031 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

SUBMISSIONS FOR THE RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

John Gage
National President

J. David Cox, Sr.
National Secretary-Treasurer

Andrea E. Brooks
National Vice President for
Women and Fair Practices

June 11, 2009

The Honorable Arlen Specter
Chairman
Senate Judiciary Subcommittee on
Crime and Drugs
U.S. Senate
Washington, DC 20510

Dear Chairman Specter:

On behalf of the 34,000 federal correctional officers and staff who work at the 115 Bureau of Prisons (BOP) correctional institutions, I am pleased to submit this statement expressing our strong support for the *National Criminal Justice Commission Act of 2009 (S. 714).*

S. 714 would establish a 11-member blue-ribbon commission charged with undertaking an 18-month comprehensive review of the American criminal justice system. Its tasks would include: (1) making specific findings related to current Federal and State criminal justice policies and practices, and (2) making concrete reform recommendations to Federal and State governments for reducing the prison inmate incarceration rate while preserving public safety, for improving prison administration and reducing prison inmate violence, and for establishing rehabilitation programs so prison inmates may successfully reenter our communities as productive, law-abiding citizens.

AFGE strongly supports S. 714 because we believe a comprehensive review of the federal BOP system by such a blue-ribbon commission will find that BOP institutions are becoming increasingly dangerous places to work because of the serious correctional officer understaffing and prison inmate overcrowding problems.

- *Increasing prison inmate population.* – More than 206,000 prison inmates are confined in the BOP correctional system today, up from 25,000 in 1980, 58,000 in 1990, and 145,000 in 2000. This explosion in the federal prison inmate population is the direct result of Congress approving stricter anti-drug enforcement laws involving mandatory minimum sentences in the 1980s, as documented in the *History of Mandatory Minimums*, a study issued by the Families Against Mandatory Minimums Foundation (FAMM).

- *Correctional officer understaffing.* - The number of federal correctional officers who work in BOP institutions, however, is failing to keep pace with this tremendous growth in the prison inmate population. The BOP

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00032 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.001

system is currently staffed at an 86.6% level, as contrasted with the 95% staffing levels in the mid-1990s. This 86.6% staffing level is below the 90% staffing level that BOP believes to be the minimum level for maintaining the safety and security of BOP institutions. In addition, the current BOP inmate-to-staff ratio is 4.9 inmates to 1 staff member, as contrasted with the 1997 inmate-to-staff ratio of 3.7 to 1.

- *Prison inmate overcrowding.* – At the same time, prison inmate overcrowding is an increasing problem at BOP institutions despite the activation of new correctional institutions over the past few years. The BOP system is overcrowded today by about 37%, up from 31.7% as of January 1, 2000. This overcrowding rate is projected to rise to 42% by 2010, according to the House Appropriations Committee report accompanying the FY 2009 Commerce, Justice, and Science Appropriations bill (H.Rept. 110-919).

- *Weakening of Federal Prison Industries.* – To make matters worse, various legislative and administrative initiatives since 2002 to modify the Federal Prison Industries prison inmate work program have eliminated thousands of FPI prison inmate jobs, with the percentage of FPI-employed prison inmates decreasing from 25% in FY 2000 to 17% in FY 2008. This is unfortunate because the FPI prison inmate work program is the primary tool that BOP correctional officers use to help deal with the huge explosion in the federal prison inmate population.

- *Increasing prison inmate assaults against correctional officers and staff, and against other inmates.* - In December 2006, the BOP Intelligence Section of the Department of Justice issued a report documenting that (1) inmate-on-inmate assaults in FY 2006 had increased 15.5% over the previous fiscal year, and (2) inmate-on-officers/staff assaults in FY 2006 had increased 6.0% over the previous fiscal year

That is why we offer our strong support for the *National Criminal Justice Commission Act of 2009 (S. 714)*. Violent incidents are the rule, not the exception, in the federal BOP system. Serious correctional officer understaffing, along with prison inmate overcrowding, is resulting in significant increases in prison inmate assaults against correctional officers and staff, and against other prison inmates. A national criminal justice commission is truly needed to review these dangerous problems, and to make concrete recommendations for resolving them.

AFGE sincerely hopes a blue-ribbon criminal justice commission, created pursuant to S. 714, will recommend that the President and Congress: (1) increase federal funding of the BOP Salaries and Expenses account so BOP can hire additional correctional officers to return to the 95% staffing levels of the

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00033 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.002

1990s; (2) increase federal funding of the BOP Buildings and Facilities account so BOP can build new correctional institutions and renovate existing ones to significantly reduce prison inmate overcrowding; (3) expand prison inmate participation in the FPI work program to 25% of the eligible inmate population, as long as no private industry or labor union is forced to bear an undue burden of competition from FPI products and services; and (4) refocus federal sentencing policies to reduce the federal prison inmate incarceration rate while preserving public safety.

Thank you for holding today's hearing on "Exploring the National Criminal Justice Commission Act of 2009." In addition, thank you for all your efforts to improve our nation's criminal justice system, and to advance the professional interests of the thousands of federal correctional officers and staffers that AFGE proudly represents. Please feel free to contact us if we can assist you in any way in these important matters.

Sincerely,

Beth Moten

Beth Moten
Legislative and Political Director

{00263034.DOC}

TESTIMONY OF
WILLIAM J. BRATTON, CHIEF OF POLICE
LOS ANGELES POLICE DEPARMENT

ON BEHALF OF
MAJOR CITIES CHIEFS ASSOCIATION

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME AND DRUGS

"Exploring the National Criminal Justice Commission Act of 2009"

June 11, 2009

Senator Specter and distinguished members of the Subcommittee, in my capacity as President of the Major Cities Chiefs Association and Chief of the Los Angeles Police Department, I am pleased to be able to contribute to the discussion and debate on what I view as some of the most important issues facing our society today. I believe that such a debate is long overdue on the national level and I agree that we need a contemporary, widespread and far-reaching review of our entire criminal justice system in order to better serve and protect the public. In a free society, it is incumbent upon the government and its agents to safeguard the rights of the victims of violence as well as the rights of the accused and the incarcerated. It is not enough to continue to churn people through a broken and ailing system with no forethought and no long-term solution. Ongoing reform is a necessary component of democracy that cannot be taken for granted and which requires constant and ongoing attention, focus and prioritization.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00035 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.004

It is widely agreed that there has been no truly in-depth or comprehensive study of the entire criminal justice system since The President's Commission on Law Enforcement and Administration and Justice, impaneled in 1965, and that many of today's criminal justice components operate based on its findings and recommendations as outlined in The Challenge of Crime in a Free Society published in 1967. It is my view that while there are many laudable and long lasting results attributable to The President's Commission on Law Enforcement and Administration and Justice, including the federally funded college education of thousands of young police professionals (myself included), the virtual dismantling of traditional organized crime and the introduction of automated fingerprint identification systems and other technology, the Commission was not as prescient as it could have been in some areas. I think now is the time to build on what we learned from these past efforts to develop a truly comprehensive and successful criminal justice system for the future. The most important message that I want to leave with you is that we must focus on preventing crime before it occurs rather than respond to it after it does. This has been the focus of my entire career, from a rookie cop in Boston to Chief of the Los Angeles Police Department. One of the great failures of The President's Commission on Law Enforcement and Administration and Justice was the acceptance of the widely held belief that police should focus their professionalization efforts on the response to crime and not the prevention of it. They mistakenly believed that the so called societal causes of crime (racism, poverty, demographics, the economy, to name a few) were beyond the control and influence of the police. They were wrong. Those 'causes' of crime are in fact simply 'influences' that can be significantly impacted by enlightened and progressive policing. The main 'cause' of crime – human behavior - certainly is something that is a principal responsibility and obligation of the

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00036 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.005

police to influence. The challenge in our democratic society is to always police constitutionally, consistently and compassionately.

My goal today is to briefly offer my perspective on what has transpired over the last forty years; to voice my support for the formation of a Criminal Justice Commission and to make recommendations on the composition and the scope of inquiry of such a Commission.

That was then, this is now

Thirty nine years ago, I was entering the police profession as a patrol officer, a profession that in many ways was severely flawed. It has been said that "the price one pays for pursuing any profession or calling is an intimate knowledge of its ugly side." I believe that is true, and I also believe that there is no greater calling than to protect and to serve the public, even through an imperfect and evolving system of justice.

So, what was happening forty years ago that prompted our elected officials to act? It is important to understand the context of the last inquiry in order to better prepare for our next foray into self-discovery and reform. The main criminal justice concerns in 1965 seemed to revolve around the hostile relationship between police and African Americans, organized crime, a dearth of research, problems with a growing juvenile justice system, gun control, drugs, the individual rights of the accused, police discretion, civil unrest, and a broken and isolated corrections system struggling to balance rehabilitation and custody issues. The "supervised" population at the time was quoted as hovering around one million people. That number has now swollen to over seven million. Another finding of The President's Commission on Law

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00037 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.006

Enforcement and Administration and Justice held that in order to be effective, a parole agent's caseload should not exceed 35 cases. Now, parole agents in some parts of the country are struggling with caseloads exceeding 80 cases.

So, that was the scene when I entered the profession. The intervening 20 years of the 70s and 80s saw a historic surge in violence, an epidemic of drug abuse and addiction, the deinstitutionalization and abdication of responsibility for the needs of the mentally ill, an explosion in our prison population, and an ever increasing commitment of uncoordinated resources to contain the effects of gangs, drugs, and guns on our communities with diminishing positive impact.

What we learned over the past two generations

While we failed to effectively address the tremendous increase in crime and violence in the 1970s and the 1980s, we finally started to get it right in the 1990s. Young police leaders were encouraged and financed in their pursuit of education, and that exposure led to a change in the way we were doing business. We had been focused on a failed reactive philosophy emphasizing random patrol, rapid response, and reactive investigations. In the late 80s we began to move to a community policing model characterized by prevention, problem-solving, and partnership. We turned the system on its head, and we were successful in driving significant crime reduction through accountability, measuring what matters, partnership with the community, and policing strategies that emphasized problem-solving and broken windows-quality of life initiatives. We developed COMPSTAT with its emphasis on accountability and use of timely accurate intelligence to police smarter. The results, as reflected by the dramatic crime declines of that

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00038 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.007

period continue to this day in New York, Los Angeles, and other cities. At the same time, the federal government took action to increase the number of law enforcement officers, to strengthen penalties, to control guns, and to support prevention programs, along with widening their efforts to combat organized crime. They became a true partner.

Since the 90s, crime has leveled off in some cities, has increased in others, and is continuing to decline in some others. This has given us the opportunity to pause, to look up from the task at hand, to analyze what we have done, to look at what has worked, and at what we can do better. The partnerships we have formed and the transparency and cooperation we have experienced has allowed us to more critically examine the form, process, and nature of criminal justice in contemporary American society.

Systemic problems persist

We have an opportunity here to capitalize on the relative success of the enforcement part of the equation to improve on the prevention, intervention, and reform aspects of criminal justice as a whole. Systemic problems persist as we fast forward to today's contemporary concerns.

The main criminal justice concerns for policy makers today revolve around the threat posed by gangs rather than traditional organized crime, continued problems with the corrections system in general and with the seemingly intractable problem of mass incarceration, a fractured and unrealistic national drug policy and a lack of protection of the individual rights and treatment of the mentally ill.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00039 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.008

George Kelling has noted that "The jailing and imprisonment of the mentally ill is a national disgrace that, once again, puts police in the position of having to do something about a problem created by bad 1960s ideology, poor legislation, poor social practice and the failure of the mental health community to meet their responsibilities. In some places, Boston and Los Angeles are examples, mental health professionals are stepping up to the plate, but it is on a small scale and only affects a small portion of the mentally ill."

My friend and the Obama Administration's new drug czar, Gil Kerlikowski, has said that he wants to banish the idea that the U.S. is fighting "a war on drugs," and shift to a position favoring treatment over incarceration in trying to reduce illicit drug use. I agree with Gil and will go a step further by suggesting that strong enforcement and effective prevention and treatment programs are not mutually exclusive. It is possible to promote a responsible enforcement agenda without driving incarceration rates through the roof. I know that it sounds counterintuitive, so let me explain. During my tenure as Police Commissioner in New York, we increased the jail population at Riker's Island to somewhere in the neighborhood of 22,000 inmates. As we drove crime down and focused on prevention, we denied criminals the opportunity to commit crimes. We, the police, controlled and modified the behavior of the criminal element to the degree that open air drug markets were disrupted, criminals were less likely to carry weapons for fear of being stopped, and aggressive beggars and other offenders were forced to abandon their long held practices of intimidating victims and destroying public spaces. The population at Riker's today stands at around 11,000 inmates reflecting a city that has seen in excess of a 70% drop in reported crime and the numbers of people committing these crimes. Los Angeles is another example. In the past eight years, we have achieved historic crime reductions. While it is true

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00040 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.089

that arrests (including those for narcotics) increased during the first few years, the last four years have been marked by declines in both crime ***and*** arrests. We recognize the importance of arrests in bringing crimes under control but also appreciate that we cannot use arrests as our only tool to deal with the crime problem.

In the intervening 40 years since the last commission, policing a free society has become significantly more complicated and demanding in order to meet the diverse expectations of citizens and elected leaders. I applaud the Committee for initiating this reexamination of our system of justice through the establishment of a National Criminal Justice Commission. The Commission, as outlined in the bill, will seek to inform policy changes designed to reduce our prison population, establish meaningful reentry programs, reform drug policy, improve the treatment of the mentally ill, and overhaul the way in which we deal with escalating gang violence, among other important issues. Together with an examination of law enforcement and policing, we expect a thorough review of the entire criminal justice system.

We Cannot Arrest our Way out of these Problems, Including the National Gang Crime Explosion

This bill recognizes what cops know and what the experience of the past forty years has shown, that we cannot arrest our way out of our gang crime problem. We recognize that arrest is necessary to put hardened criminals away; however, we will fall far short of our overall goal if this is all that we do. We need to also look for ways of preventing crime before it happens. Effective and long-term crime reduction can only be achieved through a comprehensive, collaborative approach that includes preventing gang involvement and gang violence, identifying

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00041 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.010

the relatively small number of repeat violent offenders, and restoring public order. Experiences in NYC during the 1990s and LA and other cities now in the first decade of the 21st Century demonstrate that violent crime can be prevented in part by police working in partnership with neighborhoods and communities. In addition, a significant portion of any future conversation has to focus on the crime prevention capabilities of criminal justice agencies operating as criminal justice agencies. To be sure, there are long-term needs and opportunities for our justice system , but they should not be considered out of the context of the more proximate preventive measures now available to police and prosecutors, including "broken windows," "pulling levers," and "problem-solving." The focus of this Commission should be on proximate measures to prevent crime. This was largely ignored during the 1960s President's Commission on Law Enforcement and Administration and Justice, and we should be careful not to make this mistake again.

The Los Angeles Gang Intervention Strategy

In Los Angeles, we are committed to attacking gang violence through prevention. By flooding our neighborhoods with critical prevention, intervention, youth development services, and by getting illegal guns off our streets we are keeping violence down for the long term. Mayor Antonio Villaraigosa and I are determined to continue to crack down on the gang carnage in the City and to provide young people at risk with better alternatives for their future.

We are already seeing some remarkable results. Gang-related homicides are down 26% since 2008 and 63% from 2002. An even more dramatic example is to compare gang homicides at their height in 1992 to last year's total. In 1992, 430 people lost their lives to gang violence in

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00042 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.011

Los Angeles. Last year, the toll was 167. Still far too many, but our efforts meant that 263 fewer people were killed by acts of gang violence.

Mayor Villaraigosa created the Office of Gang Reduction and Youth Development in August 2007 and appointed Reverend Jeff Carr as its Director with the mission to combat the City's gang epidemic. Reverend Carr has challenged the community to do their part as well, stating, "We have to figure out how to not become so desensitized to the violence that is going on in our community that we allow it to numb us to the point where we don't take the kind of action and have the kind of moral outrage that is necessary to eliminate this problem."

A key part of our strategy to combat the City's gang epidemic is to establish Gang Reduction and Youth Development (GRYD) zones in the communities most affected by gangs. Importantly, in addition to an increased deployment of police, the GRYD zones receive additional resources focused on prevention, intervention, and reentry programs for those involved or otherwise affected by gangs. This holistic approach is seen by experts as key to reducing not only the crime rates but also the membership of young people in gangs. In some sense, we are competing with the gangs for our youth and their lives are at stake.

Many of the reforms that were implemented in Los Angeles were proposed by and for the community. The Advancement Project headed up by Civil Rights Attorney Connie Rice, and other stakeholders proposed that the City move from its former approach of small, uncoordinated, low impact programs to a strategy of comprehensive prevention, intervention, and community investment that is linked to strategic community policing and designed to have

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00043 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.012

neighborhood level impact. In response, City public health and healing, child development, job development, and community development models have been implemented to effectively address underlying conditions that spawn gangs and violence. Any comprehensive strategy needs to address precursors to violence that may originate in the home such as domestic violence, negative parenting, and acceptance of gang culture. Its focus on prevention should reduce the need for incarceration significantly as gang related crime and violence continues to be reduced.

Final Thoughts

Our problems are systemic, widespread, and growing and only a singularly focused blue ribbon commission comprised of informed practitioners, scholars, policy makers and civil rights activists can adequately address the calculated formation of intervention and prevention strategies. Formation of this important commission is a major and essential step in the right direction. In closing let me add that:

> "America's system of justice is overcrowded and overworked. It is undermanned, underfinanced, and very often misunderstood. It needs more information and more knowledge. It needs more technical resources. It needs more coordination among its many parts. It needs more public support. It needs the help of community programs and institutions in dealing with offenders and potential offenders. It needs above all, the willingness to reexamine old ways of doing things, to reform itself, to experiment, to run risks. It needs vision."

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00044 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.013

This was true when it was penned 42 years ago by the President's Commission on Law Enforcement and Administration of Justice, and I think we can all agree that it still holds true even more so today. Nonetheless, I repeat: sustained crime control and improvement of the quality of life of neighborhoods and communities can only be achieved if our focus is on preventing crime; we cannot and should not try to arrest and incarcerate our way out of the crime, gang, and drug problems. There is today in America a better way.

Mr. Chairman, we recommend that any commission impaneled to study criminal justice in the United States examine not just the progress made since the President's Commission on Law Enforcement and Administration of Justice on traditional crime control, but also evaluate and understand the changes to policing since the attacks of September 11, 2001. The addition of the homeland security mission has forever altered the fundamentals of policing, bringing new challenges to the men and women who wear the uniform of state and local law enforcement.

At the end of the Commission's work, it is my hope that we will have carefully studied the role of policing in the United States from all angles and all perspectives. The Commission's report back to Congress and the American people should anticipate future challenges to policing and issue clear and strong recommendations to enhance the safety and security of the people of the United States. In that way, the Commission's work will help the entire criminal justice system become stronger and function better for society.

Speaking for my colleagues in law enforcement, we stand ready to assist the Commission in its efforts to improve public safety and fairness in the implementation of the nation's criminal

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00045 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.014

justice system. We advocate for a Commission that will take a comprehensive look at the entire criminal justice system, assessing the changes in policing and how they have helped to drive changes in other aspects of the field such as prosecution, community courts and prevention, probation, incarceration and parole.

Senator Specter and members of the Subcommittee, thank you for inviting me to speak today.

I am now ready to answer any questions you may have.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00046 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.015

Written Testimony of:

Senior Judge Arthur L. Burnett, Sr.
National Executive Director,
National African American Drug Policy Coalition, Inc.

Submitted to:

Senate Judiciary Committee
Subcommittee on Crime and Drugs

On

S. 714 – To Establish the National Criminal Justice Commission

June 29, 2009

Mr. Chairman and members of the Senate Judiciary Committee, Subcommittee on Crime and Drugs, I am grateful for this opportunity to submit this post-hearing written testimony on the Bill to be cited when and if adopted as the "National Criminal Justice Commission Act of 2009." This Subcommittee held a hearing on this Bill on June 11, 2009.

Because we in the National African American Drug Policy Coalition, Inc. consider this Bill so central to the very core mission of our organization,

56273.016

we felt it imperative to ask for permission to submit this post-hearing testimony statement. Our Coalition created a Blue Ribbon Commission in 2005 which held hearings in several cities of the United States and thereafter made several recommendations directly bearing on some of the objectives of this Bill. The Honorable Lee P. Brown, Chair, Blue Ribbon Commission on Racial Disparities in Substance Abuse Policies, stated in the introduction of the Report issued in September 2006:

> Based on my extensive experience in law enforcement, in overseeing the federal government's drug policies as the Nation's Drug Czar, and as Mayor of a major urban city, serving as Chair of the Blue Ribbon Commission on Racial Disparities in Substance Abuse Policies has been one of the most important events in my life. The extensive experience and expertise of the twenty-one (21) members of the Commission provided an all encompassing breadth of views on one of the *most intractable domestic issues* facing this Nation. (emphasis added). We have an extraordinarily high rate of illicit drug usage and addiction, abuse of prescription drugs and medications, alcoholism, and related co-occurring mental and emotional disorders. Illegal drug usage and drug trafficking, as well as alcoholism, have significantly contributed to this Nation having the highest rate of incarceration for criminal offenses of any Nation in the world.[1]

---

[1] Chair's Statement in introduction to the Report.

Members of the Blue Ribbon Commission were Dr. Beny J. Primm, M.D., Executive Director, Addiction Research & Treatment Corporation, Brooklyn, New York; Dr. Patricia B. Ayuk-Egbe, Doctor of Pharmacy, Associate Professor, Pharmacy Practice, Howard University, Washington, D.C.; Dr. Francis L. Brisbane, Ph.D., Dean and Professor, School of Social Welfare, State University of New York of Stony Brook, New York; Dr. James E. Cheek, President Emeritus, Howard University, Washington, D.C.; Dr. Betty Davis-Lewis, Ed. D., R.N., President, National Black Nurses Association, Inc., Houston, Texas; Dr. Julius Debro, Ph.D., Criminologist, Seattle, Washington; Clarence Edwards, Immediate Past President, National Organization of Black Law Enforcement Executives; Dr. C. Alicia Georges, Ed.D. R.N., Past President, National Black Nurses Association, Inc., Lehman College, Bronx, New York; Dr. Vincent Peter Hayden, Ph.D., President, National Black Alcoholism & Addictions Council, Inc., Minneapolis, Minnesota; Ms. Theorious M. Hickman, MSW, Past President, National Association of Blacks in Criminal Justice, Clinton, Maryland; Glenn F. Ivey, Esq., State's Attorney, Prince George's County, Maryland; Dr. Joy Jordan, D.D.S., Past President, National Dental Association, Cleveland, Ohio; Wilma A. Lewis, Esq.,

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00048 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.017

A great majority of criminal offenses in this Nation involve the use of illegal drugs or excessive use of alcoholism in one manner or another. A report by The Institute of Medicine of the National Academies suggests that as many as seventy-five (75) percent of the people involved in the criminal justice system have drug and alcohol problems.[2] As a former prosecutor for more than ten (10) years and as a judge for a total of more than thirty-six (36) years, I can personally represent that more than seventy (70) percent of the criminal cases I have handled in my professional career involved offenders being under the influence of alcohol or illegal drugs, i.e. homicides, rapes (both stranger and date rapes), domestic violence, robberies, assaults, or were property crimes to get the money needed to acquire illegal drugs or alcohol or were drug offenses. If we could but

---

former United States Attorney for the District of Columbia, Washington, D.C.; Dr. Averette Mhoon Parker, M.D., Psychiatrist, Washington, D.C.; Dr. Winston Price, M.D., Immediate Past President, National Medical Association; Rev. Dr. Kwame Osei Reid, Esq., (minister and lawyer) United Church of Christ, Washington, D.C.; Dr. Barbara T. Roberts, Ph.D., Professor, Department of Psychiatry, Georgetown University School of Medicine, Washington, D.C.; Judge Martha Lynn Sherrod, Chair, Judicial Council, National Bar Association, Huntsville, Alabama; Mavis Thompson, Esq., Vice President, National Bar Association; St. Louis, Missouri; and Dr. Vernetta D. Young, Ph.D., Professor, Department of Sociology and Anthropology, Howard University, Washington, D.C. Judge Arthur L. Burnett, Sr. served as Director and Staff Coordinator.

Kurt L. Schmoke, Dean of Howard University School of Law and President of the National African American Drug Policy Coalition, Inc. in his introductory remarks to the Report observed that each Coalition member organization "brings a unique perspective to the issues involved in drug policy reform" and that the Commission believed that adopting its recommendations would "lead to more effective drug policy and help improve the quality of life for all American citizens."

[2] See Institute of Medicine (2006), Improving the Quality of Health Care for Mental and Substance-Use Conditions: Quality Chasm Series, National Academies Press: Washington, D.C.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00049 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.018

implement a national approach to reducing the demand for illegal drugs and the excessive consumption of alcohol, we could drastically reduce drug-related crime, including violence, in this Nation, and significantly reduce our burgeoning incarceration rate and at the same time enhance public safety in this Nation.

Our Coalition came into being on April 1, 2004 when nine (9) organizations met in the Rayburn House Office Building to sign a Memorandum of Understanding to promote a public health and medical approach to dealing with drug addiction and drug dependency as a disease, rather than a moral failure, to be condemned by the criminal law, with the afflicted being criminally punished and incarcerated. This objective was the driving force behind the creation of our Coalition. The original nine (9) members of the Coalition were: (1) National Bar Association; (2) Association of Black Psychologists; (3) National Association of Black Social Workers, Inc.; (4) Howard University School of Law; (5) Congressional Black Caucus Foundation, Inc.; (6) National Dental Association; (7) National Black Caucus of State Legislators; (8) Association of Black Sociologists; and (9) National Black Nurses Association, Inc. At the Fall 2004 Meeting of the leaders of these organizations and their representatives with the leaders of the Coalition, six (6) additional

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00050 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.019

organizations joined the Coalition: (1) National Organization of Black Law Enforcement Executives; (2) National Association of Blacks in Criminal Justice; (3) National Black Alcoholism & Addictions Council, Inc.; (4) Black Administrators in Child Welfare, Inc.; (5) Association of Black Health-System Pharmacists; and (6) National Medical Association. Thereafter, the Coalition was joined by: (1) National Black Police Association; (2) National Alliance of Black School Educators; (3) National Institute for Law and Equity (an organization of former African American United States Attorneys appointed by the President); (4) National Conference of Black Political Scientists; (5) Black Psychiatrists of America, Inc.; (6) National Black Prosecutors Association; (7) National Organization of African Americans in Housing; and (8) Thurgood Marshall Action Coalition (an organization of African Americans involved with drug courts). This brought the total number of organizational members to twenty-three (23). We then incorporated in the District of Columbia as a not-for-profit educational and advocacy organization as of January 12, 2006 and on August 30, 2006 the Internal Revenue Service approved our application for Section 501©(3) status, retroactive to January 12, 2006, as a public charity. Since then the Coalition has been joined by two additional member organizations: (1) National Historically Black Colleges and Universities

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00051 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.020

Substance Abuse Consortium, Inc. and (2) National Association of Health Services Executives. We conservatively estimate that these twenty-five (25) member organizations represent 750,000 or more professional African Americans in their respective disciplines, especially when we include the students in the eighty-two (82) colleges and universities which are members of the Substance Abuse Consortium, and their graduate students in the graduate fields and professions.

The Coalition's number one goal and objective is to promote a public health and medical approach to dealing with the problem of illegal drug addiction and drug dependency, urging treatment as an alternative to criminal prosecution and incarceration for the non-violent offender whose possession of drugs or other non-violent crime is a product of his or her craving or compulsion to use drugs. We start from the premise set forth in *Robinson v. California,* 370 U.S. 660 (1962) that it is cruel and unusual punishment under the Eighth Amendment of the United States Constitution to punish an individual for the status of being a narcotic addict. Building on that concept, we have urged that when an individual possesses illegal drugs as a result of the compulsion or craving to use drugs as a result of the disease of drug addiction or drug dependency, or even sell some illegal drugs simply to get his or her own supply of drugs to use to ameliorate his or her craving

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00052 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.021

or compulsion to use drugs, like the insanity defense, the criminal offense should be viewed as a product of the disease of drug addiction or drug dependency, and not as an act permitting a criminal sanction. By analogous reasoning, the drug addict should be subject to a treatment protocol just as we would treat one recovering from a mental illness who had been found not guilty due to an insanity defense. Indeed, it is significant to note that the majority in the 6-2 opinion in *Robinson, supra* cogently likened the law in California involved in that case to one making it a criminal offense "to be mentally ill, or a leper, or to be afflicted with a venereal disease." The Physicians and Lawyers for National Drug Policy publication, *Alcohol and Other Drug Problems: A Public Health and Public Safety Priority – A Resource Guide for the Justice System on Evidence-Based Approaches,* published in April 2008[3] cogently states: "Though the initial use of

[3] This publication was published by Physicians and Lawyers for National Drug Policy in partnership with The National Judicial College in Reno, Nevada, and was funded by the Justice, Equality, Humanity, and Tolerance (JEHT) Foundation, the National Highway Traffic Safety Administration (NHTSA) and The Hanley Family Foundation.

Physicians and Lawyers for National Drug Policy (PLNDP) was created in 2004 to unite leaders from law and medicine to promote the need for evidence-based policy and practice in handling alcohol and other drug problems in medical and legal settings. PLNDP was formed as an outgrowth of Physician Leadership on National Drug Policy, an earlier medical initiative started in 1997. In the Spring of 2004, PLNDP medical leadership decided that in order to have a meaningful and lasting impact on alcohol and other drug policies it was imperative to bring in leaders of law to work with medicine on this public health concern; in response, Physician and Lawyers for National Drug Policy was created, with an administrative office at Brown University in Providence, Rhode Island.

Subsequently, PLNDP created a Judges Advisory Council, Chaired by Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court. Other members are Judge Barbara J. Rothstein, Director, Federal Judicial Center; Judge William F. Dressel, President, The National Judicial College; Martha P. Grace, Chief Justice, Juvenile Court, Boston, Massachusetts; and Senior Judge Arthur L. Burnett, Sr., National Executive Director, National African American Drug Policy Coalition, Inc., with headquarters at Howard University School of Law.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00053 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.022

substances is voluntary, continued heavy use can lead to dependence (or addiction), which is a chronic brain disease that causes physical changes in areas of the brain that are critical to judgment, decision-making, learning, memory and behavior control. Once an individual becomes addicted to a particular substance, their actions become in part involuntary in response to their brain's demand or craving from increased use despite medical and legal consequences."[4]

Turning to the application of these principles and concepts, our Coalition strongly advocates the expansion of drug courts in America and increasing their funding and capacity, including improving their cultural competency approaches so that they adequately serve all segments of our society without even subtle biases, assumptions or stereotyping which result in poor individuals and some minorities not being accepted into drug treatment programs because of the lack of structure and discipline in their lives. For the first time offender we advocate and urge that the individual be placed in a pretrial diversion program which will result in the dismissal of the criminal charge where that person satisfactorily completes the drug treatment program. Even where the person is charged with selling or

[4] *Id* at 14. It is significant to note that Physicians and Lawyers for National Drug Policy (PLNDP)'s mission is to align policy, practice and public understanding with the scientific evidence that addiction is a preventable and treatable disease; to support the use of evidence-based, cost-effective approaches toward prevention and treatment; and to enable lawyers and physicians to provide effective and sustained leadership in this effort.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00054 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.023

distributing drugs, if the selling or distributing was merely to get one's own supply, and not for profit, then on a case by case basis, we urge prosecutors to consider pretrial diversion for the first time offender. Where the individual is a repeat offender, and the prosecutor declines to agree to pretrial diversion, we urge that where the offender has a non-violent history, he or she be granted probation with a condition of participating in drug treatment, with the possibility that the conviction could be set aside if the probationer is rehabilitated and successfully completes the program. This approach should be favored over simply jailing an individual and incarceration with little or no treatment, with the offender being at high risk of repeating his crime upon release from confinement. We urge that long term effective treatment followed by ongoing supportive services will do far more to promote public safety than sending people in and out of prison without any effective treatment while in prison.

With reference to persons in the community under some type of supervision of the criminal justice system, i.e. probation, parole or supervised release, we urge and advocate that a technical violation such as a relapse and use of illegal drugs, failure to keep the supervising officer advised of address and employment, or the failure to keep an appointment, or the like be dealt with not as a basis for immediate revocation and sending

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00055 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.024

the person to prison, but that there be increased supervision and tightening of conditions in the community, with more frequent reviews before a judge, serving as a probation review judge or a re-entry court review judge. In *Alcohol and Other Drug Problems: A Public Health and Public Safety Priority, supra* I am quoted as saying: "Technical violations of probation, parole or supervised release should be dealt with in the community rather than by incarceration and costly imprisonment with increased supervision and additional services addressing the causes and stabilizing the person in the community."[5] By setting up a system of monitoring by judicial officers and giving judicial officers the power to order supportive services as needed, many such individuals can be brought into compliance and satisfactorily complete the probation, parole or supervised release and at the same time remain arrest free, thus reducing recidivism and promoting public safety, with these individuals being restored to productive lives and returning to our workforce as contributing citizens in our communities throughout the Nation. In this connection, we have suggested that in the Federal Judicial System, United States Magistrate Judges could perform this function, and if like drug courts on the front end of the system, they could achieve the same level of success, this would greatly reduce the number of individuals either

[5] *Id.* at 78.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00056 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.025

being revoked for probation violations or violation of their supervised release conditions, and reduce the commission of offenses by these individuals.

Our Coalition's Blue Ribbon Commission referred to above was also greatly concerned about disparities in the criminal justice system as to crack cocaine verses powder cocaine offenses, the extensive use of mandatory sentences in the federal criminal justice system, and the restoration of judicial discretion in order to achieve individualized justice based on the conduct and behavior of the individual before the judge. The Commission in its Report stated: "The legal distinction between crack and powder cocaine is an example of the discriminatory impact of mandatory minimum sentences. Although, the chemical characteristics of both types of cocaine are the same, studies show that in 2003 the average sentence for crack cocaine offenses, 123 months, was three and a half years longer than the average sentence for an offense involving the powder form of the drug, 81 months, and as a result African Americans now serve virtually as much time in prison for a drug offense, 58.7 months, as Caucasians do for violent offenses, 61.7 months.[6] ... The Commission supports the research and scientific studies that refute, contradict and invalidate any rationale for

[6] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003 (Washington, D.C.: October 2004) Table 7.16, p. 112.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00057 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.026

policies requiring mandatory minimum sentences and the disparate sentences for crack cocaine versus powder cocaine, and recommends reconsideration of those policies."[7]

At another point, and more generally, the Commission recommended "changes in criminal justice polices with respect to mandatory minimum sentencing for drug offenses at both the federal and state levels of government.[8] Such changes would give judges broader judicial discretion in sentencing so that they can tailor a sentence to the circumstances of the individual offender."[9] The Commission recognized that unfettered judicial discretion could lead to wide variances in sentencing and unequal treatment of offenders, and thus concluded that advisory guidelines would be appropriate to assure that people in like circumstances are treated in the same manner, and that there would be no unlawful or invidious discrimination. To the extent that there is a departure from the guidelines range, the judge should be required to give his or her reasons, subject to appellate review on appeal either by the prosecutor or the defendant, to determine if there has been an abuse of discretion or arbitrary and capricious action in the sentencing. For example, a judge may decide that it is

---

[7] *Id.* at 8.
[8] We do not here take a position on whether there should be mandatory minimum sentences for violent crimes or crimes involving the use of guns or other weapons.
[9] *Id.* at 8.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00058 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.027

justifiably to depart downward below the guidelines range where the offender was a very marginal participant in the crime event or engaged in the criminal act under duress or threats, but did not want to risk going to trial on a defense of coercion, or where the offender has shown remorse for his or her act and has engaged in voluntary acts of atonement and contribution to the community.[10]

During our Blue Ribbon Commission's deliberations, there was some discussion of whether sentences provided for some offenses were longer than required to fulfill the needs of justice. While we do not suggest that prison sentences should be shortened merely to save money, we think that this issue should be examined to determine whether the duration of sentences we provide for and impose are longer than necessary to punish or to rehabilitate the individual without compromising public safety once the offender is released back into the community. Indeed, some commentators have suggested that the longer a person remains incarcerated, the more anti-social and hardened in attitude he or she becomes and more of a threat he or she becomes to the public safety of law abiding citizens once released from custody. Should the National Criminal Justice Commission be created, this is an issue on which it should obtain all points of view and endeavor to

[10] *Gall v. United States*, No. 06-7949, 552 U.S. _____ (December 10, 2007).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00059 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.028

come up with a balanced recommendation which serves justice and adequately protects the public safety.

In the process of considering the issues involved with substance use and alcoholism, the Commission and the Coalition leaders have noted the high prevalence of the existence of co-occurring mental illness and emotional disorders in the individuals so afflicted. This has led us to question the wisdom of incarcerating misdemeanants in jails for minor offenses where they have co-occurring drug addiction or drug dependency problems and mental illness or emotional disturbances, or whether we would be far better served by placing these individuals in a civil court process rather than criminal, such as a civil commitment for the moderately mentally ill to a facility on an in-patient basis or to an assisted living facility, where the individual could be monitored and even have resident nurses or visiting nurses to administer the necessary medications to maintain the individual in a normal functioning state, with drug treatment and counseling and other supportive services as needed. Would such a system be far less costly then using our jails to warehouse these individuals for several months? Would such a system stabilize them and improve their health status? Would such a system reduce the volume of minor misdemeanor offenses they might otherwise commit when at large in the community?

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00060 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.029

Indeed, would such a supportive service system return these individuals to a productive workforce where they could be contributors to our society rather than a drain on our society, when released, homeless on our streets, and subject to repeated re-arrests for minor offenses?

For the foregoing reasons, we strongly support the proposal to create a National Criminal Justice Commission. But our support goes beyond merely the interest of African Americans to eliminate all the vestiges of racial and national origin discrimination in our criminal justice system and the achievement of a system of true equality as to each individual, where race, ethnic origin, national origin, religion, gender or sexual orientation no longer matters. Our support embraces fully the interests of all Americans. We question whether we over-criminalize conduct and behavior in the United States and whether many of our *malum prohibitum* offenses should be treated as civil infractions and perhaps subject to money penalties only, but not to the stigmatization which results from labeling the conduct criminal.[11] We may wish also to review whether regulations implementing statutes should be the basis for a criminal sanction or only a civil penalty in our legal system.

[11] See Generally, Timothy Lynch (Editor), *In the Name of Justice* (CATO Institute, Washington, D.C. 2009)(Leading Experts Reexamine Classic Article "The Aims of the Criminal Law," by noted Professor Henry M. Hart, Jr.)

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00061 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.030

We also question whether we have over-federalized criminal conduct and behavior and have made some conduct and behavior federal offenses, which would be best left to be controlled by the States.[12] For example, should small time drug offenses involving users and street dealers be in federal courts or rather left to the States to be dealt with as the States may deem appropriate, whether as criminal matters or under its welfare and health powers? Should the federal government restrict its role to actual importation of illegal drugs across our borders, or to movement of a minimum amount of kilos or a "floor" amount of grams, e.g. 500 grams, across State lines to justify bringing the case in federal court?

Other burning issues involve how to address violence in our urban communities, gun and other weapon offenses, how to reduce sex offenses and pornography, how to deal with the leaders of youth gangs and how to handle cases involving those individuals coerced to join youth gangs to survive in their neighborhoods in poverty circumstances. These are merely some of the critical issues with which such a National Criminal Justice Commission must deal.

---

[12] See Criminal Justice Section, American Bar Association, Report on the Federalization of Criminal Law 2 (1998). The ABA Task Force was composed of 17 academics, former prosecutors, Justice Department officials and others, and its final report was unanimous. See also Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT. G. REP. 295 (2008).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00062 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.031

With reference to the composition of the Commission, we recommend that it also include adequate representation from the Executive Branch of the federal government which under our Constitution is responsible for the faithful execution of the laws. We further note that since the purpose of the Commission will be to deal with both the federal and the state criminal justice systems, we recommend that the Commission be broaden to include substantial State representation. Thus it may be prudent that the Commission be increased to perhaps at least fifteen (15) members to include one or more State Attorneys General, local prosecutors, and correctional officials. We must avoid the appearance that the federal government is dictating to the States what their criminal justice systems should be in the future. Finally, we suggest that the Commission should be provided with a staff sufficient to digest all points of view to aid the Commission members in making their recommendations as to what our criminal justice system should look like in the future.

In submitting this testimony, we have not intended to be all-inclusive. We have endeavored to present some of the principal concerns of the professional African American community involved with these issues and to highlight some of the major issues for all Americans in perfecting our criminal justice system adequately to deal with individuals who will not

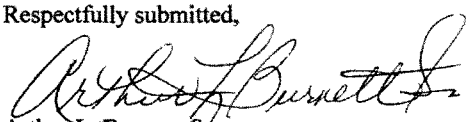
VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00063 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.032

comply with our societal norms embodied in our criminal law which at the same time respects individual liberty and our constitutional and civil rights, and which will increase and enhance public safety for all of our citizens.

On behalf of the National African American Drug Policy Coalition, Inc. I thank you Senator Specter and members of the Subcommittee on Crime and Drugs, Senate Judiciary Committee, for the opportunity to submit the views stated herein for your consideration as you determine what action should be taken on Senate Bill S. 714 – A Bill To Establish the National Criminal Justice Commission.

Respectfully submitted,



Arthur L. Burnett, Sr.
Senior Judge (Inactive Status
- on Sabbatical)
National Executive Director
National African American
Drug Policy Coalition, Inc.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00064 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.033

ThirdWay

June 17, 2009

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
United States Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

In recent years, the issue of crime has fallen to the bottom of the political charts. Rarely mentioned in Congress, many political leaders in Washington are treating the crime issue like polio—something that was once a problem in the United States but that now is basically solved. But crime is on its way back, due in no small part to the shortcomings of the current criminal justice system. It is critical that we address these problems which, if left unchecked, will endanger American communities in the coming decade. Third Way is pleased to endorse the **National Criminal Justice Commission Act of 2009 (S.714)**, as introduced by Senator Webb, which would begin to address these deficiencies and take a step towards correcting the myriad of problems plaguing our criminal justice system.

Twenty years ago, fewer than 700,000 people in the United States were incarcerated in the state and federal prison systems. This year, 700,000 people will be *released* from prison, and 3.5 million will be released over the next five years. Based on past projections, nearly two-thirds of these formerly incarcerated people will be rearrested within 3 years of their release, and this group of individuals alone will be responsible for nearly 10 million new crimes by 2013. The predominant approach to reentry has led to an ineffectual and perpetual cycle of incarceration and release. The price of failure—including the cost of crime to individuals and communities and the cost of incarceration to the taxpayer—is enormous and worth at least some additional resources to avoid.

The National Criminal Justice Commission Act would create a commission to examine all areas of federal and state criminal justice costs, practices and policies and make recommendations for greater efficiency and effectiveness. The American people are seeking solutions in this area. In a Third Way poll, we found that 57% of Americans view crime as a "very serious problem," and another 37% see it as "fairly serious." By a five-to-one margin, Americans say that crime in our country is getting worse. Sixty-nine percent believe that crime is a bigger threat to their personal safety than terrorism. And 78% think children are more vulnerable to crime today than they were 10 years ago. With a coming wave of prisoner releases, inefficiencies and ineffectiveness in the current system, and glaring past mistakes, it is urgent for Congress to take this first step to improve criminal justice policy by passing the National Criminal Justice Commission Act of 2009.

Sincerely,

Jon Cowan
President

1025 Connecticut Avenue, NW Suite 501 • Washington DC 20036-4915
• 202 775 3768 • www.thirdway.org

THE THIRD WAY CULTURE PROGRAM

ThirdWay

Third Way Crime Poll Highlights

These are the highlights of a 1,139 person survey conducted by Cooper & Secrest Associates, December 15–19, 2007 on voter attitudes toward crime.

Americans View Crime as a Resurgent Threat

Although, crime does not rival the economy or Iraq as a front burner issue, there are clear indications that the public is becoming more concerned about the issue.

- 57% rate crime as a "very serious" issue
- By a 56-11% margin, the public believes there is more crime rather than less crime in America than one year ago
- 78% say that children are more vulnerable to crime than ten years ago
- By a 69-19% margin, Americans feel that crime is more of a threat to their own safety than terrorism

Most Americans Are Non-Ideological Pragmatists on Crime

Our research identified three distinct groups of Americans on the crime issue. The most prominent was the 55% of Americans whom we call "Solve-the-Problem" voters. They are non-ideological pragmatists who are open to a very active government role in crime prevention and intervention if properly designed and framed to emphasize personal responsibility. These voters are evenly divided between Democrats and Republicans and are dispersed evenly throughout the country.

The remaining two groups are far more ideological. "Throw-the-Book" voters comprise a small minority of the population and oppose any efforts at changing criminal behavior beyond enforcement and prison. They are overwhelmingly conservative. "Read-a-Book" voters believe wholeheartedly in rehabilitation and are far more likely to be liberal than the general population. They rank crime lower as an issue and see crime as slightly less of a threat to themselves.

Democrats and Republicans are at Parity on the Crime Issue

When asked who would do a better job of "working to reduce crime," 33% chose Democrats, 31% chose Republicans, and 36% volunteered "not sure" or "neither party." Compared to the 1970s and 80s, when the country trusted only conservatives to combat crime, our polling indicates that there has been a significant shift in public opinion towards parity. However, Americans still have distinct preconceptions about both parties' approaches to the issue. They see Democrats as too quick to blame crime on circumstances, like bad schools, broken

56273.035

families, and dysfunctional neighborhoods. They see Republicans as holding individuals responsible for their own actions, but straying too far towards punitive sentencing for crime.

Voters Favor Intervention Efforts to Reduce Crime

There is strong support for programs aimed at reducing crime, but those designed to make people improve and take responsibility scored the best. For example, when prison rehabilitation programs were defined as a requirement of, not a benefit for, prisoners—support soared. Specifically, a policy forcing prisoners "to work, get an education, and learn skills because they need to be productive when they get out" scored 36-points higher (with 91% approval) than one providing prisoners who have "difficult family, economic or mental health circumstances" with the "proper counseling and training they need to be rehabilitated."

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00067 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.036

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

AREA:

	Total
Pacific West	14
Mountain-Plains	16
Midwest	24
South	24
Northeast	22

GENDER:

	Total
Male	47
Female	53

Q.1 Are you registered to vote at this address?

	Total
Registered (CONTINUE)	-
Not registered (TERMINATE)	-
Not sure (TERMINATE)	-

Q.2 Looking ahead, what are the chances you will vote in the November 2008 general election for President--are you almost certain to vote, will you probably vote, are the chances 50-50, or don't you think you will vote at this time?

	Total
Almost certain (CONTINUE)	-
Probably (CONTINUE)	-
50-50 (TERMINATE)	-
Don't vote (TERMINATE)	-
Not sure (TERMINATE)	-

Q.3 Generally speaking, do you believe that things in this country are headed in the right direction, or do you believe things are off on the wrong track?

	Total
Right direction	19
Wrong track	66
Not sure	15

Q.4 What if the 2008 general election for the U.S. CONGRESS were being held today, do you think you would vote for the Republican candidate or the Democratic candidate for Congress in your district? (If "NOT SURE":) Well, which way do you lean as of today--toward a Republican or a Democratic candidate?

	Total
Republican candidate	34
Democratic candidate	44
Neither (vol)	4
Not sure	18

Q.5 What if the 2008 general election for the STATE LEGISLATURE were being held today, do you think you would vote for the Republican candidates or the Democratic candidates for state legislature in your district? (If "NOT SURE":) Well, which way do you lean as of today--toward a Republican or a Democratic candidate?

	Total
Republican candidate	33
Democratic candidate	42
Neither (vol)	3
Not sure	22

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00068 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.037

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.6 How would you rate the overall job performance of George Bush as President-- excellent, good, only fair, or poor?

	Total
Excellent	6
Good	23
Only fair	26
Poor	44
Not sure	1

Q.7 Much of our survey today is focused on the issue of CRIME. Thinking about the issue of crime in the UNITED STATES AS A WHOLE, would you describe it as a very serious problem, a fairly serious problem, a not very serious problem or a not at all a serious problem?

	Total
Very serious problem	57
Fairly serious problem	37
Not very serious problem	5
Not at all a serious problem	0
Not sure	1

Q.8 Crime takes all forms, of course, especially in today's culture. As you think about this issue, what one or two TYPES of crime would you say are MOST likely to touch you and your family? (PROBE.) Anything else?

	Total
Theft/Robbery	36
Identity theft	17
Burglary	10
Drugs	8
Murder	7
(Top 5 of 23)	
Don't know	12

Q.9 I am going to read you a short list of approaches that elected leaders and law enforcement must consider when it comes to controlling crime. While all of them may be important, please tell me tell which ONE or TWO of these items on this list should be the top priority. (READ LIST. ACCEPT TWO RESPONSES)

ROTATE

	Total
a. Our approach to fighting crime must be tough--punishing criminals, and getting justice for the victims of crime	35
b. Our approach to fighting crime must be smart--investing in the most effective and practical crime-fighting programs to best deal with the crime problem in America today	25
c. Our approach to fighting crime must be fair--balancing punishment for criminals with giving people the opportunity to earn a second chance to become productive citizens	31
d. Our approach to fighting crime must be accountable--rejecting crime-fighting methods that no longer work and using proven crime-fighting strategies so that taxpayer dollars are spent wisely	28
e. Our approach to fighting crime must be punitive--ensuring that criminals are punished for their crimes, even if that means there is less emphasis on treating and rehabilitating criminals	18
All (vol)	4
None (vol)	3
Not sure	-

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00069 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.038

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.10 Is there any area near where you live--say, within a mile or so--where you would be afraid to walk alone at night?

	Total
Yes	34
No	65
Not sure	1

Q.11 Do you believe children are MORE vulnerable to the dangers of crime today, than, say 10 years ago, are they LESS vulnerable, or are they ABOUT AS VULNERABLE to the dangers of crime today compared to 10 years ago?

	Total
More vulnerable	78
Less vulnerable	3
About as vulnerable	18
Not sure	1

Q.12 And which would you describe as the bigger threat to you, personally--violent crime or a terrorist attack?

	Total
Violent crime	69
Terrorist attack	19
Neither	7
Not sure	5

Q.13 Is there more crime in America than there was a year ago, or less crime?

	Total
More crime	56
Less crime	11
Same amount (VOL.)	21
Not sure	12

Q.14 When it comes to 'working to reduce crime' which political party does the better job of representing your views, the Democrats, or the Republicans?

	Total
Democrats	33
Republicans	31
Neither (VOL.)	19
Not sure	17

Q.15 Generally speaking, would you say the criminal justice system in America is always fair, usually fair, sometimes fair, usually unfair, or always unfair?

	Total
Always fair	2
Usually fair	51
Sometimes fair	35
Usually unfair	9
Always unfair	2
Not sure	1

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00070 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.039

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.16 Do you believe illegal immigrants are more likely, less likely, or just as likely to commit a violent crime as other people?

	Total
More likely	25
Less likely	10
Just as likely	62
Not sure	3

Q.17 Thinking again about the issue of crime in general, please tell me which of the following statements comes closer to your point of view? (READ STATEMENTS.)

ROTATE

Statement A: Say what you will, most people who commit crimes are simply bad people who have chosen the path of crime, and are highly unlikely to change or to be rehabilitated.

Statement B: Most people who commit crimes have faced some difficult family, economic or mental health circumstances, and with proper counseling and training, can be rehabilitated and will turn away from crime.

	Total
Statement A	33
Statement B	55
Neither (vol)	7
Not sure	5

ROTATE Q.18 AND Q.19

Q.18 And which of the following two statements concerning the spending of tax dollars on criminals comes closer to your point of view? (READ STATEMENTS.)

ROTATE

Statement A: The fact is, spending a great deal of tax dollars trying to counsel, train or rehabilitate criminals, while well intended, is throwing good money after bad, and this spending is very unlikely to pay off.

Statement B: The reality is, 3 million criminals are scheduled to be released from prisons in the next four years. If we do not get practical and invest tax dollars so prisoners complete drug treatment, earn a high school degree, and learn work skills, we're just asking for a big increase in crime when they get out.

	Total
Statement A	21
Statement B	71
Neither (vol)	4
Not sure	4

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00071 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.040

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.19 And, again, which of the following two statements about spending to REHABILITATE criminals comes closer to your point of view? (READ STATEMENTS.)

ROTATE

Statement A: As long as they are serving their time in prison, inmates must be required to do things that will help make them accountable and productive when they leave. They shouldn't be wasting their time doing nothing while in prison.

Statement B: We have no obligation to provide expensive social services to prisoners. That obligation ended the moment they broke the law.

	Total
Statement A	79
Statement B	16
Neither (vol)	3
Not sure	2

Q.20 Do you favor or oppose a law that allows people who have passed a police background check to carry a concealed firearm? Would that be strongly (FAVOR/OPPOSE) or somewhat (FAVOR/OPPOSE)?

	Total
Strongly favor	32
Somewhat favor	23
Somewhat oppose	14
Strongly oppose	27
Not sure	4

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00072 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.041

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.21 Now, I'm going to read you several statements. For each one I read, please tell me whether you associate that statement MORE with the Democrats, MORE with the Republicans, with BOTH parties, or with NEITHER party. (READ EACH STATEMENT, THEN ASK.) Do you associate that statement more with the Democrats, the Republicans, both or neither?

ROTATE

	Democrats	Republicans	Both	Neither	Not Sure
a. Criminals aren't bad people; they're usually forced into crime because of family or economic circumstances	41	8	19	24	8
b. Because of the Internet and other cultural influences, our children have never been so vulnerable to crime	13	18	44	18	7
c. The criminal justice system is biased against blacks, Hispanics, and other minorities	36	12	14	30	8
d. If we make the investment in anti-poverty, early childhood education and job training programs, we can reduce crime significantly	53	10	23	9	5
e. Until we get control of our borders, the United States will struggle to get crime under control	14	38	26	16	6
f. Getting serious about crime means getting serious about punishment; tough sentences are the only answer	10	48	21	14	7
g. Changing a criminal's behavior means changing his heart; this will only happen through an experience in religious faith	12	34	16	30	8
h. People are responsible for their own actions, even if they had a bad upbringing	11	37	32	14	6
i. Anti-crime programs need to be held accountable to the taxpayer, so taxpayers know programs are actually working and that their money isn't being wasted	20	28	30	15	7
j. Prisoners should be forced to work, get an education, and learn skills because they need to be productive when they get out	29	17	34	13	7

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00073 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.042

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.22 I am now going to read a series of statements a candidate might make on crime. For each one I read, please tell me whether it makes you more likely or less likely to support a candidate who makes that statement. If it makes you MUCH more or MUCH less likely to support the candidate, please say so. (PROBE: Are you more or less likely to support a candidate who makes the statement? (IF CHOICE) And is that much more/less likely or somewhat more/less?

ROTATE

	Much More Likely	Somewhat More Likely	Somewhat Less Likely	Much Less Likely	No Difference	Not Sure
a. Criminals aren't bad people; they're usually forced into crime because of family or economic circumstances	15	22	25	27	7	4
b. Because of the Internet and other cultural influences, our children have never been so vulnerable to crime	42	32	9	7	6	4
c. The criminal justice system is biased against blacks, Hispanics, and other minorities	15	18	22	34	6	5
d. If we make the investment in anti-poverty, early childhood education and job training programs, we can reduce crime significantly	52	30	7	6	3	2
e. Until we get control of our borders, the United States will struggle to get crime under control	39	22	16	15	5	3
f. Getting serious about crime means getting serious about punishment; tough sentences are the only answer	33	25	19	16	4	3
g. Changing a criminal's behavior means changing his heart; this will only happen through an experience in religious faith	21	22	20	27	6	4
h. People are responsible for their own actions, even if they had a bad upbringing	45	28	12	8	4	3
i. Prisoners should be forced to work, get an education, and learn skills because they need to be productive when they get out	61	29	3	3	2	2

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00074 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.043

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Many experts believe there is growing evidence of a coming increase in crime in the next few years. They attribute this to several different trends, including: the release of several million prisoners in the next five years, lower federal funding for crime fighting, the ongoing issue of illegal immigration and new technologies like the Internet that may make children more vulnerable.

Q.23 Here are some suggestions some people have made for reducing crime. For each item I read, please tell me if you think it is a very effective suggestion to reduce crime, a somewhat effective suggestion, a not very effective suggestion, or a not at all effective suggestion reduce crime? (READ LIST AND REPEAT CHOICES.)

ROTATE	Very Effective Suggestion	Somewhat Effective Suggestion	Not Very Effective Suggestion	Not At All Effective Suggestion	Not Sure
a. Require criminals to perform 40-hours of work every week while in prison so that they are productive, not destructive, when they get out	61	30	5	2	2
b. Expand programs to help prisoners get off drugs, get an education, get help with mental health problems, and gain work skills	56	34	6	3	1
c. Put more police on the street	58	32	5	3	2
d. Require police to check the immigration status of any suspected illegal immigrant arrested for a violent crime	65	23	5	5	2
e. Make it illegal for an adult to pose as a minor on the Internet	66	17	8	7	2
f. Use mandatory drug testing and mental health counseling as an alternative to prison for JUVENILE offenders	40	41	11	5	3
g. Allow illegal immigrants to report crimes to police WITHOUT anyone checking on their immigration status	32	34	15	16	3
h. Create tax breaks for companies to hire ex-prisoners	23	45	16	12	4
i. Devote more resources for after-school and weekend programs for troubled youths	60	31	6	1	2
j. Create a college scholarship program for low-income teens who graduate high school and stay off drugs and don't get arrested	61	29	6	3	1
k. Support faith-based partnerships that train ex-offenders and place them in jobs	36	44	10	8	2
l. Use new technology to watch over high-crime communities, including video surveillance, gunshot detectors, and license plate scanners	47	34	9	7	3
m. Create an illegal immigration strike force to crack down on those who encourage and assist in illegal immigration, including those who create false identification, engage in human trafficking, and provide phony immigration legal services	60	24	7	6	3
n. Deny state contracts to businesses that repeatedly disobey immigration laws	54	24	12	8	2
o. Support efforts to match state records on sex offenders with data released by social networking sites such as Facebook	52	29	8	4	7

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00075 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.044

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.24 In what age group are you? (READ LIST)

	Total
18-24	4
25-34	9
35-49	29
50-64	30
65 and over	28
Refused	-

Q.25 What type of work does the person who is the main source of income in the household do? What is the job called? (BE SURE TO GET ENOUGH INFORMATION TO CLASSIFY PROPERLY. IF UNEMPLOYED, GET USUAL OCCUPATION. DO NOT READ.)

	Total
Professional	24
Executive/Manager/Proprietor	9
Sales	4
Civil service/Government	6
White collar/Clerical/Technical	10
Skilled craftsman/Foreman	10
Semi-/unskilled labor	5
Student	0
Retired	29
Housewife	0
Farmer	1
Other	1
Refused	1

Q.26 which of the following best describes the area where you live: a mostly rural area, a small town, a suburban area, or a medium-to-large city?

	Total
Mostly rural area	20
Small town	28
Suburban area	25
Medium/large city	27
Not sure	-

Q.27 Please tell me which of the following best describes your marital status. (READ OPTIONS.)

	Total
Married	65
Single	13
Divorced/Separated	10
Widowed	12
Refused (DO NOT READ)	-

Q.28 Do you have children in the household age 18 or under?

	Total
Yes	32
No	68
Not sure	-

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00076 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.045

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.29 What is the last grade of school you have completed?

	Total
8th grade or less	2
Some high school	3
High school graduate	26
Some college	17
2-year college graduate	12
4-year college graduate	22
Post-graduate	18
Not sure	-

Q.30 Aside from weddings and funerals, how often do you attend Church or other religious services?

	Total
More than once a week	17
Once a week	31
Once or twice a month	18
Once or twice a year	15
Almost never	19

Q.31 And how would you describe your own political beliefs--very liberal, somewhat liberal, moderate, somewhat conservative, or very conservative?

	Total
Very liberal	9
Somewhat liberal	19
Moderate	28
Somewhat conservative	27
Very conservative	17
Not sure	3

Q.32 How would you describe your point of view in terms of the political parties? Would you say you are mostly Democratic, leaning Democratic, completely Independent, leaning Republican, or mostly Republican?

	Total
Mostly Democratic	31
Leaning Democratic	13
Completely Independent	18
Leaning Republican	12
Mostly Republican	23
None (VOL)	1
Not sure	2

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00077 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.046

Third Way National Crime Survey
Cooper & Secrest Associates

Job number: 07059

Total number of interviews: 1139
Interview dates: December 15-19, 2007

Q.33 For statistical purposes only, we need to know your total family income for 2006. I'm going to read you a list of categories. Please stop me when I reach the category that best represents your total family income in 2006.

	Total
Under $10,000	4
Over $10,000-$20,000	9
Over $20,000-$30,000	10
Over $30,000-$40,000	12
Over $40,000-$50,000	11
Over $50,000-$60,000	10
Over $60,000-$70,000	7
Over $70,000-$80,000	6
Over $80,000-$90,000	3
Over $90,000-$100,000	4
Over $100,000-$110,000	4
Over $110,000-$120,000	2
Over $120,000	9
Not sure (VOL)	2
Refused	7

Q.34 Are you, or is any member of your household, of Hispanic or Latino origin? (IF "NO" ASK:) What is your race--white, black, Asian, Native American or other?

	Total
Hispanic/Latino	9
White	77
Black	11
Asian	0
Native American	2
Not sure/refused	1
Other	-

Q.35 And finally, do you or anyone in your household own a firearm?

	Total
Yes	44
No	54
Not sure/refused	2

Thank you very much for your time. You have been most helpful. Have a nice afternoon/evening.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00078 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.047

CRIMINON®
INTERNATIONAL

431 North Brand Blvd, Suite 305, Glendale, CA 91203
Phone: 818 546 1921 Fax: 818 546 1912
Email:president@criminon.org

Office of the President

Written Testimony of:

Greg Capazorio, President of Criminon International

Senate Judiciary Committee
Subcommittee on Crime and Drugs Hearing

"Exploring the National Criminal Justice Commission Act of 2009"

June 11, 2009

Mr. Chairman and fellow members of the Senate Judiciary Committee, Subcommittee on Crime and Drugs, I am grateful for the opportunity to submit written testimony regarding why The National Criminal Justice Commission Act of 2009 is vital.

The obvious reasons for a National Criminal Justice Commission are the current record prison and parole population – 2.3 million in prison and 5.1 million on parole and growing; the national recidivism rate of 68%; more than $65 billion spent on corrections each year, up 619 percent compared to what was spent in 1982; and state prison budgets that have created greater deficits and less money for academic and cultural programs.

For a country as revered as the United States to have such a complete failure in the application of justice is a crime in itself. The lessons written by our Founding Fathers have been ignored for the sake of political expediency and a culture of vested-interest legacies. The special interest groups that have to date benefited from the failed criminal justice system continue to mislead the public and their elected representatives about the need for tough-on-crime measures that in the end actually decrease public safety while increasing the costs to taxpayers in terms of the number of dollars and victims.

The current American criminal justice system is a self-perpetuating machine. The policeman has a job to keep the streets safe and arrest perpetrators.

Arrests create the need for lawyers and prosecutors to prepare trials. Trials provide work for Judges. Once sentences are passed down, there is the need for prisons and jails. Prisons and jails create the need for correctional officers. When criminal offenders complete their sentences and return to the communities, parole and probation officers are needed.

But because there is no effective rehabilitation and because the expected "ripening of his nerves into a sensible adult" did not occur while behind bars, the police now have a job to keep an eye on and re-arrest the perpetrator when he re-offends, which 68% of them do within three years of release. Once again arrested, the criminal justice machine is fed and the revolving door of crime spins unabated with no regard for public safety.

That is why there is a VITAL need for a National Criminal Justice Commission, so we can find the root causes of the current failures of the system; so we can implement the fixes that will allow the American system to refrain from being a "criminal" justice system and revert to being a justice system.

Areas that need full review in current criminal justice system:

State and Federal prisons and city and county jails need review instantly and at once. The cities across the U.S. have jails that are no more than human warehouses where the revolving door of crime turns at blur speed. L.A. County jails have 20,000 beds filled 24/7, 365 days a year, with an average stay of 7 days. That's close to half a million people through those doors each year, most of them repeat offenders. Dallas has 5,100 beds filled 24/7 and that means 110,000 people spinning through the revolving doors of its jail. These are just two examples of the numbers of human lives wasted by an ineffective prison and jail system that refuses to seize the opportunity to correct and rehabilitate members of its captive audience.

Prisons and jails have the golden opportunity to help the entire country by correcting their temporary visitors, yet they choose to betray the public trust for the sake of union jobs or spiteful vengeance veiled as justice.

In Federal and state prisons, 650,000 inmates are released each year. It doesn't take an Einstein to do the math on the destruction to society when factoring in the 68% recidivism rate. Our prisons guarantee a staggering 442,000 crimes will be committed by those released, creating 442,000 unsuspecting, tax-paying victims.

The fact that prisons do not carry out their stated job of correcting the inmate is criminal. The fact that one out of every 100,000 in the U.S. are in prison is proof of its ineffectiveness. The fact that prison budgets have skyrocketed in the last 20 years and look to be increasing is further proof.

Sentencing guidelines need a complete overhaul. The fact that the U.S. has the highest prison population in the world does not mean that Americans are

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00080 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.049

more criminal than any other country. It means that there are too many laws and too much force used to turn decent citizens into law breakers.

Consider this comparative study: The U.S. has a population of 300 million. Indonesia has a population of 250 million. The U.S. has 2.3 million in prison. Indonesia has 100,000 in prison. This doesn't mean Americans are more criminal. It means there are too many arbitraries in sentencing guidelines.

Sentencing guidelines in the U.S. are the most arbitrary on the planet. There is no standard guideline for a penalty. There are no standard guidelines for rewards for good behavior. The law is arbitrarily passed by a benign judge or a malicious one.

The poor have no recourse to prove themselves innocent on appeal. It's very expensive to take it to the upper courts. Justice must be swift and inexpensive and unbiased.

Criminon viewpoint on current system and the solutions:

The justice system MUST rigorously and steadfastly reinstitute the principle of confronting the accused with the accuser and their accusations BEFORE punishing actions of any kind. The flagrant abuse of this principle has been the cause of the breakdown in justice. It also destroys the value of the cause of democracy for one and for all. Legal actions that are based on false reports are behind the breakdown in the justice system.

Prison and jail staffs need to receive added mandatory training in rehabilitation along with the mandatory custody training. For the justice system to get back to being a justice system, this HAS to happen. For without this, the correctional officers will continue to be the boulder standing on the tracks to fixing this national problem. Rehabilitation takes a lot of personal work. It is labor intensive. It requires specialty education and training in drug withdrawal and detox, ethics training, education training, life skills and vocational training. This means that more staff will be needed in corrections but they will be effective and they will be able to get the result of rehabilitated criminals.

Criminon's impact and progress in the criminal justice system:

Criminon has been delivering social education courses as well as a full drug rehabilitation component to inmates since 1989. We deliver correspondence courses as well as onsite, community and re-entry based programs. We also offer training programs for corrections staff and inmate trainers. We are flexible in our delivery using the format most suitable to a specific facility environment and resources.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00081 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.050

We are currently providing educational programs and self-study courses to over 14,000 inmates in over 2,500 institutions worldwide. Over 50,000 inmates have completed a Criminon course.

There are active Criminon programs in the United States, United Kingdom, South Africa, France, Germany, Israel, Italy, Indonesia, Hungary, Canada, Colombia, Venezuela, Mexico, Rwanda, Spain, Pakistan, Nepal, Thailand, Taiwan, New Zealand, Ukraine and Russia.

SOME SAMPLE RESULTS OF THE CRIMINON PROGRAM

- The common denominator of Criminon's success has been restored self-respect to the inmates themselves.
- Inmates who are less aggressive and in better communication with other inmates, their families and with staff, resulting in fewer disciplinary problems. This in turn gives less stress to correctional staff and makes their jobs easier.
- Some of our inmate graduates have, as a result of their courses, been moved to less secure housing or lower security prisons, thereby saving the state money.
- Of the 267 juveniles who had completed the Criminon New Life Program in Pretoria South Africa, only 16 had returned to crime and the criminal justice system (6% recidivism rate).
- A two-year study done of our drug rehabilitation component delivered by the Second Chance Program in Mexico showed a drop in recidivism to less than 10%.
- In Israel, a review by officials found that two years after completion of the Criminon program in prison, of the 19 graduates of the Criminon program not one returned to the criminal justice system.

Greg Capazorio

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00082 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.051

Testimony of

Harold W. Clarke

June 22, 2009

WRITTEN TESTIMONY OF
HAROLD W. CLARKE, COMMISSIONER
MASSACHUSETTS DEPARTMENT OF CORRECTION

PRESIDENT
AMERICAN CORRECTIONAL ASSOCIATION (ACA)

PAST PRESIDENT

ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS (ASCA)

SUBMITTED TO THE

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME AND DRUGS

"Exploring the National Criminal Justice Commission Act of 2009"

June 22, 2009

Senator Specter and other distinguished members of the Subcommittee, my name is Harold W. Clarke, and I am currently the Commissioner of the Massachusetts Department of Correction and President of the American Correctional Association (ACA). I am a former Director of the Nebraska Department of Correctional Services, a position I held for almost 15 years, a former Secretary of the Washington State Department of Corrections and a past President of the Association of State Correctional Administrators (ASCA). It is my honor to have this opportunity to offer my views, pertaining to Senate Bill S.714, to establish the National Criminal Justice Commission.

It is my belief that this bill proposed by Senator Jim Webb of Virginia is long overdue. Specifically, it may yield desired results in causing a positive change in attitudes toward prisoner reentry. I believe that successful reentry is the cornerstone of enhanced public safety efforts.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00083 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.052

Prisoner Reentry

Reentry must be a purposeful commitment that begins at the point of entry into the criminal justice system and continues until the point of discharge from supervision. A comprehensive system must be established to identify the best use of resources and the most promising paths to success. These paths must focus interventions and programs on evidence-based practices and must abandon "feel-good" programs that are not evidence based. Agencies must continually collect and evaluate data to support the reduction of recidivism. Resources must be established in communities to provide appropriate supervision, treatment and services. Most importantly, we must effectively illustrate to the public that reducing recidivism through reentry will successfully reintegrate offenders into the community and break the cycle of criminal behavior. This will require the courage of conviction of legislators and other elected officials to do what is right and has been proven to be effective, rather than concede to public opinion that punishment and removal from the community will ultimately lead to a reduction in crime.

Today, correctional systems are fractured. Agencies that are responsible for community supervision, that are not part of the prison system, in many cases, do not have good working relationships with correctional agencies and the resulting lack of a shared vision complicates the seamless transition of offenders back into their communities. State systems must become unified in the interest of public safety.

Commission Findings

The work of the Commission will bear directly on many important issues currently facing correctional agencies. I will take this opportunity to address some of the 16 findings outlined in the bill.

Finding #13: The increasing incarceration of offenders with serious mental disorders poses major challenges for corrections. Correctional facilities have become de-facto mental health centers that are forced to treat seriously ill offenders in a correctional setting, not conducive to treatment. The Massachusetts Department of Correction is developing and implementing some creative solutions to this problem, and seeking more as we face class action litigation in this

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00084 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.053

area. The Commission is tasked with recommending how to "improve and streamline the treatment of mental illness, both in our society and in the criminal justice system." Mentally ill offenders are coming from the community, many not previously diagnosed or treated, with a variety of major mental illness and character disorders, which in many instances have contributed to their offenses. They must be treated in order to effectuate positive changes in their behaviors while in prison, and to prepare them to reenter their communities successfully. The special correctional units, necessary clinicians and additional security staff are very costly. It is critical that we all recognize the need for community based care and treatment to identify illnesses early, and provide appropriate care to prevent or divert these individuals from entering the criminal justice system. Equally important, at the other end of the continuum, is the availability of appropriate treatment, case management, housing and employment as these offenders discharge from custody to reduce the likelihood that they will reoffend.

Finding #14: The prevalence of serious diseases such as HIV and hepatitis C among prisoners, also holds true in many state correctional systems. Although not specifically noted within this Congressional finding, it is recognized that treatment for these and other diseases exact a substantial financial burden on states. In my home state we are working in collaboration with our contractual medical care provider and public health officials to develop effective protocols for treating these diseases. The commission may want to investigate the need for an "Office of Health Care" within the Department of Health and Human Services to address the special health care needs of individuals involved in the entire criminal justice system.

Finding #15: The bill holds that "Prison administration is uneven, lacking clear, affirmative standards of training and performance, varying greatly from institution to institution, locality to locality, and among Federal, State, and local jurisdictions." The panel is to make recommendations designed to "improve prison administration, including Federal standards of competence and the creation of a career path for prison administrators."

It is unclear what is meant by "Federal standards of competence." A system of federal standards of achievement and or training is not necessary and would be difficult to develop. To the extent that the bill seeks to identify "best practices" and to apply uniform standards throughout the American correctional systems, the American Correctional Association (ACA) is an organization that actively works toward that goal.

With specific regard to the training of correctional staff, I believe, like my colleagues, that it is the responsibility of correctional administrators to effectively train staff and provide them with

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00085 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.054

the resources to carry out their responsibilities. Many correctional agencies throughout the United States require new employees to attend up to a 10 week academy before entering correctional service and are shadowed by field training officers throughout their first year of service. It would be helpful if the commission identifies those best practices and encourage their application in all corrections agencies.

Reform

Reforming the criminal justice system requires bringing stakeholders to the table. It was stated by Brian Walsh of the Heritage Foundation that it is concerning that only two of the commission members are to be appointed non-federal officials. I also find this troubling, considering the fact that 96 percent of incarcerated individuals in the United States are incarcerated in state prisons or county jails. We should not assume that federal penitentiaries deal with exactly the same issues the state and county facilities deal with, or that all are similarly situated. I strongly encourage that the commission include state and county correctional practitioners, as there are issues at local levels that need to be addressed.

It is my experience that correctional professionals are committed to transforming correctional systems making them responsive to their missions. The struggle for improvement is continuous. However, they are challenged by a myriad of state and federal laws, a lack of resources to adequately treat and house offenders and to provide effective programming to adequately respond to offender's deficits. While we agree with reforming the drug laws in the United States, there are many social failings that we as corrections professionals have little or no control over. Prisons are a microcosm of the community at large. Societal failures are easier to identify within correctional facilities. As a result of these failures, correctional systems are forced to help inmates who presents with a lack of education, poor parenting skills, substance abuse problems, mental health and a multitude of other concerns. These problems were not created in the prison environment, but nonetheless, they must be contended with.

Corrections is at the back-end of the judicial process. We know what works and what does not work as a result of empirical data culled from years of studies. Correctional resources are overburdened as a result of overcrowding that started in the 1980's caused in part by "mandatory sentencing" laws and federal programs encouraging incarceration of certain categories of offenders which required that offenders mandatorily serve most of their sentence

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00086 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.055

before released. Such acts include the Violent Offender Incarceration and the Truth in Sentencing Act. Corrections has become mired with offenders that are ineligible for programs or that cannot be transitioned through the system from higher to lower security as sound reentry practices would dictate.

Conclusion

I am encouraged by the possibilities that the "National Criminal Justice Commission Act of 2009" presents. The facts on incarceration rates, recidivism, mental illness and a variety of other social ills can no longer be ignored. If these problems were to be effectively addressed in the community, the reliance on incarceration would be diminished. I look forward to positive changes and I am hopeful for the future of the judicial process and corrections. Thank you for your time and attention to this essential matter that is of utmost importance to our nation.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00087 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.056

FEDERAL CURE, INCORPORATED

P.O. BOX 15667
PLANTATION, FLORIDA
33318-5667

E-MAIL: FEDCURE@FEDCURE.ORG
E-FAX (801) 672 7777

WWW.FEDCURE.ORG

THE FEDERAL ISSUE CHAPTER OF WWW.INTERNATIONALCURE.ORG

"A National Effort to Reduce Crime Through Federal Criminal Justice Reform"

ACTING CHAIRMAN

MARK A. VARCA, J.D.

DIR O - PUBLIC AFFAIRS

KIRSTEN MAMER, MA

BOARD OF DIRECTORS

ELIZABETH ALEXANDER, J D.
PAULA EYRE
JANA V. JAY, J.D.
REV. ALAN LAIRD
SYLVIA MCAFEE
JOHN MCCARTY
JUSTINE C. MCCARTY
FRED M. MOSELY, J.D., LL.M
DANIEL S. MURPHY, PH. D
STEPHEN C. RICHARDS, PH. D.
MIKE SHRYOCK, M. ED.

INTERNATIONAL CURE

CHARLES SULLIVAN
PAULINE SULLIVAN
CO-DIRECTORS

PUBLIC OFFICIAL SPONSORS

SENATORS

DANIEL K. AKAKA (HI)
TOM HARKIN (IA)
JAMES M. JEFFORDS (VT)

CONGRESSMEN

HOWARD L. BERMAN (CA)
WILLIAM L. CLAY (MO)
BOB CLEMENT (D) TN
JOHN CONYERS, JR. (MI)
LANE EVANS (IL)
MARTIN FROST (TX)
SHEILA JACKSON-LEE(TX)
JOHN LEWIS (GA)
JAMES P. MORAN, JR. (VA)
CHARLES B. RANGEL (NY)
MARTIN O. SABO (MN)
ROBERT SCOTT (VA)
LOUISE M. SLAUGHTER (NY)
FORTNEY "PETE" STARK (CA)
MEL WATT (NC)

~ IN MEMORIAM ~

KENNITH H. LINN, J D , LL M
22 JULY 1939 – 28 MAY 2009

TO: The Senate Committee on the Judiciary, 11 June 2009
Subcommittee on Crime and Drugs
Room 226
Senate Dirksen Office Building
Washington, DC

RE: FedCURE Testimony: Subcommittee Hearing on "Exploring the National Criminal Justice Commission Act of 2009" (S.714). June 11, 2009 at 2:30 pm.

Dear Chairman Specter and Honorable Members of the Subcommittee:

On behalf of FedCURE and its membership, I am addressing the Subcommittee to bring attention to the need to establish a hybrid system of parole and good time allowances for federal offenders;* and to resolve the current bottle neck facing community inmate re-entry initiatives in the federal criminal justice system. The National Criminal Justice Commission Act (NCJCA) should study ways and means to bring this about in a timely manner.

This past April, Senator Jim Webb held a conference, in Washington, DC, on the National Criminal Justice Commission Act. I had the opportunity and the pleasure to address the attendees on behalf of FedCURE. Whereupon, I advised Sen. Webb's staff and the attendees that: 1) FedCURE supports the NCJCA, however, in order for the bill to be effective it must include the nation's, some 8,600, Faith-Based and Neighborhood Partnerships *(as defined by the White House Office for Faith-Based and Neighborhood Partnerships);*** and that 2) Section 7 of the Act, titled, Membership, must include Faith-Based and Neighborhood Partnerships in the appointment process, because as written the appointment power lies solely with the government. The American people are key drivers of fundamental change in our country, and few institutions are closer to the people than our faith-based and other neighborhood organizations.

Accordingly, FedCURE would strongly urge the Subcommittee to specifically provide that: 1) the NCJCA shall study mechanisms to establish a hybrid system of parole and good time allowances for all federal offenders; and that 2) the NCJCA shall study the integration of the nation's Faith-Based and Neighborhood Partnerships with the federal inmate re-entry process. To make specific findings and make recommendations for policy changes designed to lower the federal incarceration rate, reduce prison sentences, increase re-entry opportunities and community re-entry capacity, in fair and cost effective ways, prioritizing public safety.

Respectfully submitted,
Mark A. Varca
Mark A. Varca, J.D.,
Acting Chairman, FedCURE

---

* FedCURE's 100k letter writing campaign resulted in 24,000 letters being delivered to the United Sentencing Commission, this past March, in support of establishing a hybrid system of parole and good time allowances for federal offenders http://www.fedcure.org/documents/FedCURE-USSC-Testimony170709HmgKHL-070309.pdf

** http://www.whitehouse.gov/blog_post/working_with_faith

Serving Federal Prisoners and Their Families . . Working to Reinstate Parole and to Increase Good Time Allowances

USING TECHNOLOGY TO BRING ABOUT FEDERAL CRIMINAL JUSTICE REFORM
WWW.FEDCURE.ORG 2002/2009 ALL RIGHTS RESERVED

Testimony Submitted for the Record
United States Senate
Judiciary Subcommittee on Crime and Drugs
June 11, 2009

Submitted by
Jim Gibbons
President and CEO
Goodwill Industries International
15810 Indianola Drive
Rockville, MD 20855
Phone (301) 530 6500
Fax (301) 530-1516

Testimony Submitted for the Record
United States Senate
Judiciary Subcommittee on Crime and Drugs
June 11, 2009

Goodwill Industries International represents 160 local and autonomous Goodwill Industries agencies in the United States that help people with barriers to employment to participate in the workforce. The roots of today's Goodwill Industries International began as a simple idea in 1902 when Rev. Edgar Helms set out to help poor immigrants in Boston's South End by collecting clothes and household items from wealthier Bostonians to give clothing and household items for the struggling immigrants. He discovered, to his surprise, that the immigrants were too proud to simply accept the items. So he took his idea a step further by enlisting volunteers to repair, clean, and sell the items at reasonable prices. He used the revenue to provide wages to the workers – and the first Goodwill Industries store was born.

More than 100 years later, Edgar Helms' idea of "a hand up, not a handout" has become a powerful one. In 2008, the Goodwill Industries network raised more than $3.2 billion through its retail, contracts, and mission services operations. Approximately 85 percent of the funds Goodwill Industries raised last year were used to supplement government investments for people with employment barriers, resulting in the provision of services to more than 1.5 million different people, including nearly 170,000 placements in competitive employment. As our nation continues to contain an economic crisis that many experts believe to be the worst since the Great Depression, Goodwill Industries stands ready to continue in its long tradition of enhancing the dignity and quality of life of individuals, families, and communities by eliminating barriers to opportunity – such as having a criminal record – and helping people in need to reach their fullest potential though the power of work.

In recent years, Goodwill has provided job training, employment services and other needed supports to an increasing number of people who report having a criminal background. In fact the number of ex-offenders served by local Goodwill agencies more than doubled in just three years – from approximately 45,000 people in 2005 to more that 105,000 in 2008. The experience of our reintegration specialists informs us that, due to the economic climate and the steadily rising unemployment rate, local Goodwill agencies should expect even more people with a criminal background to turn to Goodwill for supports – such as employment services – that will help keep them from returning to jails and prisons.

Helping people with a criminal background to reintegrate back into society is one of Goodwill Industries International's top federal- and state-level public policy priorities. And just this week, Goodwill Industries International hosted a Capitol Hill briefing to publicly release *"The Road to Reintegration,"* Goodwill Industries call to action on serving people with a criminal background. (The executive summary of this bold position statement is being submitted with this testimony.) Informed by the experience of local Goodwill reintegration professionals from coast to coast who understand the multiple barriers to successful reentry and the employment disincentives that exist in numerous systems, Goodwill Industries International urges this Committee to use *"The Road to*

56273.059

Reintegration" as a resource as the Committee develops legislation – such as the National Criminal Justice Commission Act of 2009 (S. 714) and other legislative proposals designed to tackle the rising corrections and recidivism crisis in America.

Research shows that of the 700,000 people who will be released from prison this year, two-thirds will be returned to prison within three years of their release. In addition, the United States has the highest incarceration rate in the world. In April 2008, Congress responded to these trends by overwhelmingly approving the bipartisan Second Chance Act. Goodwill Industries believes that the Second Chance Act represents a solid first step toward tackling this crisis; however, with 2.3 million people currently incarcerated in local jails and prisons across the country at an estimated cost of $65 billion a year, local, state, and federal policymakers must continue to make changes to laws and regulations that will remove barriers to successful reentry and create supports for people with a criminal record who want to positively reintegrate back into our communities.

Without a comprehensive strategy for successfully transitioning people with a criminal background back into society, the national prison crisis will continue to grow. Therefore, Goodwill Industries calls upon key stakeholders including state and federal policymakers, judges, law enforcement officials, service providers (including local Goodwill agencies), educators, employers, and victims to come together to create systemic changes that hold offenders accountable, minimize the negative effects on their communities and families, and support ex-offenders and returning prisoners who want to reenter society to make a positive contribution.

Local Goodwill agencies nationwide support people with a criminal history in their communities. For example, a handful of agencies have partnered with prosecutors and judges to provide alternatives to incarceration for people who have committed certain crimes that require sanctions, yet don't necessarily merit removing the offender from their community by placing them in a correctional facility. In addition to diversion efforts, many local Goodwill agencies have prisons and jails in their service areas; therefore several have built relationships with corrections officials that allow Goodwill reintegration professionals to go into correctional facilities to provide pre-release planning to inmates who will soon be released. Rather than being released from jail or prison without a reentry plan, these inmates have worked with a reintegration professional to consider where they will work and live; how they will get their medication if needed; and post-release programs in which they should participate. Lastly, many Goodwill agencies provide a range of post-release services in residential or community-based settings to people who have paid the price for the crimes they have committed.

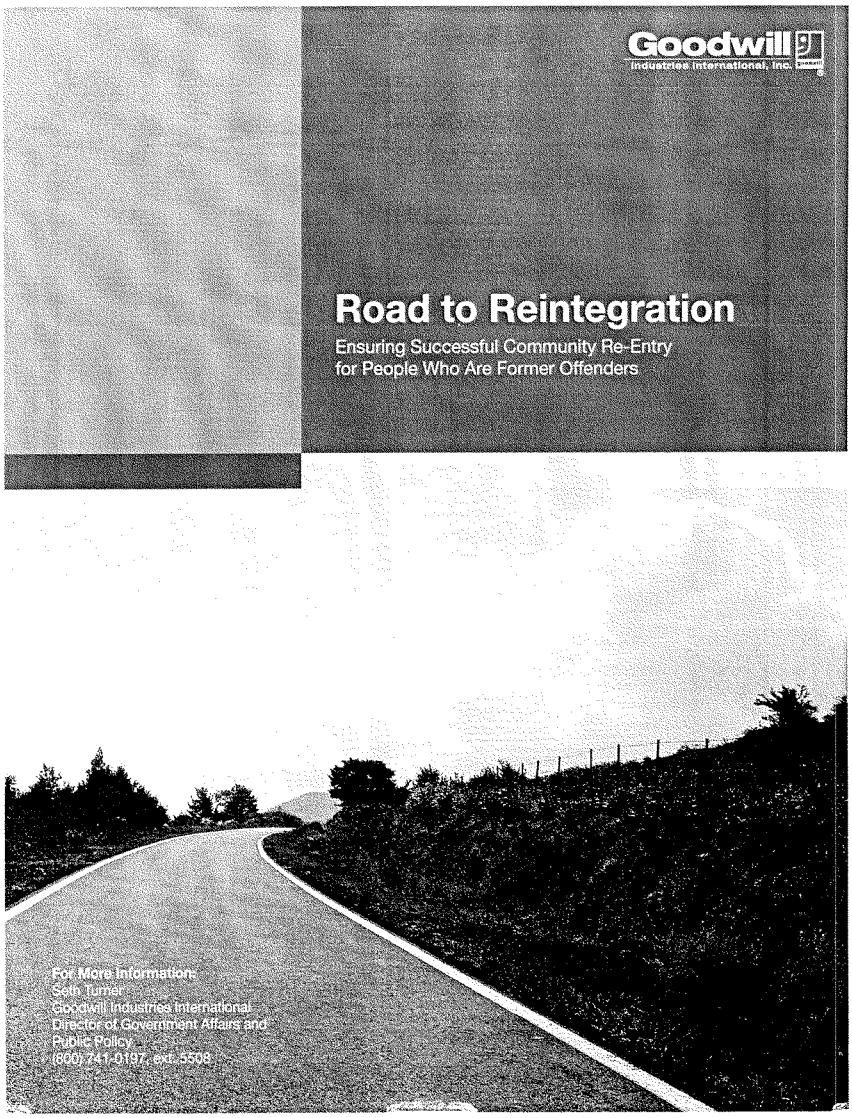
A number of Goodwill Industries' local-, state- and federal-level policy recommendations are included in *"The Road to Reintegration."* Federal recommendations include:

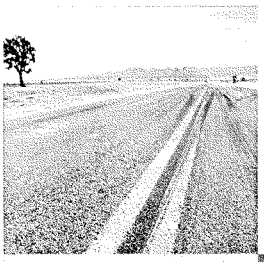
- Appropriating the full authorization level for the Second Chance Act.
- Creating incentives for One-Stop operators to make pre-release contact with prisoners.
- Expanding financial incentives for ex-offenders to accept low-wage jobs.

- Improving and publicizing the federal bonding and tax credit programs to assist employers who hire individuals with criminal records.
- Supporting alternative education programs that serve ex-offenders.
- Creating incentives to community colleges and universities to accommodate ex-offenders who want to improve their education.
- Protecting children, while being judicious when implementing policies – such as terminating parental rights – that prevent families from reunifying.

In conclusion, Goodwill Industries across the country works to contribute to a better and safer society. Social service providers that operate programs designed to meet the specific needs of people with a criminal background can contribute to the improvement and safety of their communities by preventing ex-offenders from committing new crimes, reducing recidivism, helping ex-offenders to learn job skills, employing ex-offenders and facilitating job placement with local employers. Goodwill Industries International and its network of 160 local agencies in the United States thanks the Committee for taking time to consider its positions. In addition, Goodwill Industries stands ready to work with the Committee to support legislative proposals that will promote the creation of a service continuum for ex-offenders, and the removal of barriers to successful reintegration and the creation of supports people who have a criminal background.

56273.061


Goodwill
Industries International, Inc.
Road to Reintegration
Ensuring Successful Community Re-Entry
for People Who Are Former Offenders
For More Information:
Seth Turner
Goodwill Industries International
Director of Government Affairs and
Public Policy
(800) 741-0197, ext. 3508



Goodwill Industries International, Inc.®

The Road to Reintegration

Ensuring Successful Community Re-Entry for People Who Are Former Offenders

Call to Action

Goodwill Industries® calls upon key stakeholders — including state and federal policymakers, judges, law enforcement officials, service providers (including local Goodwill® agencies), educators, employers, and victims — to come together to create an environment that will hold people accountable and support individuals with criminal backgrounds who want to reintegrate into their communities and make positive contributions.

The information contained in this document represents the current view of Goodwill Industries International, Inc. on the issues discussed as of the date of publication. This document is for informational purposes only. Goodwill Industries International makes no warranties, express or implied, in this document.

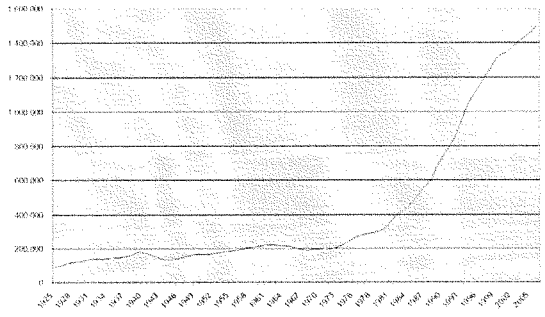
Goodwill Industries® is a registered trademark. Other product and company names mentioned herein may be the trademarks of their respective owners.

Goodwill Industries International • 15810 Indianola Drive • Rockville, MD 20855 • USA

By the middle of 2007, there were more than 2.3 million people in U.S. federal and state prisons, and local jails, giving the United States the largest prison population rate in the world.

As the rate of incarceration has increased, local, state and federal budgets have increased exponentially. At a rate of $62.05 per day, or $22,650 per year, average state spending per adult prisoner outpaced the growth rates for state spending on health, education and natural resources. In 2005, more than $65 billion was spent on corrections, up 619 percent compared to the $9 billion that was spent in 1982. The cost of corrections will only continue to grow at this current pace unless key stakeholders come together to closely scrutinize our nation's reliance on incarceration, consider alternative responses to crime and its prevention, and develop successful models for people to integrate back into their communities.

Number of Sentenced Prisoners
Under Federal and State Correctional Jurisdiction (1925-2006)



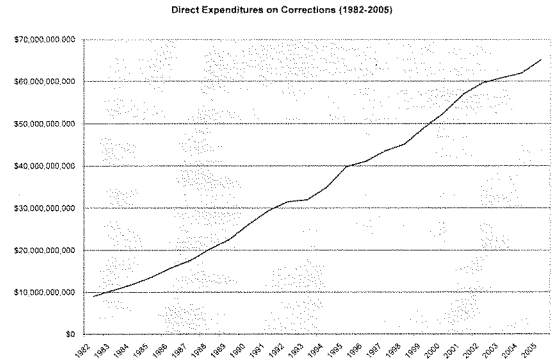
Source: http://www.albany.edu/sourcebook/pdf/t6282006.pdf

According to the U.S. Department of Justice, nearly every person in jail, and 95 percent of state prison inmates, will someday be released. Of the nearly 700,000 prisoners who will be released this year, research shows that two-thirds of those (67.5 percent) will return to prison within three years.

The cost of corrections will continue to grow at a staggering rate unless key stakeholders —

- **Closely scrutinize our nation's reliance on incarceration.**
- **Consider alternative responses to crime and its prevention.**
- **Develop successful models for people to integrate back into their communities.**

Goodwill Industries International, Inc.



The financial impact on communities is significant when these people return home, cannot find employment, violate their probation or parole, and then return to jail or prison.

When people return to prison rather than successfully reintegrating into their communities, which are often high-poverty areas, those communities lose an estimated $11.6 billion per year due to the lost potential earnings that these people could have earned. When we do not help people successfully transition back to their communities, we also spend an estimated $15.8 billion each year to keep them in prison.

There are many barriers that can keep a person from successfully re-entering public life, from drug dependency and low educational attainment, serious illness, debt, and limited work experience. Laws, regulations and systemic practices have also built additional barriers these people must face when trying to find and keep employment.

While most people return to the communities they left, in many cases these communities do not have the services or employment opportunities to support this population. According to *Employment Barriers Facing Ex-Offenders*, a document produced by the Urban Institute Re-entry Roundtable, "Most return to low-income, predominantly minority communities that have relatively few unskilled jobs... that pay very low wages and provide few benefits or chances for

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00096 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.065

upward mobility. In these circumstances, many ex-offenders may simply choose to forego these employment options, in favor of illegal opportunities or more casual work."

Racial minorities are disproportionally represented in the criminal justice arena. As a result, systemic and legal barriers that keep people from successfully returning to their communities affect the black and Hispanic communities more than other races.

Helping people with criminal backgrounds to find and keep employment is clearly difficult work and should not be considered a solution to the nation's growing corrections crisis. As the nation's largest non-profit provider of job-training services, however, Goodwill Industries® is uniquely positioned to be a leader in the successful reintegration of people who are ex-offenders and former prisoners into mainstream society. A number of Goodwill® agencies already run a variety of programs that are designed to help these people find and keep jobs, and provide help for housing, substance abuse, and health and mental health issues.

- Goodwill Industries believes that providing job placement and employment services to people who are ex-offenders is essential for building a re-entry continuum that holds people accountable for their actions, yet supports them when they return to their communities. This is especially important as local, state and federal corrections administrators and policymakers have felt it necessary to take cost-cutting steps, including reducing literacy and job training programs in jails and prisons.

- Goodwill Industries believes that access to safe and stable housing is another cornerstone in the re-entry continuum. The experience of local Goodwill agencies that work with people who are ex-offenders informs us that it is more effective to address people's various needs once they have secured stable housing and found a legitimate source of income.

Goodwill Industries International, Inc.

- Goodwill Industries believes that until necessary steps are taken to help people attain and retain jobs, recidivism will continue to be an escalating problem that weakens families and communities, and stretches states' corrections budgets to the breaking point. Goodwill seeks solutions that provide people who have criminal backgrounds with the skills and the tools they need to find work, launch careers and rebuild their lives. By keeping these people from returning to a life of crime and incarceration, we can increase public safety and reduce skyrocketing corrections costs while better utilizing community resources to tackle other compelling issues.

Goodwill seeks solutions that provide people who have criminal backgrounds with the skills and the tools they need to find work, launch careers and rebuild their lives.

Goodwill Industries International, Inc.

The Need for a National Conversation

Goodwill Industries believes the time is long overdue for a national conversation that scrutinizes and considers alternatives to the justice system's "get tough" response to crime, and policies that needlessly penalize people with criminal backgrounds long after their sentences have been served.

We recognize the need for legislative change at the state and federal levels to help address the problem of recidivism. Goodwill Industries calls upon key stakeholders — including state and federal policymakers, judges, law enforcement officials, service providers (including local Goodwill agencies), educators, employers, and victims — to come together to create an environment that holds people accountable, minimizes the negative effects on communities and families, and supports those who want to make positive contributions to society.

We must have strong case management systems in place to meet people with criminal backgrounds where they are while supporting them as they journey toward making positive and legitimate contributions in their communities. While people can take numerous pathways that lead to their becoming a former prisoner or ex-offender, the continuum consists of one, two or all three of the following actions:

- Diversion — Pre-sentencing diversion commonly occurs when the charged individual enters a plea agreement with the district attorney's office. In exchange for entering a guilty plea, the individual is sentenced to participate in programs such as job training, substance abuse counseling, or any other activity designed to hold the person accountable while addressing an issue that may have contributed toward his or her decision to commit the criminal offense. Upon successful completion of the programs, the charges against the individual are dropped.

If our nation is to overcome the two-pronged challenge of rising incarceration rates coupled by high rates of recidivism, we need to build a national service continuum of programs for people who have criminal backgrounds.

Goodwill Industries International, Inc.

8

- Incarceration — In many cases, the interests of justice and public safety demand that certain offenses result in removing people who committed the offenses from their communities. Ideally, the corrections facility where the person is incarcerated will have general training and pre-release programs available. Pre-release programs differ from general training because they occur when an individual approaches the release date. Pre-release programs are meant to smooth transitions from correctional institutions to their communities by working with the offenders to develop plans — including housing, employment and participation in post-release programs — that will help them successfully reenter their communities.

- Post-Release Programs — Residential and community-based post-release programs represent the final phase in the national service continuum. Individuals may be referred to community-based counseling, job training and job placement programs, among other supports, that can help those who want to legitimately transition from incarceration to their communities.

Goodwill Industries International, Inc.

Re-Entry Challenges for Special Populations

- The effects of a **parent's incarceration** on children are numerous, including loss of financial support, social stigma, weakened parent–child relationships, poor school performance, increased delinquency, and placement in the child welfare system. These effects have long-term implications that can last long after people have served their sentences.

- **Youth who are involved with the courts** face several challenges when re-entering their communities. Many have physical, mental health and substance abuse problems. Some have children. Yet most have never graduated from high school, held a job or lived independently. And many are returning to communities where poverty, unemployment, homelessness, drug addiction and crime are endemic.

- Since 1985, the number of **women in prison** increased at almost double the rate of men — 404 percent compared to 209 percent. Compared to their male counterparts, females tend to come from lower socioeconomic backgrounds, suffer from mental health problems at higher rates, abuse drugs at higher rates, and are likely to have been sexually abused. Policies that ban people who have committed drug-related offenses from receiving public assistance or accessing public housing disproportionately affect females, because they are incarcerated for drug-related offenses at a higher rate than men.

- Nearly all of the people who leave prison have a **physical health, mental health or substance abuse problem.** Furthermore, research finds that a significant number of people returning to their communities have more than one of these health conditions — approximately four in 10 men and six in 10 women.

- Longer sentences, reduced use of parole, growing incarceration rates and a rapidly aging general population are commonly cited reasons for the **rapid growth of elderly inmates** in prisons nationwide. Many of these older individuals may have physical and mental disabilities common to those experienced by the general aging population. When older people are released from prison, especially after serving long sentences, they are likely to lack family support systems that are willing or able to help secure housing.

The national discussion must take into account the effects of incarceration and recidivism on several special populations.

Goodwill Industries International, Inc.

Opportunities Created by Federal Laws or Regulations

Re-entry programs such as those authorized under the Second Chance Act, the Federal Bonding Program and the Work Opportunity Tax Credit are useful supports for people with criminal backgrounds. However, the experience of local Goodwill agencies that serve this population informs us that these supports, while helpful, are not enough.

- Second Chance Act — In response to the nation's alarming incarceration and recidivism trends, the Second Chance Act of 2007 was signed into law on April 9, 2008. Authorizing $330 million in funds over two years for re-entry programs, the act represents a good first step toward addressing the national corrections crisis. Goodwill Industries was active in the efforts that led to passage of the act, and now advocates for Congress to provide financial support for the programs and activities authorized by the new act.

- Federal Bonding Program — While most employers purchase commercial Fidelity Bond insurance to protect against loss of money or property sustained through the dishonest acts of their employees (i.e., theft, forgery, larceny and embezzlement), insurance companies will not usually cover "at-risk" employees because they are designated by insurance companies as being "not bondable." As a result, job applicants who are considered at-risk are routinely denied employment. Only through their participation in the Federal Bonding Program can they become bondable.

- Work Opportunity Tax Credit — The Work Opportunity Tax Credit is an incentive for private sector businesses to provide on-the-job training and employment opportunities to people in nine target groups, including people who have criminal backgrounds who have been released for less than one year and who are known to have significant barriers to employment. In exchange for providing employment opportunities to people representing one of the target populations, employers may claim a federal tax credit.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00102 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.071

Legal and Regulatory Barriers

- **Employment** — Title VII of the federal Civil Rights Act protects individuals from the denial of employment by certain employers because of arrests that do not lead to conviction unless there is a "business justification," or because of a criminal conviction unless there is a "business necessity." However, states, rather than the federal government, set most policies and legal standards governing the employment of individuals with criminal records.

- **Education** — People in state or federal penal institutions are not eligible to receive federal Pell Grants to fund their post-secondary educations. In addition, people who are convicted of possessing or selling drugs while in school and receiving federal student aid are ineligible for any grants, loans or work assistance programs. In August 2008, this law was changed to allow these students to restore their eligibility if they pass two random drug tests.

- **Public Housing** — While public housing could be a useful resource in providing shelter to people who are ex-offenders, local Public Housing Authorities often use the existence of a criminal background to automatically disqualify applicants. The public housing law also grants authority to public housing agencies to deny admission to public housing if it determines that an applicant or any member of the applicant's household has ever "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety or right to peaceful enjoyment of the premises by other residents."

- **Adoption and Safe Families Act** — Under this law, states are required to file a petition to terminate parental rights for any child, regardless of age, that has been in foster care for 15 out of the most recent 22 months. In the meantime, states are also required to identify, recruit, process and approve a qualified adoptive family on behalf of these children. While the law simply aims to protect the rights of children by limiting long-term foster care placements, one of the collateral consequences is that the families of people with criminal backgrounds are at serious risk of being permanently dissolved.

Goodwill Industries International, Inc.

- **Loss of Voting Rights** — Prohibiting people with criminal backgrounds from voting has not been proven to deter people from committing crime. Instead, it disproportionately disenfranchises racial minorities and the high-poverty communities in which they live by ensuring that their important issues remain low priorities among legislators who need not concern themselves about the issues of non-voters.

- **Military Eligibility** — People who are ex-offenders, particularly those who complete their sentences at a relatively young age, may look to the military for stability and as a resource that would teach them discipline while offering valuable hands-on training and educational benefits once they complete their service. Regardless of the circumstances surrounding an individual's conviction, if the military believes a person has committed a serious felony or a number of other serious offenses, the person is not eligible to serve in the military.

Recommendations at the Local Level

- A National Service Continuum for People with Criminal Backgrounds
  - Improve the connection between corrections and social services.
  - Encourage workforce agencies to implement strategies that take the needs of people who are ex-offenders into account.
  - Work with local stakeholders to build a social service network to connect people to pre- and post-release supportive services such as treatment, counseling, housing assistance, education (including GED and ESL), and job training and placement.
  - Ensure that there are resources in the community for people who have committed crimes against people.

- Employers
  - Encourage employers, including Goodwill agencies, to offer appropriate employment opportunities that could be filled by people with criminal backgrounds.

Goodwill Industries International, Inc.

- Provide technical assistance to these employers to ensure that they understand their liability and appropriately place those individuals.
- Unless it is relevant to the available position, discourage employers, including municipal and state governments, from asking for arrest and conviction information on employment applications.

* Housing
  - Urge local housing authorities to implement procedures that allow case-by-case decisions about whether to deny access to public housing for people who have been convicted or who are related to people who have been convicted of drug-related crimes.
  - Work with people who have been convicted of drug-related crimes to ensure that they successfully complete drug rehabilitation programs, and work with public housing authorities to ensure that their completion and subsequent public housing eligibility are quickly recognized.

* Education
  - Improve access to education by encouraging community colleges to offer classes during non-traditional hours, and/or distance-learning opportunities.
  - Encourage universities to restore scholarships that were revoked due to a criminal conviction.

* Corrections
  - Reduce barriers to prisoner–family contact.

* Military Service
  - Educate people with criminal backgrounds about military restrictions while encouraging those who may qualify to serve to work with recruiters.

Goodwill Industries International, Inc.

Recommendations at the State Level

- Re-entry Preparation
  - Require prisons to provide assistance and adequate planning time to people who will soon be released.
  - Require prisons and jails to provide access to GED and ESL programs, substance abuse treatment, counseling, vocational rehabilitation and job training.
  - Prohibit jails and prisons from releasing people without identification, such as driver's licenses, government identification cards and social security cards.

- Job Training
  - Allow participation in job training to count toward work requirements if mandated by parole.

- Employment and Career Opportunities
  - Create incentives for employers who hire people with criminal backgrounds.
  - Allow only those professional prohibitions that prevent people from becoming employed in professions related to their crimes.

- Minimize Financial Disincentives for Finding Legitimate Employment
  - Pass through all child support payments to families.
  - Set realistic support and restitution orders.
  - Automatically suspend child support obligation or set orders at zero during incarceration.
  - Provide information to parents and families during the prison intake process.

- Expungement
  - Implement a process that allows people to correct inaccuracies in their criminal background records.
  - Allow people who committed non-violent crimes to petition the state to expunge or seal their criminal records after a reasonable amount of time without a conviction.

Goodwill Industries International, Inc.

- Sentencing
  - Increase alternatives to incarceration, such as diversion.
  - Reconsider state mandatory minimums and adultification laws. Give judges the flexibility and tools they need to identify people who would respond to sentences that hold them accountable for their crimes while minimizing the negative affects associated with their incarceration.
- Transportation
  - Repeal laws — such as banning driver's licenses — that limit access to job opportunities.
- Voting Rights
  - Restore voting rights to people with criminal backgrounds.

Recommendations at the Federal Level

- Appropriate the full authorization level for the Second Chance Act.
- Create incentives for one-stop operators to make pre-release contact with people who are incarcerated.
- Work Incentives — Expand financial incentives for people who have criminal backgrounds to accept low-wage jobs.
- Employers — Improve and publicize the federal bonding and tax credit programs to assist employers who hire individuals with criminal records.
- Education — Restore Pell grants to people who are incarcerated. Support alternative education programs that serve people who are ex-offenders. Provide incentives to community colleges and universities to accommodate those who want to improve their education.
- Family Strengthening — Protect children, yet be judicious when implementing policies, such as terminating parental rights, that prevent families from reunifying.

Goodwill Industries International, Inc.

16

Recommendations for Goodwill Agencies and Other Social Service Providers

- Learn about serving people with criminal backgrounds.
- Offer ESL and GED programs.
- Offer soft-skills training that helps families reconnect.
- Provide support that helps re-entering parents to care for their children after they are released.
- Reach out to the administrators of regional jails and prisons to offer supports for people that will prepare them for their release.
- Educate other service providers about serving people with criminal backgrounds.
- Build and strengthen relationships with stakeholders at the local, state and federal levels.
- Learn about and get involved in existing local, state and federal efforts to promote systemic and legislative change.
- Suggest including legislative proposals on state and regional associations' legislative agendas to address barriers faced by people with criminal backgrounds.

Goodwill Industries International, Inc.

56273.077

SEARCH
The National Consortium for Justice Information and Statistics

Francis X. Aumand III
Chairman

Ronald P. Hawley
Executive Director

Prepared Testimony of
Ronald P. Hawley, Executive Director
SEARCH, The National Consortium for Justice Information and Statistics
Before the Senate Judiciary Committee
Subcommittee on Crime and Drugs

I. Introduction

Mr. Chairman and members of the subcommittee, I am Ron Hawley, Executive Director of SEARCH. Thank you for the opportunity to submit comments on the establishment of a National Criminal Justice Commission ("Commission"). SEARCH staff is very supportive of the goals of Senator Webb's bill. Your efforts and that of your outstanding subcommittee staff to address these important criminal justice matters are greatly appreciated.

SEARCH, The National Consortium for Justice Information and Statistics, is a nonprofit membership organization chartered by the states. SEARCH is governed by a Membership Group comprised of one gubernatorial appointee from each of the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, as well as eight at-large appointees selected by SEARCH's Chair. Members are primarily state justice officials responsible for operational decisions and policymaking concerning the management of criminal justice information, particularly criminal history information. Each state pays dues in support of the work of SEARCH. Since 1969, SEARCH's primary objective has been to help state and local criminal justice agencies use information and identification technology effectively and consistently with the protection of privacy.

II. Recommendations

As previously stated, SEARCH staff is very supportive of the goals of Senator Webb's bill. Over the past 40 years, one of the most significant changes that has impacted criminal justice policy and practice is the application of information sharing and identification technologies. SEARCH, therefore, suggests that the bill include language to specifically address issues associated with the funding and governance of information technology and sharing practices. A comprehensive review of this area of the criminal justice system should include:

- An examination of the impact of justice information and identification technologies including the challenges and benefits of integrated information sharing systems; interoperability; the sharing of information and identification infrastructure among and between criminal justice agencies and other first

7311 Greenhaven Drive, Suite 145 • Sacramento, California 95831
Telephone (916) 392-2550 • Facsimile (916) 392-8440 • www.search.org

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00109 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.078

responder agencies (including those receiving funding from homeland security appropriations);

- An examination of the digital resource needs of front line police officers with an eye toward the creation of a national strategy for developing and coordinating those resources;
- An examination of the impact of information systems on reentry programs, including information systems operated by the media; by Internet search engines; by commercial vendors; by the courts; by state repositories; by the FBI; and by other entities;
- An examination of the impact and benefits of the Justice Department's Global Information Sharing Initiative (Global);
- An examination of the impact and benefits of the National Criminal History Improvement Program (NCHIP) on the accuracy and completeness of criminal history databases, including NCIC; III; NICS; and state repository systems;
- An examination of the existing national system for criminal history records access and background checks performed by employers and other private sector entities;
- An examination of the impact, benefits and operational implications of broader information sharing, primarily with regards to enabling effective decision-making while properly securing information to protect privacy and civil rights and liberties;
- An examination of the impact and benefits of justice assistance, including the proportion of justice assistance expenditures for formula grants versus discretionary grants; the impact of earmarking; the impact of national programs which have previously received earmarks; and the substitution of competitive based grant programs for national program earmarks; and
- Consultation with key criminal justice organizations such as SEARCH, the National Governors Association, the National Center for State Courts, and other established entities that could assist the Commission.

III. Conclusion

Congressional support for the National Criminal Justice Commission is vital. On behalf of SEARCH, its governors' appointees, and the thousands of criminal justice officials who participate in the SEARCH network and who benefit from SEARCH's efforts, I thank you for your consideration of this important legislation.

7311 Greenhaven Drive, Suite 145 • Sacramento, California 95831
Telephone (916) 392-2550 • Facsimile (916) 392-8440 • www.search.org

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00110 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.079

HUMAN RIGHTS WATCH
1630 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009
Tel: 202-612-4321
Fax: 202-612-4333
Email: hrwdc@hrw.org

US PROGRAM
David C. Fathi, *Director*
Alice Farmer, *Aryeh Neier Fellow*
Jamie Fellner, *Senior Counsel*
Abigail Marshak, *Associate*
Alison Parker, *Deputy Director*
Sarah Tofte, *Researcher*

ADVISORY COMMITTEE
Catherine Powell, *Chair*
Catherine Albisa
Ann Beeson
Jeffrey Bleich
Stephen Bright
Tanya Coke
David Cole
Mike Farrell
Vanita Gupta
Lulie Haddad
David Keller
Wendy Patten
Bill Quigley
Bruce Rabb
Steven Shapiro
Alexandra Stanton
Dorothy Thomas
Robin Toone

HUMAN RIGHTS WATCH
Kenneth Roth, *Executive Director*
Michele Alexander, *Development & Outreach Director*
Carroll Bogert, *Associate Director*
Emma Daly, *Communications Director*
Barbara Guglielmo, *Finance & Administration Director*
Peggy Hicks, *Global Advocacy Director*
Iain Levine, *Program Director*
Andrew Mawson, *Deputy Program Director*
Suzanne Nossel, *Chief Operating Officer*
Dinah PoKempner, *General Counsel*
James Ross, *Legal & Policy Director*
Joe Saunders, *Deputy Program Director*
Jane Olson, *Chair, Board of Directors*

HUMAN RIGHTS WATCH

www.hrw.org

April 22, 2009

The Honorable Jim Webb
248 Russell Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

Re: Human Rights Watch supports S. 714 – the National Criminal Justice Commission Act of 2009

Dear Senator Webb and Senator Specter:

I am writing to express Human Rights Watch's strong support for S. 714, the National Criminal Justice Commission Act of 2009. Enactment of this legislation would begin a long overdue examination of criminal justice policy in the United States.

For many years Human Rights Watch has documented US criminal justice practices that violate human rights. Our reports have explored racial disparities in arrests and incarceration (*Targeting Blacks: Drug Law Enforcement and Race in the United States*); the incarceration of the mentally ill (*Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*); overly harsh punishment of juveniles (*The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*); prison rape (*No Escape: Male Rape in U.S. Prisons*); and the unavailability of drug dependence treatment in prison (*Barred from Treatment: Punishment of Drug Users in New York State Prisons*).[1]

The time has come for a comprehensive review and a fundamental rethinking of US criminal justice policy, particularly the use of incarceration. Just last month, the Bureau of Justice Statistics (BJS) released figures showing that the US incarcerated population has reached a new all-time high, with more than 2.3 million people behind bars. This gives the United States an incarceration rate of 762 per 100,000 residents – the highest rate in the world, dwarfing those of other democracies like Great Britain (152 per 100,000), Canada (116), and Japan (63).

Vulnerable populations are especially hard hit by US incarceration policy.

[1] All of these reports are available on the Human Rights Watch website, www.hrw.org.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00111 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.080

Black men in the United States are 6.6 times more likely than white men to be incarcerated, and more than ten percent of *all* black men ages 25 to 39 are behind bars on any given day. A 2006 BJS study found that large numbers of prisoners suffer from chronic mental health problems like major depression and psychotic disorders. Finally, Human Rights Watch has found that there are more than 2,500 people in US prisons serving sentences of life without parole for crimes they committed as children – a sentencing practice that does not exist anywhere else in the world.

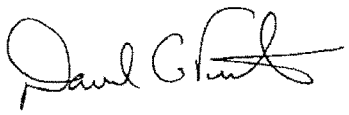
These policies violate fundamental notions of fairness and erode public confidence in the criminal justice system while providing very little return for public safety. And the enormous cost of mass incarceration drains resources that could be spent on health, education, and other essential public services.

The United States has ratified three international human rights treaties that relate to criminal justice practices: the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Monitoring bodies for these treaties have repeatedly expressed concern about racial disparities, incarceration of the mentally ill, harsh punishment of juvenile offenders, and other aspects of the US criminal justice system.

The commission established by S. 714 would "undertake a comprehensive review of the criminal justice system," and make recommendations "to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation's criminal justice system." This would be an essential first step toward a more rights-respecting approach to crime control and public safety, and would bring the United States closer to compliance with its treaty obligations.

For all of these reasons, Human Rights Watch urges passage of S. 714, the National Criminal Justice Commission Act of 2009.

Very truly yours,



David C. Fathi
Director, US Program

Cc: Senate Judiciary Committee and Senators Bingaman, Brown, Burris, Carper, Gillibrand, Hagan, Kennedy, Landrieu, McCaskill, Murray, Reid, Tester, Udall, and Warner

56273.081

Human Rights Watch
Studies Relevant to Consideration of
The National Criminal Justice Commission Act of 2009

- "Barred from Treatment: Punishment of Drug Users in New York State Prisons" (2009) *available at* http://www.hrw.org/en/reports/2009/03/24/barred-treatment-0

- "Targeting Blacks: Drug Law Enforcement and Race in the United States" (2009) *available at* http://www.hrw.org/en/reports/2008/05/04/targeting-blacks-0

- "The Rest of Their Lives: Life without Parole for Child Offenders in the United States" (2005) *available at* http://www.amnestyusa.org/countries/usa/clwop/report.pdf

- "Ill-Equipped: U.S. Prisoners and Offenders with Mental Illness" (2003) *available at* (http://www.hrw.org/en/reports/2003/10/21/ill-equipped-0)

56273.082

OFFICE OF THE DISTRICT ATTORNEY, KINGS COUNTY

RENAISSANCE PLAZA at 350 JAY STREET
BROOKLYN, N.Y. 11201-2908
(718) 250-2500

CHARLES J. HYNES
District Attorney

June 11, 2009

The Honorable Arlen Specter
U.S. Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
Washington, D.C. 20510

The Honorable Lindsey Graham
U.S. Senate Committee on the Judiciary
Subcommittee on Crime and Drugs
Washington, D.C. 20510

Re: Hearing: *Exploring the National Criminal Justice Commission Act of 2009*; Statement in Support of S.714

Dear Chairman Specter and Ranking Member Graham:

Thank you for this opportunity to address you and members of the Subcommittee regarding the National Criminal Justice Commission Act of 2009 (S.714). Now in my fifth term as the elected district attorney of Kings County (Brooklyn), New York, I have been its chief law enforcement officer for close to two decades, and, accordingly, have a strong interest in the proposed commission.

It is imperative that Congress enact this legislation. As the bill's legislative findings amply attest (*see* section 2 of S. 714), our nation cannot afford—either from a fiscal or societal standpoint—to continue along the same criminal justice path that it has followed these last few decades. The number of individuals incarcerated continues to rise in this country, even as over half a million ex-offenders get released from prison each year. Unfortunately, on average, two-thirds of former inmates are re-arrested for a new offense and one-half are re-incarcerated, either for a new crime or a parole violation, within three years of their release. The societal disruption caused by this revolving-door phenomenon has hit communities of color especially hard, as minorities make up a disproportionately large share of prison populations. Prison costs now gobble up huge chunks of many state budgets, leaving fewer and fewer scarce government funds to spend on education, health, and social services. At the same time as the population behind bars swells, gang-related violence remains disturbingly prevalent, especially in urban centers. And drug abuse and drug-related crime continue to plague our communities. The combined direct and indirect economic cost of drug abuse to our society has been estimated at over $180 billion dollars.

While the nation struggles to understand how its criminal justice policies could have resulted in such a grim situation, I would urge taking a closer look at New York State, which has, in the words of a report published by the Pew Charitable Trusts, "bucked the national trend." As noted in the report:

> Between 1997 and 2007, New York experienced both the greatest *decrease* in violent crime and, simultaneously, the greatest *decrease* in prison population and incarceration rate of any state in the country. . . . In terms of crime and prison contraction, New York led all regions of the county and every individual state.

Pew Center on the States, *One in 31: The Long Reach of American Corrections*, at 21 (Washington, DC; The Pew Charitable Trusts, March 2009) (emphasis in the original). New York State's remarkable achievement is attributable to a variety of factors, including revisions of corrections and parole policies, and expanded intelligent use of alternatives to incarceration. In New York City alone, the index crime rate dropped 38% from 1998-2007, and the violent crime rate dropped 41% during that decade.

With over 2.5 million residents, Kings County—better known as Brooklyn—is the most populous of New York City's five counties. Like the city as a whole, Brooklyn has also seen a steady decline in crime (index crime as a whole, as well as violent crime specifically) over the past decade. I believe that the several evidence-based, recidivism-reduction programs that we've deployed in Brooklyn have played a significant part in that trend.

For example, since 1998, we've had the Community and Law Enforcement Resources Together (ComALERT) re-entry program for the formerly incarcerated returning to their Brooklyn communities. This collaborative model seeks to address two of the major stumbling blocks to successful re-entry—substance abuse and unemployment—and by effectively doing so, decrease recidivism rates and increase overall public safety. In 2008, Professor Bruce Western of Harvard University completed an analysis and evaluation of ComALERT, and his findings are heartening. Parolees in a matched control group who did *not* have the benefit of ComALERT were *over twice* as likely to have been re-arrested, re-convicted, or re-incarcerated on a new crime within one year of release from prison as were ComALERT graduates. On a national level, statistics tell us that two years after release from prison, almost one-fifth (19%) of ex-offenders are re-incarcerated for a new crime. By contrast, only 3% of ComALERT graduates are re-incarcerated for a new crime.

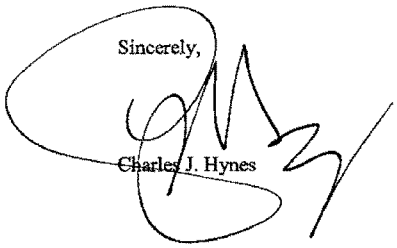
Our ComALERT re-entry program is just one means by which the Kings County District Attorney's Office is implementing a holistic strategy of crime reduction—a strategy that looks beyond traditional prosecution and incarceration and that draws on services outside the criminal justice sphere in order to address the root causes of an offender's criminal behavior and thereby prevent recidivism. Since 1990, our nationally recognized Drug Treatment Alternative-to-Prison (DTAP) program has diverted non-violent, drug-addicted repeat felony offenders into intensive

residential treatment in lieu of prison. And since 1998, our Treatment Alternatives for the Dually Diagnosed (TADD) program has provided treatment alternatives to incarceration for those suffering serious and persistent mental illnesses often accompanied by substance abuse disorders. Indeed, the success of the TADD program spurred the creation of New York State's first mental health court, the Brooklyn Mental Health Court. We also target youth involved in the criminal justice system with our Youth and Congregation in Partnership YCP) program (a faith-based initiative to divert from incarceration court-involved teens facing serious charges), Girls Re-Entry Assistance Support Project (GRASP) (a faith-based initiative to assist young women re-entering the community following their detention or incarceration), and the STAR project (an alternative to incarceration program for teens charged with prostitution).

These programs represent just a small sampling of our collaborative programs designed to reduce recidivism. It is precisely these types of programs, as well as New York State's trend-bucking success in cutting crime and incarceration as a whole, that deserve the kind of in-depth study that a National Criminal Justice Commission could bring to such a task.

Clearly, the time has come for the country to step back and reassess its criminal justice policies. The National Criminal Justice Commission proposed in S.714 would have the resources to carry out a thorough and thoughtful evaluation, and to recommend the changes needed to foster safer, healthier, and more fiscally sound communities. The legislation has my complete support, and I urge its swift enactment.

Sincerely,



Charles J. Hynes

1025 VERMONT AVENUE NW, THIRD FLOOR WASHINGTON, DC 20005
P 202.580.6971 F 202.638.6056 WWW.JUSTDETENTION.ORG

JUST DETENTION INTERNATIONAL

The Honorable Jim Webb
144 Russell Office Building
Washington, DC 20510

The Honorable Arlen Specter
711 Hart Senate Office Building
Washington, DC 20510

April 23, 2009

Re: S. 714 – the National Criminal Justice Commission Act of 2009

Dear Senator Webb and Senator Specter,

On behalf of Just Detention International (JDI), I am pleased to support S. 714, to establish the National Criminal Justice Commission. The proposed commission has the potential to help stimulate much needed criminal justice reform at the federal, state, and local levels.

Just Detention International is the only organization in the U.S. dedicated to ending sexual violence in detention. While this mission may seem narrowly focused, in fact it incorporates virtually all aspects of incarceration. Sexual violence in detention is a product of bad management, deficient policies, and dangerous practices. It does not occur in isolation. Simply stated, where prisoner rape is rampant, other abuses are also widespread.

As highlighted in S. 714, the pervasiveness of sexual violence in detention is well established. Notably, the 2007 Bureau of Justice Statistics (BJS) survey cited in the findings only addressed the sexual victimization that inmates had experienced at their current facility during the previous year. According to the best available research, a shocking 20 percent of inmates in men's prisons are sexually abused at some point during their incarceration.[1] The rate for women's facilities varies dramatically from one prison to the next, with one in four inmates being victimized at the worst institutions.[2]

The findings laid out in S. 714 identify many of the most pressing concerns with respect to inmate safety. In particular, overcrowding makes effective classification and supervision nearly impossible, and the mass incarceration of drug users and mentally ill individuals places these vulnerable individuals in highly dangerous environments.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00117 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.086

Survivors of sexual abuse in prison experience the same devastation as survivors in the community and often endure physical injury, HIV and other sexually transmitted diseases, and long-term emotional trauma. Some 95 percent of U.S. inmates ultimately return home, bringing their medical and psychiatric conditions back to their communities.

The serious problems currently facing the U.S. criminal justice system are well known, as are many of the solutions. A national entity that can compile this information and provide concrete recommendations will go a long way toward engendering the reform needed to protect the safety and well-being of detainees.

S. 714 comes at an especially critical time with respect to upholding every inmate's right to be free from sexual abuse. Nearly six years ago, Congress unanimously passed the Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. § 15601 *et seq.* PREA called for the development of national standards addressing prisoner rape, the gathering of nationwide statistics about the problem, the provision of grants to states to combat it, and the creation of a review panel to hold annual public hearings with the best and the worst performing corrections facilities. While the data gathered through PREA have been invaluable in raising awareness about sexual violence in detention, the National Criminal Justice Commission will be able to take the important next step of placing this information in a broader criminal justice policy context.

The National Criminal Justice Commission can also play a critical role in ensuring that the standards created under PREA are sufficiently implemented. Having conducted public hearings around the country, convened expert committees, and solicited feedback from entities nationwide, the National Prison Rape Elimination Commission (NPREC) is due to release its national standards in June 2009. The U.S. Attorney General will then have one year to issue a final rule adopting the standards, at which time they will be binding on all corrections systems (the first time that any form of national standards will be binding on all types of U.S. corrections agencies). State and local officials will have one year to certify their system's compliance or they will lose a percentage of their federal funds. Unfortunately, PREA does not detail how the standards will be monitored or enforced. Through a review of these important standards in the context of criminal justice needs and costs, the National Criminal Justice Commission will be able to assess what next steps are needed to maximize the impact of the standards.

Finally, JDI applauds the inclusion in S. 714 of international representatives for coordination. Far too often, the U.S. has chosen to lead in isolation, avoiding accountability under international human rights principles and entities, such as the Optional Protocol to the Convention Against Torture (OPCAT) and the International Criminal Court. The time has come to renew this nation's commitment to human rights, and to recognize that the U.S. has much to learn from other nations when it comes to incarceration policies and the treatment of inmates.

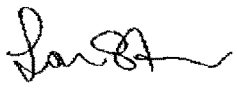
VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00118 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.087

In sum, Just Detention International is eager to see the passage of S. 714 and looks forward to working with you on the development and implementation of a national commission.

Thank you for your consideration.

Sincerely,



Lovisa Stannow
Executive Director

Cc: Senate Judiciary Committee and Senators Bingaman, Brown, Burris, Carper, Gillibrand, Hagan, Kennedy, Landrieu, McCaskill, Murray, Reid, Tester, Udall, and Warner.

---

[1] Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison,* 33 J. SEX RES. 67 (1996); *see also* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men,* 80 PRISON J. 379, 383 (2000).
[2] Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prison,* 39 J. SEX RES. 217, 220 (2002).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00119 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.088

S. 714, The National Criminal Justice Commission Act of 2009

A State and Local Perspective

Contacts:
Don Murray, National Association of Counties, (202) 942-4239
Susan Parnas Frederick, National Conference of State Legislatures, (202) 624-3566
Heather Hogsett, National Governors Association, (202) 624-5360
Mitch Herckis, National League of Cities, (202) 626-3124
Laura DeKoven Waxman, The U.S. Conference of Mayors, (202) 291-7124

As representatives of the national organizations representing thousands of state and local elected and appointed officials, we have reviewed S. 714, the National Criminal Justice Commission Act of 2009. While these do not represent the full consensus or the full breadth of issues that our member organizations will develop over time, we wanted to share these initial observations, as staff, prior to the hearing on the legislation next week. We will continue having discussions about the focus and reach of the commission with our members and look forward to sharing additional comments with you in the near future.

Criminal law and the administration of criminal justice systems have been areas of traditional state and local authority. State and local governments fund and manage the vast majority of the criminal justice, public safety and crime prevention programs that keep our citizens safe. Therefore, it is crucial that the input of state and local elected and appointed officials who are responsible for crafting state and local criminal justice policy be meaningfully included in the discussion of revising these policies.

As S. 714 seeks to implement a "top to bottom review of our entire criminal justice system," we hope our comments below will aid you and your staff in ensuring the commission is sufficient in its scope and emphasizes the need of a strong federalist partnership to highlight and strengthen innovative and effective criminal justice practices at the state and local government level.

General Government Concerns and Interests

This section contains several broad observations regarding the bill which our organizations believe should be addressed.

1. **Both State and Local government perspectives must be included among the commission membership through direct appointment.** State and local elected and appointed officials are responsible for criminal justice policy and regulations and rich bodies of law and implementing regulations have been passed and implemented at the state and local levels. There is much to learn from examining our current state and local systems and practices. State and local governments also fund and manage the day-to-day operations of the vast majority of criminal justice activities. Therefore, it is absolutely essential that state and local elected officials who are experts in the criminal justice field be

56273.089

integrally involved in formulating new policies in this area going forward. We ask that each of major organization representing state and local elected and appointed officials (be allowed to appoint persons—likely elected or appointed state or local officials—to the commission, as long as they meet all other qualifications stipulated in the bill.

2. **Language in S. 714 should reflect an emphasis on collaborative strategies that promote innovative partnerships across levels of government rather than national top-down plans.** This plan will need more than buy-in from both parties or both Congress and the White House. It will also need buy-in from the state and local leaders who provide 80 percent of the nation's funding for public safety in our country. We suggest that this bill be restructured to reflect a federal/state/local partnership to develop best practices in the target areas enumerated in the legislation. As currently drafted, the legislation does not provide for meaningful input from state and local leaders and can be construed as imposing unfunded federal mandates on already strained state and local systems, as well as unwarranted preemptions of state and local laws and procedures.

3. **The impact of commission recommendations on state and local government must be considered.** We ask that any recommendation made by the commission clearly state the estimated costs to state and local governments, as well as any cost savings to be passed on to state and local governments. This should be done in a manner that also recognizes the separate and often differing criminal justice responsibilities of municipal, county, and state governments.

4. **A review of prevention must be specifically included in the findings of the commission (Section 5).** It is common knowledge that preventative measures have a significant impact on crime. The definition of prevention must remain broad as a wide variety of tactics have been shown to be important, cost-effective tools in deterring crime—this includes a robust public and mental health system, educational and job placement opportunities for ex-offenders, mentoring and other engagement programs for disconnected youth, and intervention tactics that help diffuse the cycle of gang violence. The investigation of prevention techniques as an effective tool should be spelled out as a specific obligation of the commission.

   In addition to including a review of prevention policies, the scope of the Commission's review should be broadened to ensure that a number of other areas, such as information sharing among agencies and organizations involved in the criminal justice system, community supervision programs, and alternatives to incarceration, etc., may also be included.

56273.090

5. **Jails must be included alongside prisons throughout the bill.** As one of the first major points of entry into the criminal justice system, it is a leading indicator of a future offender that must be taken into account by the commission.

6. **Define criminal justice.** It is important that the term "criminal justice" be properly defined as it is used quite frequently throughout the bill. It appears to not only refer to the courts and penal system, but also to law enforcement and related activities. We believe the term should be defined to provide better scope to the commission's mission. We would be happy to assist with the definition of this term.

Specific Legislative Recommendations

Section 2.

Subpart (1) – amend by adding "According to the Bureau of Justice Statistics, an estimated 13.6 million inmates were admitted to local jails during the 12 month period ending June 30, 2008."

Subpart (2) – strike subpart (2) and replace it with the following "The American constitutional order has been a Federal system, and it is of national interest to build greater coordination and partnership between federal, state and local governments, particularly when it comes to criminal justice; criminal justice laws and legal procedures depend heavily on State and Local law, the vast majority of those imprisoned in the United States are held in non-Federal institutions, state and local governments provide programs proven to prevent crime, and former inmates that leave prison reenter a local community."

Subpart (3) – strike "overwhelmingly"

Subpart (4), (6) – expand these statistics to include jails (Bureau of Justice Statistics).

Subpart (13) – a new study prepared by the Council of State Governments' Justice Center in partnership with Policy Research Associates and released in the June 2009 issue of Psychiatric Services found that 15 percent of men and 31 percent of women in jails had "a serious and persistent mental illness"

Subpart (15) – as currently drafted, this language appears to promote uniformity for uniformity's sake which is unacceptable. We suggest the following rewording: "Prison administration would greatly benefit from education, training and information sharing between federal, state and local jurisdictions in order to achieve the best standards possible in the area of jail and prison administration."

56273.091

Section 4.

Strike "Federal and State" in every occurrence and replace with "Federal, State, and local" throughout.

Section 5.

Subpart (a) – strike "Federal and State" and replace with "Federal, State, and local"; and add at the end, "and their impact on public safety, health, and the general welfare of United States citizens.

Subpart (b)(2) – after "policies" on line 13, strike ", in" and insert "innovative state, regional and local programs, as well as"; add "and jail" after prison on line 17.

Subpart (b)(3) – add "and jail" after prison.

Subpart (b)(4) – add "and jail" after prison.

Subpart (b)(5) – after activities, insert "and innovative strategies for gang prevention"; strike from after "United States" through "syndicates".

Subpart (b)(6) – add "and substance abuse" on line 13 after "drug"; strike after "to include" to the end and replace with, "the impact and effectiveness of current policies to reduce substance abuse and drug use, and on the incidence of substance abuse and drug related crime, and in the case of criminal offenders, the availability of treatment programs before, during and after incarceration.

Subpart (b)(8) – strike "historic"; strike from "the military" to the end of parenthesis and replace it with "Federal, State, and local partnerships".

Section 6.

Subpart (a) –

In general - Add a required recommendation on regarding the availability of preventative programs; add a recommendation regarding the budgetary impact of all recommendations upon State, local, and tribal governments, as well as any cost savings to those entities.

In the opening paragraph – insert "federal" before "policies" on line 19.

Subpart (a)(1) – replace "incarceration" with "criminal justice"

Subpart (a)(2) – add "and jail" after prison.

Subpart (a)(3) – add "and jail" after prison.

Subpart (a)(4) – replace "institute" with "Encourage and support"

Subpart (a)(5) – after "that" add ", in partnership with State and local government,"

Subpart (a)(7) – replace "our society" with "local communities"

Subpart (a)(8) – replace "Federal and local" with "Federal, State, and local"; replace "responses to" with "partnerships to respond to"; strike all after "syndicates".

Subpart (a)(9) – after "system" add ", including related policy areas,"

Subpart (b) – in the title, remove "International and Domestic"

Subpart (b)(1) – after "local" insert "elected and non-elected officials, including"

Subpart (c)(1) – replace "Congress and the President" with "Congress, the President, and the Governors."

Section 7.

Subpart (a) – transfer Governors appointments to the National Governors Association while preserving the need for bipartisan Governors and include appointments made by the Presidents of the above organizations not already represented; this requires adding the following additional members: the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, and the National Council of State Legislatures. We suggest appointments by the Presidents of these organizations.

Subpart (b) – ensure that local and state elected and appointed officials are able to serve on the commission despite the "appointed from private life" clause, as long as they meet the rest of the requirements; add "(l) State & local government" as a relevant area of expertise.

56273.093

President
John Wesley Hall
Little Rock, AR
President-Elect
Cynthia Hujar Orr
San Antonio, TX
First Vice President
Jim E. Lavine
Houston, TX
Second Vice President
Lisa M. Wayne
Denver, CO
Treasurer
Steven D. Benjamin
Richmond, VA
Secretary
Jerry J. Cox
Mount Vernon, KY
Parliamentarian
Jim E. Lavine
Houston, TX
Immediate Past President
Carmen D. Hernandez
Washington, DC
Directors
Chris Adams
Atlanta, GA
James A. H. Bell
Knoxville, TN
Blair G. Brown
Washington, DC
William H. Buckman
Moorestown, NJ
Jay Clark
Cincinnati, OH
Anthony Colton
Waukesha, WI
Joshua L. Dratel
New York, NY
Steven J. Feldman
Pleasantville, NJ
Todd Foster
Tampa, FL
William R. Gallagher
Cincinnati, OH
Tracy Green
Los Angeles, CA
Michael J. Iacopino
Manchester, NH
Richard S. Jaffe
Birmingham, AL
Wm. O. "Bill" James, Jr.
Little Rock, AR
Evan A. Jenness
Santa Monica, CA
Rick Jones
New York, NY
Elizabeth Kelley
Cleveland, OH
Mark J. Mahoney
Buffalo, NY
E. G. Morris
Austin, TX
William H. Murphy, Jr.
Baltimore, MD
Ken Murray
Phoenix, AZ
Timothy P. O'Toole
Washington, DC
Barry J. Pollack
Washington, DC
Mark P. Rankin
Tampa, FL
Martin A. Sabelli
San Francisco, CA
Maria H. Sandoval
San Juan, PR
Mark Satawa
Southfield, MI
Gail Shifman
San Francisco, CA
Theodore Simon
Philadelphia, PA
David B. Smith
Alexandria, VA
Penelope S. Strong
Billings, MT
Jennifer Lynn Thompson
Nashville, TN
Geneva Vanderhorst
Washington, DC
Deja Vishny
Milwaukee, WI
James H. Voyles, Jr.
Indianapolis, IN
William T. Whitaker
Akron, OH
Christie N. Williams
Dallas, TX
C. Rauch Wise
Greenwood, SC
Vicki Young
San Francisco, CA
Executive Director
Norman L. Reimer

National Association of Criminal Defense Lawyers

June 10, 2009

The Honorable Arlen Specter
Chairman
Subcommittee on Crime and Drugs
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Subcommittee on Crime and Drugs
United States Senate
Washington, DC 20510

Re: The "National Criminal Justice Commission Act of 2009" (S. 714)

Dear Mr. Chairman and Senator Graham:

On behalf of the National Association for Criminal Defense Lawyers (NACDL), I am writing to endorse the National Criminal Justice Commission Act of 2009 (S. 714). The Act would establish a blue-ribbon commission to conduct a comprehensive review of the federal, state, and local criminal justice systems. Specifically, we are pleased to note that the Act would direct the commission to review "all areas of federal and state criminal justice costs, practices, and policies," a review which we anticipate would shed light on the waste caused by excessive criminalization and incarceration.

A top-to-bottom examination of our criminal justice system is urgently needed. Almost one percent of the adult population of the United States is behind bars, and about one in thirty-one are either incarcerated or on probation. These numbers are staggering from a historical perspective; for instance, the number of incarcerated drug offenders has increased 1200% since 1980. The United States today imprisons more of its citizens than any democracy in history. Indeed, our moniker as "a nation of jailbirds" (or "a nation of jailors") is well-deserved: we number only 5 percent of the world's population, yet we account for 25 percent of the world's prisoners.

The prison system itself is rife with abuse and inefficiency. The prevalence of sexual assault and violence within prisons is well-documented. Perhaps less well-known is the warehousing of the mentally ill in prisons: four times as many mentally ill people are in prisons than in mental health institutions. Furthermore, our country has increasingly incarcerated people for nonviolent offenses, often triggered by illness or drug dependence.

NACDL's recent report, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts, describes how the overcriminalization of minor infractions has burdened local courts and attorneys. For instance, the New York

1660 L Street, NW • 12th Floor • Washington, DC 20036
202-872-8600 Fax 202-872-8690 assist@nacdl.org www.nacdl.org

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00125 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.094

crime of sleeping on a subway is punishable by imprisonment of up to 10 days. Feeding the homeless is a misdemeanor offense in Las Vegas, Orlando, and several other cities. In many jurisdictions, charges of driving with a suspended license account for a significant portion of the docket. Such misdemeanors divert resources from where they are needed most: violent crime.

Research and state-level efforts have demonstrated that alternatives to incarceration for nonviolent offenders may generate substantial savings without endangering the public. A four-year study of 2,600 Washington state inmates released early found significant cost reductions and no negative impact on recidivism. In the current economic climate, the wastefulness of incarceration is especially unjustifiable.

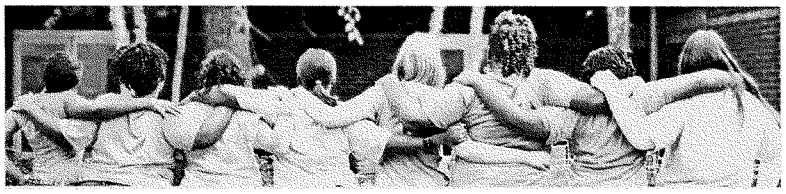
Not only is mass incarceration expensive, it's also not working. A concerted effort to prosecute and imprison illegal substance users over the past three decades has utterly failed to reduce substance use. However, drug policy has devastated minority communities. Although African Americans comprise 12 percent of the U.S. population and 14 percent of monthly drug users, they account for 37 percent of those arrested on drug charges and 74 percent of drug offenders sentenced to prison. An African American male born in the United States has a greater than one- third chance of spending time in prison.

The skyrocketing costs of imprisonment and the economic crisis have created a unique political moment in which the public supports curbing the excesses of so-called "tough on crime" policies. Twenty-eight Senators have co-sponsored the National Criminal Justice Commission Act so far. NACDL urges the Senate Judiciary Committee to move forward with S. 714 and to take all steps necessary to ensure its passage.

Sincerely,

John Wesley Hall
President, National Association of Criminal Defense Lawyers

56273.095



Testimony for S. 714 to establish the National Criminal Justice Commission Act of 2009

The NCCD Center for Girls and Young Women is guided by the courageous life experiences of girls and young women in the juvenile and child welfare systems. The Center is the passionate voice for activism to ensure equitable, humane, and gender-appropriate responses to improve outcomes for girls and young women.

The National Council on Crime and Delinquency (NCCD) has dedicated over 100 years promoting effective, humane, fair, and economically sound solutions to family, community, and justice problems. ***The NCCD Center for Girls and Young Women, a division of NCCD, strongly supports Senator Webb's bill, S. 714 to establish the National Criminal Justice Commission Act of 2009*** *to* improve public safety, cost-effectiveness, overall prison administration, and fairness in implementation. The crime rate in the U.S. is intolerably high and will remain so under current criminal justice, economic, educational, and social welfare policies.

In April, 2009, NCCD commissioned Zogby International to conduct a national public opinion poll about American voter attitudes toward our nation's response to nonviolent, non-serious crime. The results of this poll showed that striking majorities favor using methods other than incarceration to respond to non-serious crime. Specifically, eight in ten (77%) adults believe the most appropriate sentence for nonviolent, non-serious offenders is supervised probation, restitution, community service, and/or rehabilitative services; if an offender fails in these alternatives, then prison or jail may be appropriate. Over three-quarters (77%) believe alternatives to incarceration *do not* decrease public safety. More than half (55%) believe alternatives to prison or jail *decrease* costs to state and local governments. Further, respondents more often think alternatives to incarceration are *more effective* than prison or jail time at reducing recidivism (45% vs. 38%). And, respondents cited a variety of reasons they believe justify sending fewer people to prison or jail, including expense, overcrowding (danger to guards, danger to inmates), the ability of proven alternatives to reduce crime, and the fairness of the punishment relative to the crime.

NCCD is highly regarded for its pioneering work in research, advocacy, and program development aimed at improving outcomes for girls and women in the juvenile and criminal justice system. Women and girls have been largely ignored or become an afterthought, and these poll findings suggest that alternatives to incarceration are supported by the public, and would be especially critical to apply to women and girls' offenses, which are often less serious and less a threat to public safety. Girls and women's unique challenges are critical to this reform effort. The combination of policies that result in disparate and inequitable treatment of women and girls combined with the current economic strain on state and local jurisdictions underscores the need for federal support to address the conditions and practices that further victimize and traumatize them. In November 2008, shortly after the NCGYW was established, we released, *"A Call for Gender Equity."* The recommendations called for the convening of a congressional hearing that identifies solutions to critical issues facing girls in juvenile justice. The issues are similar to the ones described in S. 714, but are specific to the challenges facing girls and young women. They include the escalating rates of arrest and incarceration, criminalization of

behaviors that do not pose a public safety threat, and institutional abuse. We have called for the examination of legislation, policies, and practices that negatively impact girls and the allocation of adequate funds to improve outcomes for girls involved in the juvenile justice system. Below are the challenges that require reform:

The Facts supporting Senate Bill 714

- The US has one of the highest incarceration rates in the world. The arrest and incarceration rates show a growing proportion of girls and young women. In 2007, there were 2.5 million arrests for females of all ages. 25% of these were for girls under the age of 18[1].
- Research shows that most girls are not a threat to public safety. Some of the increase in girls incarcerated for violent offenses (e.g. aggravated assault and battery) may be due to the unintended effects of new policies on mandatory charging in domestic violence cases. In some instances, family disputes are re-labeled as criminal events.
- Black and Latina girls are overrepresented in the juvenile justice and criminal justice system.
- Substance use is pervasive among girls and young women. In our Rallying Cry study found that substance abuse contributed to the delinquent behaviors of almost half (46%) of girls in Florida study.
- Girls present with higher rates of serious mental health conditions including post- traumatic stress disorder, psychiatric disorders, attempts of self harm and suicide. It is estimated that 10% of incarcerated girls are pregnant and that 30% have children.
- Although the JJDPA Act of 1992 requires gender-specific services for girls, these services, are virtually non-existent. The nation's juvenile justice agencies lack a uniform training protocol. There is a 40-80% estimated annual worker turnover among the nation's juvenile corrections staff, caseworkers, and counselors.
- While the rates of abuse for girls outside facilities are estimated higher than 50%, the rates of abuse for girls inside facilities is unacceptable and demands immediate correction. The US Justice Department has sued nine states and two territories alleging abuse, inadequate mental and medical care and dangerous use of restraints.

Consequences

Our failure to effectively address the needs of girls has created a major public health and social welfare concern with severe short and long-term consequences. Young girls who could have their lives turned around wind up in ill-conceived lock-up facilities costing an average of $50,000 annually per girl. Ineffective intervention to address the needs of justice-involved girls during adolescence also predicts a host of problems in adulthood including poor physical and mental health, substance dependence, and future arrests and incarceration. These girls are at a high risk of future domestic violence and other violent relationships, dysfunctional parenting and losing custody of their children. In general, if appropriate prevention and intervention services are not available,these girls will heavily utilize public health and social welfare services in adulthood.

NCCD Center for Girls and Young Women

[1]In 2007, there were 8.1 million arrests for males. In comparison, only 18% were for boys under 18.

56273.097

Testimony of Pat Nolan
Vice President, Prison Fellowship
Before the Senate Judiciary Committee, Subcommittee on Crime and Drugs
June 11, 2009

Mr. Chairman and members, I am grateful for this opportunity to testify in support of Senator Webb's proposal to establish a national commission on criminal justice. My name is Pat Nolan, and I am a Vice President of Prison Fellowship and lead their efforts to reform the criminal justice system. I bring a unique background to Prison Fellowship. I served for 15 years as a member of the California State Assembly, four of those as the Assembly Republican Leader. I led the fight on crime issues, particularly on behalf of victims' rights. I was one of the original sponsors of the Victims' Bill of Rights (Proposition 15) and was awarded the "Victims Advocate Award" by Parents of Murdered Children.

Then my life took an unexpected turn. I was prosecuted for a campaign contribution I accepted, which turned out to be part of an FBI sting. I pleaded guilty to one count of racketeering and became #06833-097 and was held in the custody of the Federal Bureau of Prisons for 29 months. What I saw inside prison troubled me because I observed that little was being done to prepare the inmates for their release. And, I also saw that the skills the inmates learned to survive inside prison made them *more* dangerous when they were released.

My role at Prison Fellowship is to work with government officials to improve our criminal justice system. Our prison reform efforts have taken me to 35 states, where I have worked with Governors, Attorneys General, Judges, Secretaries and Directors of Corrections and legislative leaders. I have seen what works and what isn't working. I serve on the National Prison Rape Elimination Commission and was also a member of the Commission on Safety and Abuse in America's Prisons. I was appointed by Governor Schwarzenegger to his Rehabilitation Strike Team and am currently a member of Virginia's Task Force on Alternatives to Incarceration.

I tell you all this because my work has given me a close up view of our criminal justice system across the country, and I must tell you our prisons are in crisis. There are three important points I want to emphasize from the outset. First, our top priority must always be a justice system that keeps our communities safe with fewer victims. Second, we need prisons. There are some offenders that are so dangerous to the public that they need to be quarantined, some for the rest of their lives. Third, the crisis in our prisons was not created by the dedicated corrections and law enforcement professionals; they are merely trying to cope with policies they didn't choose,.

The report of the Commission on Safety and Abuse in America's Prisons put it well, "...many of the biggest so-called prison problems are created outside the gates of any correctional facility. Congress and state legislatures have passed laws that dramatically increased prisoner populations without providing the funding or even the encouragement to confine individuals in safe and productive environments where they can be

56273.098

appropriately punished and, for the vast majority who are released, emerge better citizens than when they entered."

Our current crime policies have resulted in overcrowded prisons where inmates are exposed to the horrors of violence including rape, infectious disease, separation from family and friends, and despair. Most offenders are idle in prison, warehoused with little preparation to make better choices when they return to the free world. When they leave prison they will have great difficulty finding employment, and the odds are great that their first incarceration will not be their last.

The Pew Public Center on the States has chronicled the magnitude of our prison systems and the challenges they face. Over 2.3 million Americans are behind bars at this very moment – that is one out of every 100 adults in the US. In addition, another 5 million are on probation and parole, meaning that one out of every 31 adult Americans is under some form of corrections supervision. The cost to the taxpayer is a whopping $78 billion. On average, corrections are eating up 15% of state discretionary dollars, and last year corrections was the fastest growing item in state budgets.

We just can't sustain the continued expansion of prisons because corrections budgets are literally eating up state budgets, siphoning off money that could be going to schools, roads and hospitals. The dilemma we face is how to keep the public safe while spending less on corrections.

My work in the states and at the federal level has convinced me that we desperately need a complete review of the criminal justice system as called for in Senator Webb's legislation.

We incarcerate more people than any nation on earth, and I don't think we are getting our money's worth in public safety. Many commentators look at the drop in crime rates and conclude the massive increase in incarceration has worked. But most social scientists, even the conservatives, think that at most one-fourth of the drop in crime is the result of incapacitation of repeat offenders. As I said before, we need prisons, but not for everyone who commits a crime. Prisons are meant for people we are afraid of, but we have filled them with people that we're just mad at.

A check kiter can safely be punished in the community, while holding down a real job, repaying their victims, supporting their families and paying taxes. A drug addict who supports his habit with petty offenses needs to have his addiction treated. Sending him to prison where less than 20% of the addicts get any treatment doesn't change the inmate. When he is released he'll still be an addict. Our object should be to get him off drugs. Spending $30,000 a year to hold him in prison without any drug treatment is just plain wasteful.

We can learn a lot from the experience of New York City under the strong leadership of Chief Bratton. Most people are aware that crime has dropped dramatically in New York; a much larger drop than other large cities. For instance, murders in New York City

56273.099

dropped from 2,605 in 1990 to 801 in 2007. What isn't as well known is that this drop in crime occurred while New York was cutting its prison population. Officials were more selective in who they put in prison and for how long. They examined the tipping point where longer sentences don't buy more public safety. Those folks were released. Why keep them behind bars if it isn't making the community safer? Some sentences were cut significantly, and the savings from those shorter stays behind bars were put into medical care, education, and more police on the streets.

Several states have succeeded in separating the dangerous from the low-risk offenders. And the results are impressive. They have shown that it is possible to cut the costs of prisons while keeping the public safe. Last year, Texas enacted sweeping reforms of its prison system, reserving costly prison capacity for truly dangerous criminals, while punishing low-risk offenders in community facilities. As a result, Texas was able to scrap plans to build three more prisons. Maryland, Massachusetts, Nevada, New Jersey, North Carolina, and South Carolina have also reduced their prison population while reducing their crime rates.

These states are saving hundreds of millions of dollars by reserving costly prison beds for truly dangerous criminals, while punishing low-risk offenders in community facilities. They use new technologies to monitor parolees' whereabouts and behavior, and more effective supervision and treatment programs to help them stay on the straight and narrow.

That is why the commission can play a very important role. Corrections officials are so busy coping with the flow of new bodies being sentenced that most don't have the time or resources to examine how they might be doing better. The commission can evaluate the evidence of what works and share their findings with state and federal corrections leaders. The crisis in our criminal justice system is national in scope, and only a national commission can conduct the type of review that will help guide us into better policies and safer communities.

Because the states cannot afford to build the prisons necessary to house the increasing number of offenders that are the result of more numerous crimes and longer sentences, they are crowding offenders into facilities that were never designed to hold that many prisoners. Our prisons are literally bursting at the seams. The commission can review the policies that swelled the prison population so dramatically and recommend changes that will reduce the number of people we incarcerate.

Governor Schwarzenegger's Deputy Chief of Staff described their dilemma starkly. He told me that every available space in their prisons is used for housing – every classroom, chapel, gym, classroom and closet. He asked, "How can we have education classes, drug treatment, or Bible studies when there is no place to hold them?"

Overcrowding also puts the inmates at terrible risk. The incidence of rape in our prisons is scandalous. In 2007, the Bureau of Justice Statistics released a survey based on prisoner self-reporting. The results are shocking. An estimated that 60,500 federal and

state prisoners had been sexually abused by staff and other inmates in a twelve-month period – a number that likely understates the actual incidence. That averages 166 sexual assaults per day! A BJS pilot study of juveniles in detention found that nearly one out of every five inmates in juvenile facilities had been sexually abused. How can we expect these young people to live normal lives after they are released when they have been victimized so horribly while in the custody of the government? No crime, no matter how horrible, includes rape as part of the sentence.

Fortunately, Congress with strong support from the leadership of both parties, passed the Prison Rape Elimination Act, which established the National Prison Rape Elimination Commission. Later this month the Commission will release its report and recommended standards. These will give a roadmap to corrections officials on how to fight prison rape and to assist the victims when it does occur.

I should note that shortly as soon as the commission releases its report, we will begin the process of shutting down the office and will go out of existence within three weeks. As a conservative, I have always been suspicious of government commissions that seem to go one forever- the closest thing to eternal life here on earth. But the Prison Rape Commission is proof that a federal commission can do its work and then close up shop. As a member of that commission, I can tell you that having a drop dead date forced us to grapple with the issues and reach a conclusion. Without it, a lot more would have been said than done. Fortunately Congress didn't give us that option. The commission proposed by Senator Webb has the same "self-destruct" mechanism, and I think that is very good thing.

Offering proven ways for the states to make better use of their prison beds would be a major accomplishment for the commission. Here are four specific reforms I hope the commission will consider:

Treat the non-dangerous mentally ill in community facilities. Obviously, some people with mental illness are very dangerous. But thousands are merely sick, and pose no threat. They end up in our jails and prisons as a result of "mercy bookings." The police would much rather take them to a civilian facility for proper treatment, but few beds are available. Holding the mentally ill behind bars is very costly. Taxpayers spend $65 a day to jail the mentally ill; community treatment costs only $29. Money spent on new community mental health facilities would be far cheaper than building more prisons.

Apply swift and certain sanctions for parole violations. In many states a large number of new admissions to prison are parole violations, but most did not commit a new crime, but instead committed a "technical violation" such as failure to turn in paperwork, a missed appointment with a parole officer, or a dirty drug test. Many offenders are knuckleheads who just don't follow the rules. One judge summed up the situation well when he said, "Please give me more options. Right now I can send them to prison or let them go to the beach."

The Pew Center studied Project HOPE, a program in the Hawaiian courts established by Judge Stephen Alm, a former federal prosecutor. This program enforces

the rules of probation with immediate consequences. If offenders have a dirty urinalysis they are immediately jailed - but not for years, just 24 or 48 hours. If they have a paying job, their incarceration is postponed until the weekend – but there is no exception to serving it then. Drug treatment is provided for those who have difficulty staying clean.

The results are impressive for those offenders who have been in HOPE the longest: 92 percent *fewer* missed appointments and 96 percent *fewer* positive drug tests. This program accomplishes what we want – teaching offenders to follow the rules and keeping addicts in drug treatment – without filling our prisons.

Tailor the level of supervision for parolees to the risk they pose to the public. Some states place virtually every inmate on parole, a very costly and burdensome process. As the Chairman of California's Little Hoover Commission put it, "These laws have not been tough on crime, but they have been tough on taxpayers." Instead, these policies need to be changed so that the most dangerous offenders receive the greatest attention of parole officers.

Revoke the perverse policy that stops in-prison mentors from continuing to help inmates after they are released. Returning offenders need healthy relationships. Having a good, moral person to help think through the decisions that confront them as they leave prison makes a huge difference in whether they can stay out of trouble and become contributing members of the community. A study of a Prison Fellowship program by Dr. Byron Johnson of the University of Pennsylvania found that graduates of the program had a significantly lower reincarceration rate, and that mentors were "absolutely critical" to the success. Yet, many states and the Federal BOP prohibit mentors who have worked with prisoners inside prison from staying in touch with them after they are released. This prevents inmates from having access to the very people that can help them succeed. No wonder our recidivism rate is so high. It's time to stop turning away the helping hands of mentors.

In conclusion, for years state and federal leaders have been trying to fix our criminal justice system a bit at a time. It hasn't worked, and the public has suffered. It is time to look at the system as a whole and revamp it so it protects public safety and does it at a sustainable cost to the taxpayers. I applaud Senator Webb and the cosponsors of the legislation in taking this timely and very important step toward safer communities.

Written Testimony Submitted to the

Subcommittee on Crime and Drugs
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Exploring the National Criminal Justice Commission Act of 2009

June 11, 2009

Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Founding & Executive Director of the
Charles Hamilton Houston Institute for Race & Justice

Harvard Law School
516 Hauser Hall
Cambridge, MA 02138

Phone: 617-496-2054
Fax: 617-496-3936

Email: ogletree@law.harvard.edu
Website: http://www.charleshamiltonhouston.org

Dear Chairman Specter and Members of the Senate Subcommittee on Crime and Drugs:

Good afternoon. My name is Charles J. Ogletree, Jr. and I serve as the Jesse Climenko Professor of Law at Harvard Law School. In 2005 I founded the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School and serve as its Executive Director. I am very pleased to have been invited to appear before the Subcommittee today. It is my heartfelt belief that the comprehensive, timely and important bill proposed by Senator Jim Webb of Virginia will go a long way toward addressing some of the severe inequities in the criminal justice system. I applaud Senator Webb's goals and those of this Subcommittee to move them forward. Having had a chance to carefully review the *National Criminal Justice Commission Act of 2009*, it is clear to me that this bill will not only create a bipartisan blue ribbon commission to study all aspects of our criminal justice system, but will also provide an opportunity to promote reform of antiquated criminal justice methods at every conceivable level. I am convinced that the Subcommittee will examine the many reasons that make the *National Criminal Justice Commission Act of 2009* both timely and necessary.

As the late Justice William Brennan reminded us more than two decades ago: "[t]hose whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment." [1] Justice Brennan's prescient view in 1987 should provide us with some guidance as we address these critical issues in the year 2009. It is important that we recognize, at the local, state and federal level, as Democrats and Republicans, those who are seeking a re-examination of our criminal justice system. This effort should be pursued with great vigor to ensure that we not only hold offenders accountable, but that we implement criminal justice policies that are sensible, fair, increase public safety and make judicious use of our state and federal resources. We are taking this matter a step further by encouraging the voices of governors, state legislators, wardens, district attorneys, corrections officials and police officers who have come to see that public safety includes alternatives to incarceration. Or, in the words of

[1] McCleskey v. Kemp, 481 U.S. 279 (1987) (dissenting).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00135 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.104

Ohio Governor Ted Strickland, "[y]ou don't have to be soft on crime to be smart in dealing with criminals." [2]

I want to express my gratitude to Senator Webb, Senator Specter and the Subcommittee members for allowing me to testify, on behalf of the Charles Hamilton Houston Institute for Race and Justice, and its staff members and interns. [3] As you will see, it is important to provide a brief sense of the work that we do at the Institute, and how our work relates to the challenges faced by this Subcommittee.

After this brief introduction, I want to discuss three major issues. First, I describe the critical features of our current criminal justice system, including its sheer magnitude, the issue of racial disparities, exorbitant costs, and stunning rates of failure. Second, I address the historic and structural factors that created this system and continue to fuel it. Third, I offer my views about why a Commission is urgently needed now and describe areas in need of review. In conclusion, I discuss the ways that the criminal justice system affects individuals, and identify ways that we can redirect our public resources to help individuals currently caught up in the criminal justice system become productive leaders and advocates within their communities.

INTRODUCTION

Before launching into the actual testimony, I believe it will be helpful to provide the Subcommittee with some background on the perspective I bring to the question of whether we, as a nation, should re-examine the efficiency and effectiveness of our criminal justice system. At the Houston Institute, I, with a staff of experts in the areas of education,

---

[2] The Pew Center on the States, *One in a Hundred: Behind Bars in America in 2008*, citing The Columbus Dispatch, January 26, 2008. Available online at:
http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf

[3] I want to specially thank the following people for their help and research in drafting this testimony and for so much of the important work that we do at the Houston Institute to address disparities in the criminal justice system. Each of them deserves credit for their extraordinary dedication to creating a fair and equitable criminal justice system. Johanna Wald, Director of Strategic Planning, Rob Smith, Legal and Policy Advisor; Kaia Stern, Director of our Pathways Home project; Kelly Garvin, Researcher; David Harris, Managing Director; and our student interns, Harrison Stark and Nicole Kinsley.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00136 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.105

housing, child development and criminal justice, attempt to carry on Houston's legacy in remedying racial inequalities in opportunity and related injustices in connected systems of education and criminal justice. The Institute conducts policy and legal analysis, and regularly convenes meetings, roundtables and conferences. Staff members take part in activities ranging from research analysis and synthesis to community organizing to presentations at academic and legal conferences. Ultimately, the Houston Institute creates a bridge between knowledge and action. We reach deeply into the worlds of research, policy, and practice. While adhering to the most rigorous standards of academic scholarship, we are equally committed to ensuring that such knowledge is accessible and useful to policy makers, practitioners and the general public.

My own areas of expertise are civil rights and criminal justice, as a scholar and practitioner. I am a graduate of Stanford University and Harvard Law School. I spent the first eight years of my career in Washington, D.C., first as a trial attorney, later as Director of Training, then as Chief of the Trial Division and finally as Deputy Director of the District of Columbia's Public Defender Service. In this capacity, I represented hundreds of clients in juvenile and adult matters, in trials and at the appellate level. Moreover, I was able to train and supervise hundreds of lawyers, investigators and others involved in the criminal justice system in the District of Columbia and other jurisdictions. In addition to my work in Washington, D.C., I argued criminal justice cases in state and federal courts, including death penalty cases before the United States Supreme Court and state supreme courts. For example, I was counsel of record in *James Ford v. Georgia*, 498 U.S. 411 (1991). I have also argued cases before courts in Georgia, South Carolina and other states.

I am Chairman of the Board of the Southern Center for Human Rights, based in Atlanta, which handles death penalty and prison condition cases in Georgia and other southern states. I have served on several committees of the American Bar Association and other professional organizations dealing with criminal justice matters.

As a legal scholar, I have written extensively in a variety of contexts about criminal justice and race. For example, my most recent book, titled *When Law Fails: Making Sense of Miscarriages of Justice,* which I edited with Austin Sarat, reveals the human consequences of

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00137 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.106

failures of our criminal justice system, including wrongful convictions, faulty eyewitness identifications, false confessions, biased juries, and racial discrimination. As both a scholar and practitioner, I have viewed from many perspectives the remarkable and enduring repercussions of race in the criminal justice system. As my and other research has long shown, and individuals who work in the system will confirm, people of color, and African Americans in particular, are frequently the subject of disparate treatment at every stage of the criminal justice process. This disparate treatment often begins with police profiling, either of individuals of color or communities of color, and continues to be reflected in decisions about which defendants will be granted bail pending trial, the severity of charges brought, the juries selected for trial and the punishments imposed. It ends with the hugely disproportionate numbers of African Americans, and other people of color, currently serving lengthy sentences in prison.

PART ONE: FOUR DEFINING FEATURES OF A DYSFUNCTIONAL SYSTEM

1. Sheer Magnitude:

We have become the world's leader in incarceration. In the past thirty years, the United States has built up a criminal justice regime of a size and pervasiveness unparalleled in this or any other country in the world. According to the Pew Center on the States' Public Safety Performance Project, 2,319,258 adults, or one in every 99.1 men and women, were held in American prisons or jails in 2008. [4] This figure represents an increase of more than tenfold in less than four decades—rising from 200,000 people in 1970. [5] When one adds the individuals currently on probation or parole, there are now more than 7 million men and women in this country under legal supervision—a number equal to the population of Israel. [6] In addition, 2.2 million people are currently employed by our mass incarceration system—

[4] The Pew Center on the States, *One in a Hundred: Behind Bars in America in 2008*, available online at: http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf
[5] The Sentencing Project: *Facts about Prisons and Prisoners*, 12/07, available online at: http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprison.pdf
[6] Justice Policy Institute, *Moving Target, A Decade of Resistance to the Prison Industrial Complex*, p. 6, September 25, 2008, Amanda Petteruti and Nastassia Walsh, available online at: http //www.justicepolicy.org/content-hmID=1811&smID=1581.htm

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00138 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.107

in policing, corrections or the courts. [7] This population exceeds the 1.7 million Americans employed in higher education, and the 650,000 employed by the system of public welfare. [8] At the turn of the millennium, approximately 1.5 million children have had at least one parent in jail or prison, and 10 million have had a parent in jail at some time during their lives. [9]

2. Large Racial Disparities:

As overall numbers of individuals imprisoned or monitored by the government have grown, so have racial disparities among this population. African Americans make up only 13 percent of the overall population, and Latinos 15 percent. However, 40 percent of the prison population is African American and 20 percent is Latino. One in every 8 black males in their twenties is in prison or jail on any given day, as compared with 1 in 26 Latinos, and 1 in 59 white males.[10] Black males have a 1 in 3 chance of serving time in prison, and Latinos 1 in 5, as compared with 3 in 50 for white males. According to Harvard sociologist Bruce Western, the U.S. penal system has become "ubiquitous in the lives of low-education African American men," and is becoming an "important feature of a uniquely American system of social inequality." [11]

These large disparities are due to a constellation of complex and interrelated factors that include poverty, high rates of joblessness, low levels of education, and the clustering of African Americans and Latinos in concentrated urban areas. They are also related to very deep, systemic flaws within the criminal justice system. For example, while blacks and whites use and distribute drugs at comparable rates, [12] African Americans were arrested for

---

[7] Ibid.
[8] Justice Policy Institute, *Deep Impact, Quantifying the Impact of Prison Expansion in the South*, available online at: http://www.riseup.net/jpi/article.php?list=type&type=44. Annual expenditures for this revolving prison system reached $57 billion in 2001 ($167 billion for police, prisons and courts combined), and these figures do not begin to account for productivity losses or other social costs. See Butterfield, *With Longer Sentences, Cost of Fighting Crime Is Higher*, New York Times (May 3, 2004).
[9] Council on Crime and Justice, *Children of Incarcerated Parents*, January 2006, available online at: www.racialdisparity.org/files/CCJ%20CIP%20FINAL%20REPORT.pdf
[10] The Sentencing Project, *Racial Disparity*, available online at: http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=3
[11] Bruce Western, *Incarceration, Employment, and Public Policy*, New Jersey Institute for Social Justice Report, April 2003
[12] *Targeting Blacks: Drug Law Enforcement and Race in the United States*, May 2008.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00139 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.108

drug offenses in every year between 1980 and 2007 at rates between 2.8 and 5.5 times higher than whites. [13] This is related to the fact that their environments are more heavily policed than whites living in the suburbs and rural areas. Youths of color are more likely than their white and Asian American peers to attend segregated, high poverty, failing schools, often referred to as "dropout factories," which do not prepare them for higher education or with marketable skills. Relatively recent research on unconscious stereotypes suggests that they may also well be victims of implicit bias, as well as overt racism, on the part of key decision-makers within the criminal justice system. All of these factors are described in later sections. Whatever the causes and reasons, the racial disparities are so pronounced that the Leadership Conference on Civil Rights wrote in its report that they "threaten to render irrelevant fifty years of hard-fought civil rights progress." [14]

3. Exorbitant Costs

As states are forced to make wrenching cuts in education, health care, and other basic services, it is critical that we consider the price we are paying to maintain current levels of incarceration and law enforcement oversight. Between 1985 and 2000, state corrections spending grew at six times the rate of higher education spending. [15] State spending on corrections increased by 166 percent, while higher education spending grew by only 24 percent. [16] Between 1996 and 2005, total government spending on criminal justice related expenses increased by 64 percent. [17] The United States spent $213 billion on the criminal justice system in 2005—$98 billion on police, $68 billion on corrections, and $47 billion on the judiciary. In contrast, it spent less than $42 billion on housing, and $192 billion on higher education. [18]

---

[13] Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States*, March 2009.
[14] Ronald H. Weich and Carlos T. Angulo, Leadership Conference on Civil Rights, *Justice on Trial*. 2000. Available online at: http://www.civilrights.org/publications/reports/cj/justice.pdf
[15] Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men*, 2002. Available online at: http://www.justicepolicy.org/images/upload/02-09_REP_CellblocksClassrooms_BB-AC.pdf
[16] Ibid, p. 4
[17] *Moving Target*, p 7, original source: Bureau of Justice Statistics.
[18] Ibid; original source U.S. Census Bureau, Government Division, *State and Local Government Finances by Level of Government and by State, 2005-2006*, available online at: www.census.gov/govs/www.estimate.html

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00140 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.109

Researcher Amanda Petteruti wrote in a study released by the Justice Policy Institute: "[E]very dollar spent on the prison industrial complex is a dollar withheld from programs that educate our children and build on the strengths of our communities." [19] One current example of how criminal justice costs dwarf other pressing societal needs can be found in California. Despite proposing devastating cuts totaling over $21 billion, including eliminating health insurance for the state's poorest children, Governor Schwarzenegger's budget still allocates $400 million to build a new facility to house death row inmates. [20]

An example of how funds could be more effectively deployed in order to improve public safety and reduce crime can be found in "LA's BEST"—the largest after-school program in Los Angeles. It currently serves more than 28,000 children in 180 Los Angeles Unified School District (LAUSD) elementary schools with the greatest needs and fewest resources throughout the City of Los Angeles. The program is open to children who regularly attend a school where LA's BEST is located and is offered at no cost to parents.

A 2007 evaluation of LA's BEST, funded by the Department of Justice, found that:

- Students enrolled in LA's BEST are 30 percent less likely to commit juvenile crime than their peers;
- For every dollar invested in the LA's BEST program, Los Angeles saves $2.50 in costs associated with crime. [21]

At the press conference to release the study's results, Mayor Antonio Villaraigosa said, "This study shows that when we invest in our children and we engage our students, crime rates drop and everyone benefits." The cost per child to enroll in LA's BEST is $7.50 per day, or approximately $1,350 per year. If $1 million were redirected from the criminal justice system into this program, an additional 740 of the city's neediest children could be served each year, and the city would stand to save $2.5 million in crime-related costs.

---

[19] Ibid, p. 7

[20] Natasha Minsker, *Save $1 Billion in Five Years—End the Death Penalty in California*, available online at the Death Penalty Information Center: http://deathpenaltyinfo.org/california-could-save-1-billion-5-years-eliminating-death-penalty

[21] Full study available online at: http://www.lasbest.org/resourcecenter/ucla.php

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00141 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.110

4. High Rates of Recidivism

This is a system that thrives on failure. Each year, more than 700,000 people return to their neighborhoods from jail or prison. Within three years, approximately two thirds of these men and women are re-incarcerated. The reasons are numerous and complicated: the lack and adequacy of programs and resources to help formerly incarcerated individuals successfully return to their communities; the reluctance of employers to hire formerly incarcerated individuals; the "collateral" punishments that have been imposed in states and communities even after an individual has completed his or her sentence; and the structure of parole and probation policies.

In addition, many researchers have noted that by incarcerating young people who may be marginally involved in gangs, and other non-violent, low-level offenders, we isolate them from opportunities to develop healthy relationships, complete their education and attain marketable skills. As such, our current system in fact generates criminal behavior from our young people who might, with support and structure, become productive citizens. For example, one report found that "the experience of incarceration is the most significant factor in increasing the odds of recidivism... the odds of returning to DYS [Department of Youth Services] increased 13.5 times for youth with a prior commitment." [22] This same report cited research from Carnegie Mellon that found that incarcerating young people may actually interrupt and delay the natural pattern of "aging out" of delinquency. [23]

Julio Medina is currently the Executive Director of the Exodus Transitional Community in East Harlem, an organization that addresses the needs of formerly incarcerated men and women. He spent over eleven years in prison for drug offenses. This is how he described his experience:

> The upstate correctional camps are breeding grounds for people who were coming home again to make every drug contact in the world. I met every

[22] Justice Policy Institute, *The Dangers of Detention*, November 2006. Available online at: http://www.justicepolicy.org/content-hmID=1811&smID=1581&ssmID=25.htm
[23] Ibid, p. 9, original research completed by A. Golub, *The Termination Rate of Adult Criminal Careers*

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.111

> Columbian, Nigerian drug connection that I wanted to meet. It was kind of a planning stage. I was 22 years old...incarceration wasn't a deterrent. [24]

PART TWO: HISTORICAL AND STRUCTURAL FACTORS FUELING THE CURRENT SYSTEM

As Senator Webb has noted, this unprecedented build up and investment of resources in confining and monitoring so many individuals must indicate that we are home to the world's most dangerous and violent population. But we know this is not the case. According to the Sentencing Project, 82 percent of those sentenced to state prisons in 2004 were convicted of non-violent crimes, including 34 percent for drug offenses and 29 percent for property offenses. [25] So, how did we become an incarceration nation? A review of the legislation and legal decisions that fueled this incarceration phenomenon suggests that it came about through a convergence of a variety of social and political factors. First, as Professors Bruce Western and Christopher Wildeman have documented exhaustively, the merciless tandem of urban deindustrialization [with its chronic loss of unskilled labor jobs] and punitive politics combined in the 1970s and 80s to skyrocket prison populations throughout the country. [26] Around the same time period, and largely in response to urban riots and other signs of social chaos in several American cities, politicians running for national office began to shepherd crime control onto the national platform. Before this time, criminal justice was largely in the domain of state and local governments. Since then, the use of national resources to control crime has been a bipartisan effort: As Western and Wildeman note, in 1994 the Violent Crime Control and Law Enforcement Act signed by President Clinton and championed by Democrats and Republicans alike, "earmarked $9.9 billion for prison construction and added life terms for third-time federal felons." [27]

---

[24] Interview for doctoral dissertation of Kaia Stern, titled *Eight Voices from Prison: Transforming the Spirit of Punishment.*

[25] The Sentencing Project, *Facts About Prisons and Prisoners* (original source: Bureau of Justice Statistics), available online at:
http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprisons.pdf

[26] Bruce Western and Christopher Wildeman, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: The Black Family and Mass Incarceration*, 621 Annals 221 (2009). See id ("From 1969 to 1979, central cities recorded enormous declines in manufacturing and blue collar employment. New York, for example, lost 170,000 blue-collar jobs through the 1970s, another 120,000 jobs were shed in Chicago, and blue-collar employment in Detroit fell by 90,000 jobs. For young black men in metropolitan areas, employment rates fell by 30 percent among high school dropouts and nearly 20 percent among high school graduates. Job loss was only a third as large among young non-college whites.") (internal citations omitted).

[27] Ibid

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00143 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.112

Not to be outdone by their federal counterparts, state officials implemented "tough on crime" policies of a kind and quantity unrivaled in our nation's history. The kidnapping and murder of a 12-year-old girl named Polly Klaas jumpstarted the trend. In 1993, Richard Allen Davis, a two-time convicted kidnapper who would still have been incarcerated at the time Klaas was killed had he served more than half of his sentence on his previous kidnapping charge, took Klaas from her home in Petaluma, California. [28] After a massive public outcry, the California Governor signed the "Three Strikes and You're Out" bill into law in 1994. The stated purpose of the law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." [29] By 1995, 24 states had passed three-strikes laws. [30] These laws, however, have netted mostly people who have committed non-violent triggering offenses, including many for drug offenses. For example, in a bitterly divided 5-4 decision, the United States Supreme Court upheld a sentence against charges that it was cruel and unusual for a recidivist whose theft of $1,200 worth of golf clubs resulted in an indeterminate life sentence with a minimum term of 25 years without the possibility of parole. [31]

Along with three strikes laws, states and the federal government began to implement mandatory minimum sentences. These sentences, including mandatory terms of imprisonment for people who have committed first time non-violent offenses, drastically reduced sentencing discretion, and in the process eliminated the ability of judges to take the extenuating facts of a case (such as addiction or mental illness) into consideration. At the federal level, Congress created a Sentencing Commission which promulgated sentencing guidelines to dictate the proper sentencing range for a wide variety of offenses. As Congress passed increasingly stiff statutory minimums, the guideline ranges increased accordingly. [32]

---

[28] *Ewing v. California*, 538 U.S. 11 (U.S. 2003), discussing genesis of three strikes laws.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, B.Y.U.L. Rev. 935, 943 (2004) ("As statutory mandatory minimums trump any conflicting sentencing guidelines, the Sentencing Commission has always structured the guidelines to conform to statutory mandatory minimum terms. Thus, many of the harsh penalties contained in the guidelines represent congressional mandatory minimums rather than Commission policy.")

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00144 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.113

The result was a higher level of punishment imposed with less discretion for judges to lower prison sentences for less culpable people or for those whose circumstances suggest they could make a valuable contribution to society if not incarcerated.

One of the major critiques of mandatory minimums, three strikes laws, and sentencing guidelines, and an undeniable source of the prison boom near the end of the century, is the interaction between these harsh laws and people who are affected by mental illness and substance abuse. Prisons and jails have become America's default mental health institutions. As many experts, including the former president of the American Psychiatric Association, have recognized, our penal institutions are neither designed for, nor up to, the task. [33] With experts estimating that as many as 1 in 5 people in prison suffer from severe mental illness, profound moral questions about our treatment of people with mental illness are also in play. [34]

While these figures and statistics are well-known to people who study and document trends in criminal justice, the implications—for individuals, youth, families, communities, businesses, civil rights, and our democracy—of what David Garland has called a "massive and controversial social experiment" [35] are only beginning to be fully understood. Bruce Western has documented how going to prison reduces wages through lost work experience and diminished skills, signals untrustworthiness to employers, weakens social connections to steady employment, and increases wage inequality because incarceration is concentrated among minority and low-education men. [36] Because communities of color have such concentrated numbers of people who were formerly incarcerated, this has the effect of taking fathers, and increasingly mothers, away from their children, removing wage earners from their families, and thus de-stabilizing entire communities.

---

[33] American Psychiatric Association, *Mental Illness and the Criminal Justice System: Redirecting Resources toward Treatment, Not Containment*, May 2004.
[34] Ibid. ("Perhaps as many as 1 in 5 prisoners was seriously mentally ill, with up to 5 percent actively psychotic at any given moment.")
[35] David Garland, *Mass Imprisonment: Social Causes and Consequences*, Sage Publications, 2001.
[36] Bruce Western, *Incarceration, Employment and Public Policy*, available online at: http://www.njisj.org/reports/western_report.pdf

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00145 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.114

In sum, we have become the world's leader in incarceration by resorting to a crippling case of tunnel vision. In response to burgeoning crime, social unrest, mental illness, and drug abuse, we came up with only one approach: build more prisons and pass tougher laws so that we can put more people in prison and keep them there for longer periods of time. It has not worked. The criminal justice system is devouring our resources; putting people who have committed low-level offenses, who are perfectly capable of being rehabilitated, away for lengthy sentences and turning them into hardened criminals; destroying families and communities; and callously throwing away lives. We cannot afford to continue to invest in such a system. My hope is that this Congress passes the legislation proposed by Senator Webb, so that the Blue Ribbon Commission can begin to examine optimal policies to increase public safety.

PART THREE: WHY WE NEED A BLUE RIBBON COMMISSION AND RECOMMENDED AREAS FOR STUDY

Senator Webb is to be commended for recognizing that piecemeal solutions will not solve these massive structural problems. We need a "soup to nuts" review of the entire system, along with a comprehensive evaluation of what recent scholarship finds to be necessary to promote public safety.

Our current system is not only failing victims of crime, people who are currently and formerly incarcerated, and each American taxpayer; it is also failing our law enforcement public servants, police, and corrections officers who are committed to keeping communities safe. As David Kennedy, Director of the Center for Crime Prevention and Control at John Jay College, wrote in his 2007 testimony to Congress: "[N]one of us likes what is going on. Law enforcement does not want to endlessly arrest and imprison. Communities do not want to live with violence and fear...Everybody wants those who will take help to have it..." [37]

[37] David M. Kennedy, *Making Communities Safer: Youth Violence and Gang Interventions that Work*, February 15, 2007, prepared testimony available online at:
http //www.jjay.cuny.edu/cmcj/pdfs/Making_Communities_Safer_Kennedy.pdf

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.115

Unfortunately, too often, the people who live and work inside U.S. penal institutions experience the complete antithesis of a safe, stable and humane community. There are many dedicated people within the field of corrections who are committed to rectifying the problem of deficient training, diverting non-violent offenders from the system to get them the services they need, and creating more humane and effective punishment practices. [38] Many district attorneys, police chiefs, prison wardens and other law enforcement officers are forging new partnerships aimed at reducing recidivism, and changing negative perceptions of community members and law enforcement. [39] Holistic prison reform requires that the Commission listen carefully to the critical perspective of law enforcement to create policies that will improve the lives of all who are engaged in the system.

Below, I outline four major areas that, in my opinion, should be the focus of the Commission's work.

1. Review Mandatory Minimum Sentences, Particularly in Regard to Drug Policies:

America's criminal laws currently take a draconian stance towards drug users and low-end drug dealers. Rather than attempting to cure addiction or target the underlying cause of rampant drug abuse, our laws put drug users and drug addicts in jail for sentences that often span decades or even for life. The result is that more than one-third of people being held in state prisons and jails in 2004 were imprisoned for non-violent drug offenses. [40] Their incarceration accounts for a staggering amount of our tax dollars and exacts a devastating toll on already impoverished communities.

---

[38] For example, as part of the National Institute of Corrections' Norval Morris Project, two teams are currently addressing the topics of "corrections workforce transformation" and "safely reducing the corrections population." See: http://www.nicic org/Norval

[39] In his prepared testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, *Making Communities Safer: Youth Violence and Gang Interventions That Work*, David M. Kennedy cites the "Boston Miracle" (that cut youth homicide by two thirds and homicide city-wide in half, see, http://www.ojp.usdoj.gov/nij/pubs-sum/188741.htm), and Minneapolis as examples of innovative partnerships that reduce crime and yield positive relationships between local community and law enforcement (February 15th, 2007). See: David M. Kennedy, *Taking Criminology Seriously. Narratives, Norms, Networks, and Common Ground* (2006) Unpublished paper available from the author and on file with the committee; and David M. Kennedy and Anthony A. Braga, *Homicide in Minneapolis: Research for Problem Solving* (1998) Homicide Studies Vol. 2 No. 3.

[40] The Sentencing Project, *Facts About Prisons and Prisoners* (original source: Bureau of Justice Statistics), available online at: http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprison.pdf

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00147 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.116

In particular, the crack/powder cocaine disparity may be the single largest factor fueling the huge racial disparities that now exist in our jails and prisons. As with Polly Klaas and the three strikes laws in California, a dose of history speaks more to why this disparity exists and persists than any attempt at justification ever could. In the early 1980s, crack cocaine use began to increase throughout urban communities, quickly gaining media attention as an example of illicit drug use on the rise. Then, in June of 1986, one day after being drafted by the Boston Celtics as the number two overall pick in the National Basketball Association draft, 22-year-old standout college basketball star Len Bias died suddenly after ingesting cocaine. [41] Though Bias actually died after using cocaine in its powder form, the widespread perception was—and still is—that he died from using crack cocaine. During Senate hearings on crack cocaine sentencing held shortly after his death, Bias's name was mentioned 11 times. [42] The Senate passed the Anti-Drug Abuse Act, complete with the 100:1 crack/powder disparity, by the fall after Len Bias's death. [43] Because the United States Sentencing Commission must promulgate guidelines consistent with the statutory minimums created by Congress, the sentencing guidelines (until very recently) reproduced the 100:1 disparity.

As Assistant Attorney General Lanny Breuer reported to this Subcommittee last April, the best data available shows that despite the 100:1 ratio, our laws are only netting low-level street crack dealers. More disturbingly, and as Breuer also underscored, the crack versus powder categorization breaks down along racial lines: 82 percent of federal defendants convicted in 2006 for distributing crack cocaine were African American. Only 9 percent were white. To be sure, crack cocaine has had a heartbreaking effect on inner city communities, but a law that sends a disproportionate number of African Americans who have committed low-level drug offenses to jail (and away from their communities and families) for a disproportionately long period of time—sometimes for decades or even for

---

[41] Keith Harriston and Sally Jenkins, *Maryland Basketball Star Len Bias Is Dead at 22: Traces of Cocaine Found in System*, Washington Post, June 20, 1986. Available online at http://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias1.htm

[42] Marc Mauer, *The disparity on crack-cocaine sentencing*, Boston Globe, June 5, 2006. Available online at: http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/

[43] Ibid.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00148 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.117

life—is neither fair, just, nor a judicious use of public resources, particularly when we know that treatment is less expensive and more effective. [44]

Fortunately, we seem to be making strides at eliminating the 100:1 ratio. This year, Representative Sheila Jackson Lee (D-TX) introduced the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, which aims to dismantle the disparity between crack and powder cocaine sentencing. A member of the United States Sentencing Commission, United States District Court Judge Reggie Walton, testified to this Sub-committee this past May urging Congress to eliminate the 100:1 ratio. Two decisions by the United States Supreme Court have also worked to eradicate the rigid 100:1 disparity: In *Kimbrough v. United States*, [45] the Court held that sentencing courts do not need to adhere to the sentencing guidelines' 100:1 ratio. This year, in *Spears v. United States* [46] the Court reiterated that district courts are entitled to reject and vary categorically from the crack-cocaine guidelines based on a policy disagreement with those guidelines. Following in the wake of *Kimbrough* and *Spears*, leading federal judges, such as the Honorable Mark Bennett who sits on the United States District Court for the Northern District of Iowa, have refused to employ the 100:1 ratio, instead opting to use a 1:1 ratio to calculate the proper sentencing range. [47] I hope that this Congress will take the next step and eliminate the unjust and nonsensical ratio completely.

2. Identify Effective Re-Entry Programs and Bring Them to Scale

As previously mentioned in this testimony, about 700,000 people return home to their communities each year after their release from prison. From a purely public safety standpoint, the urgent need to provide them, their families and their communities with effective re-entry programs cannot be under-estimated. There is no question that the re-assimilation of people with criminal records into society is among the most weighty—and elusive—objectives of the criminal justice system. New York University Law School

---

[44] See, for example, Susan Ettner et. al , *Benefit-cost in the California treatment outcome project: does substance abuse treatment "pay for itself"?* Available online at: http://www.ncbi.nlm.nih.gov/pubmed/16430607
[45] 552 U.S ___ (2007)
[46] 555 U.S. ___ (2009) (*per curiam*)
[47] See generally, *United States v. Gully*, No CR 08-3005-MWB (May 18, 2009)

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00149 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.118

Professor Anthony Thomas captures the gravity of the transition from prison back to the outside world in the following testimony:

> Armed with little more than her own instincts and innate abilities, she is thrust instantaneously into a world that is at once foreign and intimidating in its differences and complexities. Her home community barely resembles that which she left behind. Yet, more than physical changes await her. The community that she enters has undergone significant economic, technological, and social changes that perhaps its insider now takes for granted, but that will be all too apparent to our time traveler—the outsider. The insider will be familiar with the norms of conduct, the formal and informal structures that exist in this environment, and the relationships that govern how residents interact and thrive. The outsider will not know the rules. And yet, we will expect the ex-offender—the quintessential stranger in a strange land—to enter this dramatically different environment and simply fit in without information, without significant support, and without meaningful preparation. If she does not manage to succeed on her own, she must then face the ultimate consequence—a return to her own time, a return to prison. [48]

And far too many do not succeed on their own. According to the Pew study, "parole violators accounted for more than one-third of all prison admissions" and half of the population in U.S. jails. [49] In California, over two-thirds of people on parole are returned to prison within three years of release; 39 percent of whom were the result of technical violations. [50]

These high rates of recidivism make it clear that parole officers need better monitoring and compliance tools, and more graduated sanctions to use when people on

---

[48] Testimony of Andrew C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. Rev 255, 256 (2004)
[49] The Pew Center on the States, *One in a Hundred: Behind Bars in America in 2008*, available online at: http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf
[50] Ibid.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00150 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.119

parole make minor violations. As the Pew study highlights, these tools could include "a mix of day reporting centers, electronic monitoring systems, and community service" and would "make offenders pay for their missteps but keep prison beds free for more violent and chronic lawbreakers." [51] Doing so maximizes the chances for a person on parole to succeed while simultaneously decreasing the heavy tax burden placed on society when a person is re-incarcerated for a technical or other minor non-violent offense.

One of the most damaging and counter-productive policy developments of the past 25 years has been a trend within state legislatures to enact "collateral" punishments on people who have served their time. These include restrictions on employment, access to housing, the right to vote, and eligibility on obtaining student loans for further education. These policies actually put communities at public safety risk by increasing the likelihood that people who are released from jail and prison will re-offend because they are not able to survive any other way. As Anthony Thompson, Professor of Law at New York University wrote: "[C]ountless scores of men and women alike...have been released from federal and state prisons having paid their debt to society only to find the walls of prison extend into their own communities." [52]

Research on best practices from national experts like Jeremy Travis, President of John Jay College; Joan Petersilia, Professor at the University of California at Irvine; and Anthony Thompson has given us much information about how to structure effective re-entry programs. We know that, to be effective, these programs need to address housing, health and employment needs. In addition, many people with criminal records require treatment for alcohol, substance abuse or mental health issues. This is an area where creative and dedicated law enforcement officials, such as Brooklyn District Attorney Joe Hynes; John Rutherford of the Jacksonville (Florida) Sheriff's Office; Patricia Caruso, Director of the Department of Corrections of Michigan; and Ken Massey of the Douglas County (Kansas) Sheriff's Office, are partnering with community advocates, clergy, health

[51] The Pew Center on the States, *One in a Hundred: Behind Bars in America in 2008*, citing The Columbus Dispatch, January 26, 2008. Available online at: http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf

[52] Address of Anthony Thompson to the NLADA Annual Conference, 2002.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00151 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.120

agencies, and others to make a difference. These programs need to be evaluated so we can more fully understand the components of success, and bring them to scale.

3. Increase High School Graduation Rates and Redirect the School to Prison Pipeline

I believe it is particularly important that the Commission closely examine the strong connection between educational attainment, public safety and incarceration. In this country, as most of you know, we have a dropout crisis. This crisis is particularly severe among youths of color. According to a new report issued in April 2009 by America's Promise Alliance, [53] only 55.3 percent of African American students, and 57.8 percent of Latino students, graduated from high school on-time with their peers in 2005. [54] This compares with 77 percent of white students, and 81 percent of Asian American students. In school districts serving our nation's largest cities, which are overwhelmingly attended by students of color, these graduation rates are often much lower, prompting one researcher to label these schools, "dropout factories." [55] For example, the on-time high school graduation rate for urban schools is 38 percent in Cleveland, 41 percent in Baltimore, and 54 percent in New York City. [56]

Dropping out of school triples the likelihood that an individual will become incarcerated at some time in his or her life. [57] If one is black and male, then the risk becomes far greater. According to Bruce Western, almost 60 percent of black male high school drop-outs in their early thirties have spent time in prison. [58] Leading economists from Columbia, Princeton and Queens College have estimated that increasing high school graduation rates would decrease violent crime by 20 percent, and property crime by 10 percent. They calculate that each additional high school graduate would yield an average of

---

[53] Editorial Projects in Education, *Cities in Crisis, 2009: Closing the Graduation Gap*, available online at: http://www.americaspromise.org/Our-Work/Dropout-Prevention/Cities-in-Crisis.aspx
[54] Ibid; see chart, p. 3
[55] Robert Balfanz, *The Graduation Rate Crisis We Know and What Can Be Done About it*, Education Week Commentary, June 12, 2006, available online at: http://www.csos.jhu.edu/pubs/edweek/Graduation%20Rate%20Crisis%20Commentary-Balfanz-Legters%20(2).pdf
[56] *Cities in Crisis*, p. 16
[57] Coalition for Juvenile Justice, *Abandoned in the Back Row: New Lessons in Education and Delinquency*, 2001 Annual Report, p.2, available online at: http://www.juvjustice.org/media/resources/resource_122.pdf
[58] Bruce Western, *Punishment and Inequality in America*, 2006, p. 17.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00152 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.121

$36,500 in lifetime cost savings to the United States public. [59] Another study concludes that a 10 percent increase in male graduation rates would reduce murder and assault arrest rates by about 20 percent, motor vehicle theft by 13 percent and arson by 8 percent. [60]

Below, I reproduce a chart from a policy brief that the Charles Hamilton Houston Institute for Race and Justice wrote about best practices and strategies to reduce gang violence and affiliation, titled *No More Children Left Behind Bars.* [61] The chart estimates the savings to states from averted crime costs if they increased high school graduation rates by ten percentage points. As you can see, states stand to save hundreds of millions—billions in California—of dollars from reduced crime if they invested in programs that would increase high school graduation rates. [62]

Put simply, what this research tells us is that reducing the number of high school dropouts is, in and of itself, an effective crime prevention and public safety strategy. It suggests that lawmakers should think very seriously about redirecting funds now used to build more juvenile halls and prisons toward programs that keep our youths in school and those "second chance" programs that help dropouts successfully re-engage in GED and other high school equivalency programs.

---

[59] Henry Levin, Clive Belfield, Peter Muennig & Cecilia Rouse, *The Costs and Benefits of an Excellent Education for America's Children,* Working Paper, Teachers College, Columbia University (2006). Available online at: www.cbse.org/pages/cost-benefit-studies.php

[60] Alliance for Excellent Education, *Saving Futures, Saving Dollars: The Impact of Education on Crime Reduction and Earnings*, August 2006.

[61] Charles Hamilton Houston Institute for Race and Justice, *No More Children Left Behind Bars*, 2008, available online at: http://www charleshamiltonhouston.org/Publications/Item.aspx?id=100012

[62] Graduation rate estimates from Christopher Swanson, *Projections of 2003-2004 High School Graduates.* Source: Common Core of Data Local Educational Agency and School Surveys, National Center for Education Statistics.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00153 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.122

ESTIMATED STATE LEVEL SAVINGS FROM AVERTED CRIME COSTS RESULTING FROM 10 PERCENTAGE POINT INCREASE IN GRADUATION RATES FOR ALL STUDENTS

10 States with largest grade 9 enrollment	# Grade 9 enrolled in 2000-01	10% of grade 9	Total lifetime crime cost savings for 10% grad rate improvement in one cohort	Estimated graduation rate for Class of 2004	Goal that would produce savings
California	476,142	47,614	$1,261,771,000	68.9	78.9
Florida	238,161	23,816	$631,124,000	53.0	63.0
Georgia	126,793	12,679	$335,993,500	55.5	65.5
Illinois	163,806	16,381	$434,096,500	75.0	85.0
Michigan	142,663	14,266	$378,049,000	74.0	84.0
New York	245,311	24,531	$650,071,500	61.4	71.4
North Carolina	111,745	11,175	$296,137,500	63.5	73.5
Ohio	159,724	15,972	$423,258,000	70.7	80.7
Pennsylvania	153,523	15,352	$406,828,000	75.5	85.5
Texas	355,019	35,502	$940,803,000	65.0	75.0

.

A phenomenon closely related to the high school dropout issue, particularly for children of color, is what has become known as "the school to prison pipeline." The pipeline refers to the growing numbers of children and teens in the United States who are getting suspended and expelled from public schools. Such suspensions and expulsions make students more vulnerable to falling into the "prison track." According to recent statistics from the U.S. Department of Education, in 2004, more than 3 million students were suspended and 106,000 were expelled. This represents a 7.4 percent increase in expulsions and a 9.3 percent increase in expulsions since 2000. [63]

For more than three decades, numerous studies and investigations have revealed that harsh school discipline policies are imposed upon children of color at highly

[63] National Center for Education Statistics, 2007a & 2007b. *Digest of Education Statistics* Table 144 (2000 figures) and Table 152 (2004 figures)

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00154 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.123

disproportionate rates. [64] Importantly, the U.S. Department of Education reports show that the reasons for suspensions differ markedly by race. For example, most white students are suspended for smoking, vandalism, leaving school without permission or obscene language. Black students are more likely referred for arguably more subjective reasons such as showing disrespect, excessive noise, making a threat and loitering. [65] Russell Skiba and his colleagues at Indiana University studied 37 states and found a strong relationship between racial disparities in school suspension and overall juvenile incarceration rates. [66] Indeed, racial disparities in suspension do correlate closely with the racial disparities we find in state juvenile prison populations. Nationally, in 2003, youth of color made up 38 percent of the U.S. youth population, yet they represented 65 percent of the youth in secure detention facilities. [67]

This national-level increase in punitive school policy does not appear to be a rational response to increased school violence. The most recent government data, in fact, indicates a decline in school violence. [68] Fortunately, a growing number of school officials, parents, law enforcement officers, and community members are beginning to recognize that all children need to be in school. They are implementing a host of promising programs designed to keep schools orderly and safe without pushing out large numbers of students. These include restorative justice practices, PBIS (Positive Behavioral Intervention Systems) that implement a graduated system of sanctions and focus on creating a positive school environment, and additional mental health and health services in schools to address students' non-academic needs. As we learn more about the relationship between children's out of school environments and their ability to succeed in school, it is important that lawmakers support communities in their efforts to help all children succeed in school.

---

[64] For example, see Children's Defense Fund (1974). This year, the U.S. Department of Education Office for Civil Rights found suspension rates for black students two and three times higher than suspension rates for white students. Research consistently found this pattern. See also (Gregory, 1996; Shaw & Braden, 1990; Leone et.al., 2003; Harvard Civil Rights Project, 2002). Rabinovic and Levin (2003) found that in Massachusetts during the 2000-2001 school year, while Latino and African American students were only 19 percent of the school population, they represented 57 percent of school exclusions. In 2000, researchers found that African American students are two to three times as likely to be suspended or expelled as other students (Skiba, Michael, Nardo, & Peterson, 2000).

[65] Skiba, Michael, Nardo, & Peterson, 2000.

[66] Skiba, Simmons, Staudinger, Rausch, Dow, & Feggins, 2003.

[67] W. Haywood Burns Institute, 2007.

[68] Dinkes, Forest Cataldi, Lin-Kelly & Snyder, 2007.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00155 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.124

4. Address the Role of Implicit Bias in Decision-Making

Another area worthy of investigation by this Commission involves a growing body of research about the role that implicit, or unconscious, racial bias may play in decisions and judgments made routinely by actors across the criminal justice system. [69] Implicit bias refers to unconscious negative feelings about particular racial or ethnic groups that might clash with one's publicly professed views or feelings about such groups. [70] In other words, a teacher may say she does not think that her African American students are more prone to violence than her white students, and she may truly believe that she holds that view. However, because of images or conditioning from a variety of sources over many years, she may hold wholly unconscious negative feelings about African Americans that do indeed affect her actions. This leads some social psychologists and others to advocate for further professional education that might bring such prejudices and their consequences to light, lead to self-examination and, in the end, possibly reduce huge racial disparities in criminal justice systems.

In the past five years, this scholarship has become increasingly sophisticated and rigorous. For example, one large-scale study from Florida showed that judges were far less likely to "withhold adjudication" for Latino and black males than they were for white males. (The withholding adjudication provision applies to people who have pled or have been found guilty of a felony and will be sentenced to probation. It allows the person on probation to retain his civil rights and to legally assert that he has never been convicted of a felony.) The racial association was strongest, researchers found, for blacks and for people

---

[69] *See, e.g.*, Katherine Beckett, Kris Nyrop & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY. 105-137 (2006). Researchers attempted to explain the racial disparities in Seattle's drug delivery arrests. The findings indicated that blacks were "significantly overrepresented among Seattle's drug delivery arrestees." This could be explained by several "organizational practices." Specifically, law enforcement focused on crack as opposed to powder cocaine offenders and placed priority on outdoor drug venues and also concentrated on heavily black areas The "available evidence further indicates that these practices are not determined by race-neutral factors such as crime rates or community complaints " In other words, the researchers conclude: "race shapes perceptions of who and what constitutes Seattle's drug problem, as well as the organizational response to that problem."

[70] Sunstein, & Jolls 2006; Lane, Kang & Banaji., 2007.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00156 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.125

with drug offenses. [71] Other research from the field of cognitive science demonstrates that people tend to make unconscious associations between African Americans and crime, among other negative characteristics. [72]

In one such study, "Priming Unconscious Stereotypes about Adolescent Offenders," (2004) authors Sandra Graham and Brian Lowery examined the potential for racial stereotypes to affect decisions made by police officers and probation officers. By simulating conditions with experimental priming, they determined that, once activated, racial stereotypes can affect these key decision-makers' judgments about young people's character, culpability, negative traits and "deserved punishment." The authors concluded that "racial disparity in the juvenile justice system can partly be understood as the outcome of a complex causal process that begins with unconscious stereotype activation and ends with more punishment of African American offenders." [73] They also posited that parallel racial disparities in school discipline may also be caused, at least in part, by the activation of unconscious stereotypes of teachers and administrators.

These associations appear to have real-world consequences: Research conducted by Jennifer Eberhardt on the application of the death penalty confirms that "defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black." Even in non-death cases, the more stereotypically black a defendant's physical characteristics are perceived to be the more likely he will receive a longer sentence. [74]

---

[71] Stephanie Bontrager, William Bales & Ted Chiricos, *Race, Ethnicity, Treatment and the Labeling of Convicted Felons*, 43 CRIMINOLOGY 589 (2005).

[72] *See, e.g.*, Ted Chiricos, Kelly Welch & Marc Gertz, *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 358-390 (2004). In this study, researchers examined the extent to which people associate crime with African Americans. The "racism" that the authors noted in this study "eschews overt expressions of racial superiority and hostility but instead sponsors a broad anti-African American effect that equates African Americans with a variety of negative traits of which crime is certainly one. This study demonstrates that the equation of race and crime is a significant sponsor of the punitive attitudes that are given material substance in the extraordinary rates of incarceration now found in the United States."

[73] Graham and Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 2004, p.499.

[74] Eberhardt, J. L., Davies, P. G., Purdie-Vaughns, V. J., & Johnson, S. L. (2006). *Looking deathworthy: Perceived stereotypicality of Black defendants predicts capital-sentencing outcomes.* Psychological Science, 17, 383-386

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00157 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.126

These findings accord with a recently published study of 133 sitting judges, authored by scholars from Cornell and Vanderbilt Law Schools and United States Magistrate Judge Andrew Wistrich, which found that judges, like other citizens, harbor implicit biases, and that these biases can affect the outcome of judicial decisions. [75]

Fortunately, there is some evidence to suggest that automatic stereotypes can be "unlearned" through "social tuning," or relationship building with members of the group subject to stereotyping. One author noted that: "Because stereotypes are amenable to change, we can educate decision-makers...to be more aware of the nature and function of these biases." [76] We must study these results carefully, commission further research, if necessary, and heed the early advice of experts: With proper training and awareness, we can reduce the effects of implicit racial bias.

CONCLUSION

I want to conclude by putting a human face on these numbers. Last year, Ely Flores testified before the House Subcommittee on Crime, Terrorism and Homeland Security, on the impact of YouthBuild on his life. YouthBuild is a program that provides young men and women between the ages of 16 and 24, mostly adolescents of color who have been court-involved, with job and leadership training. At a cost of $22,000 per participant per year, YouthBuild sets these young people to work building affordable housing units in their communities, while simultaneously requiring them to obtain a GED or high school diploma. It offers them a community of peers and adults who believe in them, are willing to give them a new chance, and expect them to succeed. And they do.

Ely Flores grew up poor in Los Angeles. He was abandoned by his father at an early age. Like many of his peers, he fell into a life of violence and gang membership. He cycled in and out of jail several times. In his testimony, he wrote:

---

[75] Rachlinski, Jeffrey J., Johnson, Sheri Lynn, Wistrich, Andrew J. and Guthrie, Chris, *Does Unconscious Racial Bias Affect Trial Judges?* Notre Dame Law Review, Vol. 84, No. 3, 2009; Vanderbilt Public Law Research Paper No. 09-11. Available at SSRN: http://ssrn.com/abstract=1374497

[76] Ibid.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00158 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.127

> As I adopted a gang life style, incarceration naturally followed. For four years I went in and out of prison. Some people say I was just a knuckle head but I...was never given any resources to better my life or to improve a community I truly did care for. I had to go hunt for resources outside of my community because there simply were not any in mine. I was hungry for change. However, jail and probation officers never seemed to believe me. I felt I'd been written off. But, I was lucky in the end. I found an organization like the Youth Justice Coalition and LA CAUSA YouthBuild that believe in the empowerment of young people to better their lives and their communities. [77]

Ely is now a youth worker, making Los Angeles safer by diverting youths from gangs and other anti-social behaviors toward more productive outlets. But he was lucky. YouthBuild has to turn away thousands of young people each year eager to learn new skills, obtain a GED, and make a difference. In Los Angeles alone, there is a waiting list of 800 youths, without any marketing or recruiting whatsoever by YouthBuild.

In contrast, many of you may have read the Fox News series on Clarence Aaron, a young man of color who, at age 24, was sentenced to *three life terms* for distributing 24 kilos of crack cocaine. He is now 39. [78] Unless his sentence is commuted, he will spend the rest of his life in prison, at an annual cost to the taxpayer of approximately $15,000 per year. [79] If he lives to be 74, Louisiana taxpayers will end up paying, at the most conservative estimate, $750,000 to keep him in jail, exclusive of any medical expenses.

---

[77] *From Violent Gang Member to Productive, Contributing Community Member. Testimony submitted by Ely Flores*, June 10, 2008.
[78] *Man Serving Three Life Terms for Drug Deal Pins Hopes on Clemency from Obama*, Tuesday, June 2, 2009, Fox News, Available online at: http://www.foxnews.com/story/0,2933,524820,00.html
[79] *Louisiana's incarceration rate is the highest in the country*, by Doug Simpson, Associated Press, March 2, 2009, available online at: http://www.nola.com/news/index.ssf/2009/03/louisianas_incarceration_rate.html

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00159 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.128

Bear in mind that Louisiana has the highest incarceration rate in the country, with one in 26 adults under control by the criminal justice system. [80] It was also recently ranked 44th among the country's 50 states in its high school graduation rate. [81] The state legislature is currently debating how to make $1.4 billion in cuts. [82] Consider what the state could do with the millions of dollars freed up by creating other options for people who have committed non-violent offenses. It might build schools, improve roads and public transportation, fund victim assistance programs, community policing efforts, substance abuse and alcohol treatment, or any number of other services or programs that would actually make its communities safer and better places to live.

A system that routinely chooses to throw away the lives of its young people who have made mistakes, but could become productive citizens, is a system that has lost its moral compass. Of course, we must protect communities from violent and dangerous individuals, and we must punish those who break the law. But incarceration should be our choice of last, not first, resort, and our precious resources should be reallocated toward preventing crime in the first place—by educating our children and providing them with alternatives to gang affiliation, violence, and drugs—and toward doing a better job of assisting victims of crime. Given all that we now know about the effectiveness of prevention over harsh punishment, it would be utterly counter-productive for this nation to continue its present course in regards to criminal justice policies and laws.

Today, political leaders of all persuasions, ranging from Republican Senator Sam Brownback of Kansas to former President William Clinton to Supreme Court Justice Anthony Kennedy, recognize that our current punitive policies are wasteful, ineffective, and unfair. Several states have already moved in the right direction: to rescind mandatory minimum sentences; to employ "justice reinvestment" strategies for diverting funds away from prisons to services that will help communities in need; to fund substance abuse treatment over incarceration. These are all positive and hopeful developments.

---

[80] Ibid.
[81] Alliance for Excellent Education, *Healthier and Wealthier: Decreasing Health Care Costs by Increasing Educational Attainment*, November 2006, available online at: http://www.all4ed.org/files/HandW.pdf
[82] *Louisiana Senate debates $28 billion budget*, Associated Press, June 5, 2009.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00160 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.129

But they are piecemeal, adopted by states and communities without always considering important evidence or research. We need Senator Webb's Commission because we must reform and restructure this system in its entirety—in a bipartisan and thoughtful way. We must be able to provide states and communities with sound guidelines for how they can reduce costs and overall prison populations without overwhelming already distressed communities, and without sacrificing public safety. We need to examine the best re-entry programs that will help the formerly incarcerated become productive members of society. We need to tie criminal justice reform to education reform, health care reform, workforce issues and job training programs, so that prison wardens, corrections officials and guards can be retrained as prisons close down. We need to figure out how to carefully, and effectively redirect resources now used to incarcerate those who pose no danger to society toward programs that will lift up communities and families. Weaning ourselves off of our incarceration addiction will not be easy, but it will make us a more just and prosperous society, if we do it right. Senator Webb's Commission is an important step in that direction.

Thank you for this opportunity to testify on this critical matter.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00161 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.130

Greg Ridgeway, Ph.D.
Director
1776 Main Street
Santa Monica, CA 90407-2138
310 393 0411 x7734
gregr@rand.org

RAND CORPORATION

Safety and Justice

A RAND INFRASTRUCTURE, SAFETY, AND ENVIRONMENT PROGRAM

June 9, 2009

Chairman Arlen Specter
Ranking Member Lindsey Graham
Subcommittee on Crime and Drugs
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Graham:

At your request, I am submitting a written report to your committee for use in the upcoming hearing—"Hearing to Examine the National Criminal Justice Act of 2009"—to be held on June 11, 2009.

As Director of Public Safety and Justice Research for the RAND Corporation, I, along with several of my colleagues, have conducted studies that assess our nation's criminal justice system. In recent years, RAND has published research on U.S. drug problems and policy, mental health and drug courts, crime reduction strategies, and disparities faced among boys and men of color. Additionally, RAND houses the Center on Quality Policing, which focuses on improving contemporary police practice and policy.

The written report being submitted—"Understanding the Public Health Implications of Prisoner Reentry in California: Phase I Report"—is being released on June 11, 2009, and addresses many of the factors that the National Criminal Justice Commission would evaluate on a national level.

RAND RESEARCH AREAS
THE ARTS
CHILD POLICY
CIVIL JUSTICE
EDUCATION
ENERGY AND ENVIRONMENT
HEALTH AND HEALTH CARE
INTERNATIONAL AFFAIRS
NATIONAL SECURITY
POPULATION AND AGING
PUBLIC SAFETY
SCIENCE AND TECHNOLOGY
SUBSTANCE ABUSE
TERRORISM AND HOMELAND SECURITY
TRANSPORTATION AND INFRASTRUCTURE
WORKFORCE AND WORKPLACE

OFFICES
SANTA MONICA, CA
WASHINGTON, DC
PITTSBURGH, PA
BOSTON, MA
NEW ORLEANS, LA
JACKSON, MS
DOHA, QATAR
CAMBRIDGE, UK
BRUSSELS, BELGIUM
www.rand.org

Some recommendations based on this research are as follows:

1. Safety net providers, especially community clinics, are an important component of the safety net for parolees. Funding more clinics may help fill in geographic gaps in services.
2. There is a need to better integrate the different treatment networks that provide services to the parolee population, particularly those for mental health, alcohol, and drug treatment.
3. Most parolees return to disadvantaged communities where their needs for healthcare, housing, and employment, among other services, will be harder to meet. Focusing reentry resources on those communities disproportionately impacted by reentry will be important.
4. An assessment is needed of options for removing policy and institutional barriers that may prevent access to needed health care services.

I hope you will consider making the RAND report part of the Congressional Record for this hearing.

Sincerely,

Greg Ridgeway
RAND Corporation
Santa Monica, CA

OBJECTIVE ANALYSIS. EFFECTIVE SOLUTIONS.

Testimony Submitted for the Record
United States Senate
Committee on the Judiciary
Subcommittee on Crime and Drugs
June 11, 2009

Submitted by Russell Simmons
Co-Founder, Def Jam Records
Founder, Rush Communications

It is with great humility that I present this written testimony in show of support of the National Criminal Justice Commission Act. I was hoping to be present at today's hearing; however, due to personal matters, I am unable to be in Washington for this very important discussion about the future of our beloved country. I had the great honor to meet Senator Webb two days ago, and I am very impressed with his approach to reforming the entire criminal justice system.

It is clear that our country has come to the tough realization that our criminal justice system needs a serious evaluation with the intention of a serious overhaul. Over the past seven years, I was actively involved in the campaign to repeal the Rockefeller Drug Laws in New York State, which were the harshest drug laws in America and the foundation of the "War On Drugs." We fought tirelessly to end mandatory minimum sentencing in New York, and on April 9th of this year, Governor David Paterson ended these drug laws after thirty six years on the books.

Since this war began in 1973, our prison population has quadrupled in size, with over 500,000 people in prison for drug offenses. And we have seen our communities destroyed by this endless cycle of incarceration with unjust laws and sentences that punish minorities far greater than they do whites. I hope that this Commission can deliver its findings in a quick and timely manner, so we can begin to implement the proper changes needed to create opportunities for our young people, so they never end up in the criminal justice system in the first place. I look forward to working closely with the members of this committee and the future members of the Commission in any capacity in which I can serve.

Thank you.

56273.132

Written Testimony of Julie Stewart,
President, Families Against Mandatory Minimums
On
"Exploring the National Criminal Justice Commission Act of 2009"

Submitted to the
Senate Judiciary Committee
Subcommittee on Crime and Drugs

June 11, 2009

Richard Paey's life did not flash before his eyes. Instead, he watched his life slip away day by day, hour by hour, and minute by minute. Saddled with chronic pain from a car injury and then diagnosed with multiple sclerosis, Paey needed high doses of prescription drugs to dull the pain. His Florida physician refused to prescribe them. So, Paey's former doctor in New Jersey mailed him undated prescription painkillers for two years. This supply was ultimately uncovered by local sheriffs and Paey was charged and convicted with drug trafficking. He was sentenced under one of Florida's harsh mandatory minimum sentencing laws to an unconscionable 25 years in prison, even though he was a first-time, non-violent offender trying to cope with debilitating pain.

Thanks to the indefatigable support of his wife, and with help from Families Against Mandatory Minimums, Richard Paey is free today. He served three years before Governor Charlie Crist, stating, "we aim to right a wrong," granted him a full pardon in 2007. His ordeal remains a powerful example of the failings of our criminal justice system.

I am Julie Stewart, President of FAMM. FAMM is a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day to ensure that sentencing is individualized, humane and no greater than necessary to impose just punishment, secure public safety and support successful rehabilitation and reentry. In our view, punishment should fit the individual and the crime. Too frequently it does not.

On behalf of Richard Paey and the thousands of others like him – including the hundreds of individuals and their loved ones I have met over the past 18 years who have been forced to deal with the consequences of one-size-fits-all sentencing – thank you for holding a hearing on the effort to launch a comprehensive review of the nation's criminal justice system. I appreciate the opportunity to share FAMM's views on the National Criminal Justice Commission Act. We also want to express our appreciation to Senator Jim Webb for his commitment to addressing criminal justice reform in a comprehensive manner.

We agree with Senator Webb that our nation's criminal justice system – both at the federal and state level – is broken. Mass incarceration is the most obvious symptom of the problem. The United States is home to 5 percent of the world's population but 25 percent of the world's reported prisoners. Our nation's current incarceration rate of 756 inmates per 100,000 citizens is nearly five times higher than the world average. According to a recent Pew Foundation Report, one in every 31 adults in the United States is now in prison, in jail, or on supervised release. The cost of this incarceration spree is skyrocketing. Federal, state, and local spending on corrections now costs roughly $68 billion per year.

We at FAMM, however, think some of the most devastating consequences of our criminal justice systems do not lend themselves to measurement in dollars and cents. After all, what is the true cost to society of millions of children being raised without the help and influence of an incarcerated parent? How do we measure the lost trust in a criminal justice system that appears to penalize people differently based on the color of their skin? No, not all of our losses can be monetized.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00165 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.134

We also agree with Senator Webb that the only way to achieve real reform is to look at every aspect of the criminal justice system in a comprehensive and thoughtful way. When Congress acts prudently and after careful study, it usually makes the best policy. Conversely, when Congress acts rashly, it often makes its worst mistakes.

In the mid- and late 1980s, Congress reacted to the high-profile drug overdose of basketball star Len Bias by rushing through new mandatory minimums sentences for certain drug crimes and gun offenses. Congress enacted the new laws without any hearings, debate, study or consideration. A number of states followed suit.

The mandatory minimums are obligatory. A conviction of a given charge will result in a pre-determined and, for the most part, inescapable sentence, even if the court believes that sentence is too long given the circumstances of the case.

By any standard, including their proponents' stated goals, the mandatory minimums enacted in the 1980s have failed. Specifically:

- They have not discouraged drug use or abuse. Drug use rates had already declined before Congress passed the 1986 and 1988 anti-drug laws. Crack and powder cocaine use only dropped when negative media coverage increased the perception that these drugs were dangerous and socially unacceptable.

- They have failed to reduce drug trafficking. Despite 50 years of experimenting with mandatory minimums, supporters cannot point to a single study that conclusively demonstrates any positive impact between mandatory minimum sentences and drug trafficking rates.

- Mandatory minimums' failure comes with billion-dollar direct costs. Expanded use of prison sentences for drug crimes and longer sentences required by mandatory minimums have caused a dramatic increase in state and federal corrections costs. State corrections spending jumped from $6 billion in 1982 to over $50 billion in 2008.[1]

- Mandatory minimums impose substantial indirect costs. Not only do longer prison sentences make it more difficult for prisoners to re-enter society successfully, but they also put a heavy burden on families and children who must live without a spouse or parent while that person is incarcerated.

- Mandatory minimum sentences are not applied evenly. In practice, mandatory minimum sentences have not been applied equally when viewed by race of the defendant. Further, two equally culpable defendants can receive vastly different sentences based on the value of the information they have to share with prosecutors.

[1] PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF THE AMERICAN CORRECTIONS 11 (Mar. 2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf (last visited June 10, 2009).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00166 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.135

In all of these ways, mandatory minimums have failed to perform as advertised. And, yet, I can't help but think that, even if they were effective to some degree, they would still be objectionable. Mandatory sentences offend a bedrock principle of justice best articulated in the federal sentencing statute. The core congressional command in the Sentencing Reform Act of 1984 directs courts to impose a sentence "sufficient, but not greater than necessary to comply" with the purposes of punishment.[2] This principle of parsimony has deep roots in American soil and in our sense of fundamental fairness. The law directs judges to exercise reasoned discretion, taking into account considerations such as the need to avoid unwarranted disparity, the history and characteristics of the defendant, and the seriousness of the offense, and then fashion a sentence for the particular individual who stands convicted.[3] Mandatory minimums prohibit courts from complying with that mandate.

Moreover, mandatory minimums challenge basic structures on which our government rests. Federal mandatory minimums offend federalism. They are frequently associated with laws that extend federal jurisdiction over conduct traditionally the domain of state law enforcement. And, because they often impose more severe penalties than similar state laws, they make federal prosecutions appear more attractive in the immediate wake of an offense. In addition, state and federal mandatory sentencing laws distort traditional roles by transferring judicial discretion to legislatures as well as prosecutors, who, by choice of charge, exercise undue and unreviewable influence over sentencing.

All of these problems have caused many former prosecutors, judges, and legal commentators to speak out against mandatory minimums. A report by the non-partisan Federal Judicial Center concluded with this statement about mandatory sentencing laws: "As instruments of public policy [mandatory minimums] do little good and much harm."[4] Today, mandatory minimum repeal enjoys widespread support from leaders in the criminal justice community. The Judicial Conference of the United States[5], the American Bar Association[6], the United States Sentencing Commission[7], and the United States Conference of Mayors[8] are among those who oppose mandatory minimum sentencing.

---

[2] 18 U.S.C. § 3553(a) (2008).

[3] The list of sentencing considerations and the parsimony mandate are found in the sentencing statute at 18 U.S.C. § 3553(a)(1)-(7) (2008).

[4] Barbara S. Vincent & Paul Hofer, *The Consequences of Mandatory Minimum Prison Terms*, Federal Judicial Center (1994), at 32 (quoting Michael Tonry, ed., *Mandatory Penalties*, in 16 CRIME & JUSTICE: A REVIEW OF RESEARCH 243-44 (1990))

[5] *See, e.g.,* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (Mar. 13, 1990) (voting in favor of urging Congress to reconsider the wisdom of mandatory minimum sentences), *available at* http://www.uscourts.gov/judconf/90-Mar.pdf (last visited Nov. 5, 2008); *see also* Testimony of Honorable Paul Cassell before the House Judiciary Committee Subcommittee on Crime, Terrorism and Homeland Security (June 26, 2007), *available at* http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf (last visited Nov. 5, 2008).

[6] *See* AMERICAN BAR ASSOCIATION, REPORT # 121-A (Aug. 9-10, 2004), *available at* http://www.abanet.org/leadership/2004/annual/dailyjournal/121A.doc (last visited Nov. 5, 2008).

[7] *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 25-33 (Aug. 1991) (describing how mandatory minimums undermine the purpose and goals of the federal sentencing guidelines, and concluding that "the intended purposes of mandatory minimums can be equally or better served by guidelines, without compromising the crime control goals to which

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00167 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.136

President Obama also has spoken of the need for reform. Noting that his predecessor, former President George W. Bush, expressed skepticism about imposing long sentences for first-time drug offenders, then-candidate Obama said, "I agree with the President. The difference is, he hasn't done anything about it. When I'm President, I will. We will review these sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of non-violent offenders."

Last, but certainly not least, the American people support mandatory minimum reform. A 2008 poll found that fully 78 percent of Americans agree that courts, not Congress, should determine an individual's sentence, and 59 percent oppose mandatory minimums for nonviolent offenders.[9]

FAMM is pleased to report that many jurisdictions are now rethinking, reconsidering, and, in some cases, simply repealing their mandatory minimum laws. FAMM was proud to play a leading role in the very first state repeal effort, which took place in Michigan. Several years ago, FAMM helped grow a strong, bipartisan movement that culminated with Republican Governor John Engler signing legislation to repeal nearly all of its mandatory minimum statutes. Just a couple months ago, the State of New York got into the act by repealing the nation's oldest mandatory minimums, the notorious Rockefeller drug laws. Mandatory sentencing reform measures sponsored or supported by FAMM have now been introduced in New Jersey, Massachusetts, and Nevada.

The list of reform-minded states is certain to grow. After all, it is impossible to pick up a newspaper without reading of another state government being forced to come to grips with the skyrocketing corrections costs. Now is an especially tough time, as the general economic downturn is crushing state budgets. More than a few states are scurrying to cut costs by freeing some inmates. But trying to fix over-incarceration on the back end of the problem is extremely short-sighted. We ought to do a better job of getting it right at the beginning. Other policies being implemented by states are less drastic, but are, similarly, short-term solutions with potentially dangerous consequences. According to recent news reports, some states are cutting back the number of meals they serve to inmates, despite studies that show a link between food and discipline problems behind bars, while others are cutting costs by reducing the amount of milk and fresh fruit they serve.[10]

The failings of mandatory minimum sentences are well-documented, and support for reform among judges, policymakers, and the American people is high. So, what is to be done? As noted, history demonstrates that hasty action has resulted in poor policy. But history also

---

Congress has evidenced its commitment."), *available at* http://www.ussc.gov/r_congress/MANMIN.PDF (last visited Nov. 5 2008).

[8] U.S. CONFERENCE OF MAYORS, 74TH ANNUAL MEETING ADOPTED RESOLUTIONS 47-48 (June 2-6, 2006), *available at* http://usmayors.org/resolutions/74th_conference/resolutions_adopted_2006.pdf (last visited Nov. 5, 2008).

[9] Families Against Mandatory Minimums/Strategy One poll on mandatory minimums (Aug. 2008), *available at* http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf (last visited Nov. 5, 2008).

[10] "Prison Meals: States Slimming Down Inmate Meals," The Elizabethton Star Online, June 8, 2009, *available at* http://www.starhq.com/news/html/news/AP/articles.asp?day=Sunday&article=a0468bc-us-prisonermeals06.html (last visited June 10, 2009).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00168 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.137

provides examples of thoughtful, deliberate action that brought about positive change. For example, the Prettyman Commission[11] established by President John F. Kennedy and the Katzenbach Commission[12] created by President Lyndon Johnson studied issues related to drug abuse and crime and concluded that long prison sentences were not an effective deterrent to drug users, that rehabilitation should be a primary objective for the government, and that courts should have wide discretion to deal with drug criminals.

Following these reviews, President Richard Nixon was elected on a platform that included getting tough on drug crime. But rather than add new arbitrary mandatory sentences, the Nixon Administration negotiated a bill that sought to address drug addiction through rehabilitation; provide better tools for law enforcement in the fight against drug trafficking; and provide a more balanced scheme of penalties for drug crimes. As part of this effort, the Administration and Congress repealed mandatory minimums for drug crimes.[13] The Act was praised by both Republicans and Democrats in Congress, including then-Congressman George H.W. Bush (R-TX), who said it would "result in better justice and more appropriate sentences."

FAMM believes Congress must work on a bipartisan basis once again, this time to fully uncover and help remedy the problems plaguing our federal and state criminal justice systems. We think Senator Webb's proposal for a bipartisan commission to examine every aspect of the justice system, including mandatory minimums, and to make specific recommendations for improvement holds the most promise for helping to achieve the kind of significant and comprehensive reform our nation needs. For this reason, FAMM fully supports enactment of the National Criminal Justice Commission Act and urges Congress to approve it.

---

[11] The official name of the commission was the President's Advisory Commission on Narcotics and Drug Abuse.

[12] The formal name of the commission was the President's Commission on Law Enforcement and Administration of Justice. The Commission produced a ten-volume study on federal criminal justice.

[13] For a history of the 1950 mandatory minimum law, the "Boggs Act," its repeal in 1970, and the lesson we can take from that history, *see* FAMILIES AGAINST MANDATORY MINIMUMS, CORRECTING COURSE: LESSONS FROM THE 1970 REPEAL OF MANDATORY MINIMUMS (2008), *available at* http://www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf (last visited June 10, 2009).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00169 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.138

The Heritage Foundation
LEADERSHIP FOR AMERICA
214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

CONGRESSIONAL TESTIMONY

Exploring the National Criminal Justice Commission Act of 2009

Testimony before
the Subcommittee on Crime and Drugs
of the Committee on the Judiciary
United States Senate

June 11, 2009

Brian W. Walsh
Senior Legal Research Fellow
The Heritage Foundation

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00170 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC
56273.139

My name is Brian Walsh, and I am Senior Legal Research Fellow in The Heritage Foundation's Center for Legal and Judicial Studies. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.[1]

Thank you Chairman Specter, Ranking Member Graham, and Members of the Committee for inviting me here today to address the principles and provisions of the National Criminal Justice Commission Act of 2009 (S. 714). Criminal justice reform is a central focus of my research and reform work at the Heritage Foundation. Over the past three years, I have worked with hundreds of individuals and scores of organizations across the political spectrum to build consensus for principled, non-partisan criminal justice reform. My colleagues, allies, and I have gathered substantial evidence that the criminal justice system is in great need of principled reform, particularly at the federal level, and that this reform should not be driven by partisan politics.

As Harvard law professor Herbert Wechsler reminded us half a century ago, criminal punishment is the greatest power that government routinely uses against its own citizens. Criminal justice thus is too important to allow it to fall subject to partisan political interests. Rather, it should be governed and, whenever necessary, reformed according to sound principles that are widely acknowledged and understood by the American people.

Criminal justice policy has become increasingly politicized over the past few decades, including in Congress. This has been caused by at least three major factors. First, the American people's strongly negative reaction to the increase in crime in the 1960s and 1970s made it politically popular to be "tough on crime," with harsher criminal offenses and greater punishment indicating an elected official's *bona fides*. On average, candidates for election and reelection who are "tough on crime" can be expected to fare better at the polls than those candidates who are (or who are perceived to be) "soft on crime."

Second, the efforts to combat this trend were in the past bogged down in constituent and interest-group politics, with those engaged in criminal-justice reform advocating for offenders who have committed certain categories of crime rather than for even-handed, across-the-board reforms that benefit all Americans. Some reform advocates and their constituents purposefully and consciously allied themselves with a political party.

Third, state and local law enforcement officials have increasingly become regular supplicants for funding from the federal government. This hunt for federal funding

[1] Sections of this testimony are incorporated in part from my previous work on the problems of overcriminalization affecting the federal criminal justice system that was published in the Federal Sentencing Reporter. *See* Brian W. Walsh, *Doing Violence to the Law: The Over-federalization of Crime*, 20 FED. SENT'G REP. 295 (2008). Members of the Committee may want to review this publication for a more complete discussion of the problems and possible solutions.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00171 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.140

skews the priorities of state and local law enforcement officials and generally results in their emphasizing those issues that receive national attention rather than those that pose the greatest risks and problems to local communities.

My criminal-justice reform allies and I have found among members of both major political parties at the federal, state, local federal levels a growing recognition of the need for reform that is both principled and non-partisan. Before the November election, for example, a coalition of groups spanning the political spectrum and working with key Members of the House of Representatives reached substantial consensus on pursuing hearings and reform proposals for federal criminal justice reform. I am hopeful that the non-partisan spirit in which we worked will establish a foundation for sound, lasting reform as well as for greater trust and cooperation among reform-minded advocates and elected officials.

It is also my hope that any commission put in place by the National Criminal Justice Commission Act will be designed and focused to ensure non-partisan conclusions and recommendations that incorporate the experience and best thinking of persons across the political spectrum. For that reason, reform experts who are serious about criminal-justice reform should draw encouragement from Senator Webb's efforts to date to reach out to elected officials on both sides of the aisle and to criminal-justice reform advocates across the conservative-to-liberal spectrum. I commend such bipartisan efforts for criminal-justice reform. And along with some concerns expressed below about the current version of the Act, I hope that its positive elements might serve as a foundation for shaping and establishing a commission that will represent the full range of interests in the criminal justice system and that will investigate and make reasonable recommendations on the full range of problems affecting, in particular, the federal criminal justice system.

SALUTARY FEATURES AND NEEDED IMPROVEMENTS

In addition to the bipartisan approach, the Act as drafted has laudable features. It seems tailored to allow the commission to study and offer solutions addressing, for example, the problems of crime committed by the mentally ill and alternatives to incarceration for some first-time, non-violent offenders. With its emphasis on reviewing national drug policy, the commission should be able to explore the benefits of the drug courts that various states have been using as an alternative to the traditional criminal justice system for non-violent drug offenders in possession of relatively small quantities of drugs. The commission should assess the effectiveness of the various drug-court models and report on what works and what does not work in the various states.

Similar systematic study is needed of the programs the states have employed to facilitate offenders' productive reentry into society after their release from incarceration and government supervision. I am not aware of any comprehensive study of these state

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00172 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.141

efforts since the enactment of the federal Second Chance Act,[2] and the commission should undertake to rectify that gap in data.

While there is much positive in the Act's proposal, several features need improvement, notably:

1. As currently proposed, the composition of the commission would be too narrow, focusing too much on federal rather than state appointees to the commission as well as congressional rather than executive appointees, to address the full range of criminal justice issues that the Act proposes to be considered and that should be considered.

2. The Act as currently crafted is founded on unstated premises about the problems with – and lack of benefits from – current national policy on incarceration and drug enforcement; empirical data show that such premises are not well-founded.

3. While purporting to authorize a comprehensive review of American criminal justice, the Act has an undue emphasis on violent and drug offenders and fails to address the proliferation of offenses criminalizing socially and economically beneficial conduct, the federalization of truly local crime, the widespread elimination of criminal-intent requirements, and related problems that put at risk the rights and liberties of all Americans.

These necessary improvements will be addressed in sequence below.

COMPOSITION OF THE COMMISSION

For any national criminal justice commission to have a lasting, salutary impact on criminal justice policy, its membership must be broadly representative of the experts in the federal and state systems under inquiry. Otherwise, the commission's conclusions and recommendations are not likely to be widely respected or to stand the test of time. There are three problems with the composition of the commission as currently proposed by the Act that undermine the likelihood that the commission will be sufficiently broad. The Act makes insufficient provision to ensure the views, backgrounds, and expertise represented among the commission's members will adequately cover each of these commission's areas of inquiry; the 50 states lack adequate representation to protect their sovereignty over criminal justice operations, a core state responsibility; and the interests and expertise of the federal Executive Branch are also inadequately represented.

Broadening the Commission's Representation

Section 4 of the Act lays out an exceedingly broad scope of inquiry for the Commission, stating that it "shall undertake a comprehensive review of the criminal justice system," including making findings related to Federal and State criminal justice polices and practices. Further, the Commission is directed to "make reform

[2] Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00173 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.142

recommendations for the President, Congress, and State governments" covering a broad range of criminal-justice topics. Section 6 sets forth a similarly broad range of topics for inquiry and recommendations. These include:

- incarceration policy;
- prison administration:
- prison violence;
- the treatment of mental illness;
- international and domestic gangs,
- cartels, and syndicates;
- the criminalization and punishment of illicit drug possession; and
- "the use of policies and practices proven effective throughout the spectrum of criminal behavior."

Although this defined scope of inquiry does not encompass all areas of American criminal justice, it covers a broad swath. Yet the Act makes insufficient provision to ensure that the views, backgrounds, and expertise represented among the commission's members will adequately cover each of these areas and provide well-supported and opposing perspectives on contentious issues. While it is helpful that both major political parties would appoint an almost equal number of commission members, the wide popularity of increased criminalization causes the interests of the two parties to converge in many critical areas of criminal-justice policy. In short, the politics at work on Capitol Hill make it difficult for Congress to view the criminal justice system objectively and resist the perpetual temptation to increase criminalization.[3] Care must be taken to insulate the Commission from these forces, in part by including express language in the Act that will establish criteria ensuring that the expert practitioners and researchers chosen represent opposing, well-supported points of view.

The size of the commission may be slightly smaller than necessary to accommodate the requisite diversity of views, backgrounds, and expertise as well as the recommendations made below. The Act currently proposes 11 members for the commission, but this should be increased by 2 to 4 members to provide for a 13- or (at most) 15-member commission. The Act should also require a majority of the commission's members to be present to constitute a quorum for any meeting.

Increasing Representation to Protect Constitutional Federalism

The Act is unabashed about asserting Congress's review and oversight of State criminal justice systems and assigning that review to a national commission. Yet the Act's rationale for doing so is weak: "the conditions under which Americans are

[3] *See* CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, REPORT ON THE FEDERALIZATION OF CRIMINAL LAW 2 (1998). The ABA Task Force was composed of 17 academics, former prosecutors, Justice Department officials who served in Republican and Democratic Administrations, and Members of Congress of both major parties. Its final report was unanimous.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00174 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.143

incarcerated and the manner in which former inmates reenter society is a compelling national interest that potentially affects every American citizen and every locality in the country." The same statement could be made about hundreds of areas of state government responsibility. Yet the federal government is a limited government of enumerated powers, and Congress must be careful not to dictate criminal-justice policy to the States, even through the use of the Spending Power. It is therefore of concern that only two members of the commission are to be appointed non-federal officials, one by the chairman of the Democratic Governors Association and the other by the chairman of the Republican Governors Association.

Criminal justice is at the very core of governmental powers and responsibilities that are predominately left to the states. The criminal justice burden borne by the 50 states dwarfs the burden undertaken by the federal government. In 2003, state and local governments were responsible for 96 percent of those under correctional supervision — i.e., in prison or jails, on probation or parole.[4] Similarly, in 2004 just 1 percent of the over 10 million arrests made nationwide were for federal offenses.[5] The enormously disproportionate responsibility for criminal law enforcement that the states fulfill is also reflected by the number of law enforcement officials in the two systems. Although the American justice system employed in aggregate nearly 2.3 million persons in 2001, only 9 percent were federal employees.[6] The remaining 91 percent were employed by state and local governments.

Further, in repeatedly acknowledging that the federal government has no general or plenary police power, the Supreme Court has recognized that the power to punish crimes that do not implicate an enumerated power of the federal government belongs solely to the states.[7] The Court's holdings on the police power and scope of federal

---

[4] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2003, 7 (July 2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf. In 2003, the federal government was responsible for 282,800 of those under correctional supervision, while state and local governments bore the burden of 6,607,000 of the total under correctional supervision. *Id.*

[5] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004, 17 (Dec. 2006), *available at* http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf; *see also* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2004, 290–91 (2004), *available at* http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf. Of the total number of arrests made in 2004 (10,047,256), 9,942,501 of those arrests were made by state or local agencies.

[6] LYNN BAUER, BUREAU OF JUSTICE STATISTICS, JUSTICE, EXPENDITURE, & EMPLOYMENT IN THE U.S 2001 (May 2004), *available at* http://ojp.usdoj.gov/bjs/pub/ascii/jeeus01.txt.

[7] United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. . . . Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); United States v. Lopez, 514 U.S. 549, 566 (1996) ("[S]o long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.' . . . The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.").

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00175 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.144

authority to criminalize are consistent with the views of those who crafted and ratified the Constitution.[8]

The states not only bear the vast majority of the burden for criminal law enforcement, but it is preferable that they do so. Among other reasons for this, what some refer to as the principle of subsidiarity holds that it is best for laws to be imposed and services to be provided by that level of government that is closest – and thus most responsive – to the individuals affected. Thus, criminal justice policy and priorities that do not fall squarely within the scope of a power the Constitution assigns to the national government should be set by state and local officials. State and local officials are in the best position to understand and respond to the needs and interests of the communities and individuals who are affected most by criminal law enforcement.

Official Washington has recently been demonstrating a willingness and propensity to drastically increase the scope and power of the federal government at the expense of the state sovereignty that is at the heart of the constitutional design. Particularly in this environment, Congress must be exceedingly careful about implying that state criminal justice systems are somehow subject to federal oversight. For this reason, at least one-half of the members of the commission should be members of non-federal organizations, some appointed by Congress and some by the executive branch. To protect our dual-sovereignty system of constitutional government,[9] the commission's non-federal representatives should include several who are staunch and outspoken supporters of constitutional federalism.

Representation by Members Appointed by the Executive Branch

The only member of the commission that the Act as currently written would have appointed by the Executive Branch is the chairman, who would be appointed by the President. To better represent the interests and experience of the federal government as a whole, the commission should have an equal number of members appointed by the executive branch as the number appointed by Congress. This is not only a matter of fairness but of prudence, for it would allow the commission to draw upon the extensive expertise of the Department of Justice, Federal Bureau of Investigation, and other federal law enforcement agencies. This change would also afford the proper respect to a coequal branch of government, particularly in light of the fact that the commission seems designed to effect broad, sweeping recommendations for national criminal justice.

---

[8] *See* THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter, ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*" (emphasis added)); *see also id.* NO. 17 (Alexander Hamilton) (referring to the ordinary administration of criminal and civil justice as the "transcendent advantage [over the national government] belonging to the province of the State Governments").

[9] *See id.* NO. 51 (James Madison).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00176 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.145

There seems to be little reason other than cost for limiting the number of commissioners to 11, and one of the purported reasons for this commission is to identify the best areas in which to find cost savings in the criminal justice system. If this premise of the Act is correct and the recommendations end up finding some cost savings, the commission might indirectly pay for itself even were it to have 13 or 15 members.

ACT'S UNSTATED PREMISES REGARDING CRIMINAL PUNISHMENT

Despite the potential benefits of a non-partisan national commission on criminal justice reform, the Act's unstated premises must not be allowed to go unquestioned. Nor should these unstated premises be allowed to shape the focus and scope of the investigations conducted by a commission that purports to be designed to consider the entire criminal justice system. Instead, a commission with this broad scope should be designed and directed to be as objective as possible in its review.

Incarceration

One of the Act's chief unstated premises may be the unfounded assumption that incarceration rates need to decrease across the board. Section 6 would direct the commission to make recommendations "to reduce the overall incarceration rate." While it may be true that some prison sentences, particularly those at the federal level, are longer than required to fulfill the needs of justice, a directive to decrease the overall incarceration rate strongly suggests that all prison sentences are too long. This is simply not borne out by the best available evidence. It should neither be overlooked nor minimized that nationwide rates for all categories of violent and property crimes remain at or near their lowest levels for the last fifteen years.[10] This drop in the crime rates has coincided closely with the increased levels of incarceration that the Act apparently seeks to change.

Much has been said and written by those in advocacy organizations, professional research organizations, and the media who are broadly opposed to most incarceration suggesting that incarceration does not decrease crime rates. This not only defies common sense and is contrary to the considered opinion of the vast majority of law enforcement professionals, it is contrary to some of the best research. Texas is often held up as the poster child for unwarranted incarceration. Yet the rates of violent and property crime in Texas decreased substantially in the 1990s. And research that disaggregated Texas's incarceration rates from economic, demographic, and other law-enforcement factors concluded that "[v]irtually all the reduction in violent crime, and about half the reduction in property crime, can be attributed to an increase in jail and prison populations."[11]

Incarceration has also been found to have a substantial deterrent effect on crime. One research study, for example, reviewed the deterrence effect of the longer sentences

[10] FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2007, Table 1 (Sep. 2008), *available at* http://www.fbi.gov/ucr/cius2007/data/table_01.html (2008).
[11] William Spelman, *Jobs or Jails? The Crime Drop in Texas*, 24 J. OF POLICY ANALYSIS & MANAGEMENT 133, 158 (2005).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00177 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.146

the people of California in 1982 imposed by popular referendum – i.e., Proposition 8 – on repeat offenders. For offenders convicted of any "serious felony" after Proposition 8 took effect on June 9, 1992, the new sentencing provisions added five years to the length of the offender's sentence for each "serious felony" of which he had been convicted in the past.[12] The study made good use of the insight that the deterrent effect of this new sentencing regime could be disaggregated from its incapacitative effect by looking at those convictions that would have been punished with incarceration both before and after the longer sentences took effect. The incapacitative effect could not come into play until a period longer than the sentences that would have been imposed before the new law. So the years immediately following Proposition 8's enactment could be compared with the years before its enactment to see how much crime was deterred. The study found that, controlling for other factors, the rates of both violent crimes and property crimes decreased substantially in California even in the first three years after the new law took effect. Consistent with both common sense and economic research,[13] the deterrence effect of the tougher sentencing law appears to be the best explanation for these drops in California's violent and property crime rates. Experience, common sense, and scholarly research provide solid reasons to conclude that incarceration reduces crime.

Moreover, in addition to the factors above, the benefits of incapacitating violent and other criminals cannot be disputed. The safety of law-abiding citizens and their hard-earned property is increased when criminals who would otherwise commit additional crimes are held in jail or prison. Long terms of incarceration are particularly appropriate for those who have committed multiple violent felonies and, according to criminological research, are likely to do so again. Similarly, those who have committed multiple violent felonies and who intentionally purchase or possess a firearm in violation of criminal law pose a great risk of further violence. They, too, should be subject to substantial terms of incarceration.

This analysis counsels strongly in favor of any national commission on criminal justice engaging in careful study and deliberation when determining which prison sentences are warranted and should be maintained and which, if any, should be reduced. The analysis also counsels against the sort of wholesale reductions in prison populations invited and encouraged by the current version of the Act. Regardless of how much cost savings broad reductions in incarceration may generate in these challenging economic times or how politically popular such reductions may be, non-criminological factors such as these should not be allowed to trump public safety.

The Act therefore should be amended to clarify that the commission should carefully assess and report on the criminological effects of existing sentences before recommending any reductions. Further, the Act should direct the Commission to present the evidence "for" along with the evidence "against" the benefits of incarceration.

---

[12] *See* CAL. PENAL CODE §§ 667(a), 1192.7(c).

[13] *See* Gary Becker, *Crime and Punishment: An Economic Approach*, J. OF POL. ECON. 76, 169-217 (1968) (applying economic analysis to demonstrate the deterrent effect of increasing criminal punishment).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00178 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.147

Retroactive reductions in sentences are particularly prone to abuse. Incarcerated offenders who waived their right to an expensive criminal trial and pled guilty to one charge often did so in exchange for other, greater charges being dropped. They may be serving a long sentence for a non-violent offense, but that is often the minimum sentence necessary to fulfill the needs of justice because they also committed a violent offense for which the maximum sentence was even longer. For these reasons, the Act should include language directing the commission not to recommend reducing sentences for incarcerated offenders who pled guilty to a lesser charge in exchange for a greater charge being dropped.

Drug Policy

As has been true with incarceration policy, the public discourse on national drug policy has been dominated in the past few years by those members of advocacy organizations, the research industry, and the media who are broadly opposed to enforcement and often favor drug decriminalization. As currently crafted, the Act appears to be premised on assumptions about drug enforcement policy that are one-sided and not entirely well-founded. Nothing in the Act mentions the successes the states and the federal government have had in the fight against drug abuse. Similarly, the Act's language ignores the fact that the national strategy against drug abuse already employs a three-part approach in which prevention, enforcement, and treatment all play a key role. While drug rehabilitation may bring about successful results for some drug offenders, few drug users voluntarily seek it is often enforcement that A rehabilitation-centric approach

The discussion that follows in this section is by no means intended to be a full review or unequivocal defense of all current drug-enforcement policy. Rather, its purpose is to highlight some of the facts and research on national drug policy that have been largely ignored in the recent public discourse and that seem by default to have been largely ignored in the Act as well. This is the type of research and information on the destructive effects of drug abuse and successful results of the fight against it that any commission the Act creates must investigate thoroughly, weigh carefully, and report accurately if the commission's findings and recommendations are to be accorded authority.

Section 2 of the Act emphasizes that a "significant percentage" of incarcerated drug offenders "have no history of violence or high-level drug selling activity." No mention is made, however, of the economic and human costs drug abuse imposes on individuals, families, communities, or employers. For example, one out of every 10 children in America under 18 years old lives with a parent who is substance-dependent or substance-abusing, and the Department of Health and Human Services (HHS) reports that such living situations have a severe negative impact on children.[14] As Eric Borderick, the acting administrator of HHS's Substance Abuse and Mental Health Administration

[14] *See* U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Administration, Office of Applied Studies, *Children Living with Substance-Dependent or Substance-Abusing Parents. 2002-2007*, April 16, 2009.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00179 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.148

recently stated, "The chronic emotional stress in such an environment can damage [children's] social and emotional development and permanently impede healthy brain development, often resulting in mental and physical health problems across the lifespan."[15] In short, personal drug abuse is far from a victimless crime.

Further, drug abuse correlates with the commission of crime. Forty-five percent of incarcerated federal offenders and 53 percent of incarcerated state offenders meet the criteria for drug dependence, and this dependence correlates with extensive criminal records.[16] The same HHS research reports that 18 percent of federal prisoners and 17 percent of state prisoners committed their offenses in order to get money to purchase drugs,[17] and 15 percent reported that they used marijuana at the time of the offense.[18]

Although such facts do not alone justify all current drug policy, such information about the national fight against drug abuse must be granted its full weight by the commission in order for any of its drug policy recommendations to be granted any weight or authority. As currently written, the Act does not invite such study and suggests that it is unnecessary. The Act should be changed to ensure that drug policy is addressed thoroughly, systematically, and in an unbiased manner and that the states' experience with drug courts for those charged of non-violent, low-level possessory offenses are fully explored.

Overcriminalization

A major omission of the Act is that it overemphasizes violent offenders and drug offenders. It does not address the problems presented by the proliferation of criminal offenses – particularly federal criminal offenses – involving conduct that should not even be criminalized at all. The rapid expansion of federal criminal law, beyond almost all prudential and constitutional limits, may not be the first thing to leap to mind when one thinks of key problems with American criminal law. But the existence now of over 4,450 federal criminal offenses[19] is itself a problem that implicates the foundations of the criminal law. The number of federal offenses is too great for Americans to be familiar with all of the conduct that is criminal, and many of the offenses themselves are deeply flawed, omitting essential substantive elements necessary to protect the innocent. As a result of these flaws, the federal criminal code fails to serve what may be its most important function, which is not to expose and punish the relatively few persons who consciously choose to engage in criminal conduct, but to inform citizens of the law's requirements, thereby equipping them to avoid the conduct deemed worthy of society's most severe penalty and moral censure.[20]

---

[15] *Id.*

[16] DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, Oct. 2006 (rev'd Jan. 2007).

[17] *Id* at 2.

[18] *Id*

[19] John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 1.

[20] Although some treat enforcement of the law as if it were the only means of reducing crime, this ignores the role of moral censure and individual conscience and assumes that most Americans would violate the

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00180 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.149

The explosion of the federal criminal law – both in the number of offenses and their overall scope – demands that legal reformers revisit basic assumptions about what criminal law is and how best to rein in its actual and potential abuses. Over the last 40 to 50 years, government at all levels has succeeded in convincing Americans that the criminal law is whatever legislators define it to be. Ill-conceived new criminal offenses occasionally raise an eyebrow or two, but Americans generally accept their legitimacy. The result is that Americans have come to rely, consciously or not, on the good graces of prosecutors and the laws of probability to shield them from prosecution. When lightning does strike and an otherwise law-abiding citizen is charged and convicted for conduct that is not traditionally criminal or necessarily even wrongful, most Americans convince themselves that the accused must have done *something* to warrant the prosecutor's attention. Yet while Americans remain incredulous that improper criminal laws could be used to convict someone who had no intention of doing anything wrongful, the reality is otherwise.

"An unjust law is a code that is out of harmony with the moral law," wrote Martin Luther King, Jr., who had no little experience with unjust law.[21] Many federal criminal offenses fall far short of this standard because they do not require an inherently wrongful act, or even an act that is extraordinarily dangerous. In the days when average citizens were illiterate, they could still know and abide by the criminal law. At that point, most criminal offenses addressed conduct that was inherently wrongful – *malum in se* – such as murder, rape, and robbery. That is no longer the case. Many of today's federal offenses criminalize conduct that is wrong only because it is prohibited – *malum prohibitum.*

Worse, many of these prohibitions are actually contrary to reason and experience, giving average Americans little notice of the content of the law. For example, few would imagine that it is a federal crime for a person to violate the terms of service of an online social networking site by registering with a fake name, as a recent federal indictment in Los Angeles alleged.[22] Indeed, many Americans might instead expect such conduct to be protected, for it promotes the user's privacy and anonymity and, by extension, the personal safety of minors and other vulnerable users. Another example: Unauthorized use of the 4-H organization's logo is a federal crime.[23] There are undoubtedly reasons that these laws are on the books, but they are not reasons that average law-abiding Americans would be likely to anticipate when trying to conform their conduct to the law's requirements.

---

law without compunction if they could get away with it. But others argue persuasively that conscience, upon being conditioned by appropriate moral education, reduces more crime than is deterred by punishment. *See, e.g.*, JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME & HUMAN NATURE 494-95 (1985).

[21] Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 293 (James Melvin Washington ed., 1986).

[22] *See* United States v. Lori Drew, Case No. CR-08-0582-GW (C.D. Cal. May 15, 2008) (indictment), *available at* http://online.wsj.com/public/resources/documents/Drew.pdf.

[23] *See* 18 U.S.C. § 707.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00181 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.150

Exacerbating the criminalization of an ever-increasing array of behavior that is not inherently wrongful is the crumbling of traditional protections in the law for Americans who act without wrongful intent. Historically, a criminal conviction required that a person:

1. committed an inherently wrongful act that constituted a serious threat to public order, and

2. acted with a guilty mind or criminal intent (that is, *mens rea*).

These two substantive components were essential for conviction in almost all criminal cases from the time of the American founding through the first decades of the 20th century.

But over the past few decades in particular, Congress has routinely enacted criminal laws that lack *mens rea* requirements or that include *mens rea* requirements that are so watered down as to provide little or no protection to the innocent.[24] As a result, honest men and women increasingly find themselves facing criminal convictions and prison time. This happens even when their "crimes" are inadvertent violations that occur in the course of otherwise lawful, and even beneficial, conduct.

Despite increasing attention to this problem in recent years, the trend is for fewer and weaker *mens rea* requirements. In a recent study, Professor John Baker found that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement whatsoever.[25] The Heritage Foundation and the National Association of Criminal Defense Lawyers will soon publish the results of their joint research into the *mens rea* provisions in bills introduced in the 109th Congress.[26] Preliminary findings reveal that the majority of those offenses lack a *mens rea* requirement sufficient to protect from federal conviction anyone who engaged in the prohibited conduct but who did so without the intent to do anything wrongful.[27]

Many lawyers today accept uncritically the idea that any act made criminal by a legislature is, by that fact alone, a proper *actus reus*. But to accept that definition is to obliterate the deeper, more fundamental meaning of *actus reus* as a bad act (not merely something to be disincentivized), for it would be a mere synonym for "act that has been made criminal." The problem may be best illustrated using some of the "criminal" laws made and enforced by totalitarian regimes. For example, under some communist regimes it was deemed a "criminal" act for relatives of politically or religiously persecuted persons to discuss their relative's persecution, even in private and even with other family members. In some regimes, any type of unauthorized communication with a foreigner was deemed a "crime." Regardless of any elaborate (or convoluted) logic and rhetoric

[24] *See* John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," The Heritage Foundation Legal Memorandum No. 26, June 16, 2008, at 7.
[25] *Id.*
[26] The research is limited to non-violent criminal offenses that do not involve drugs or firearms.
[27] The Heritage Foundation & National Association of Criminal Defense Lawyers, Report on Overcriminalization in the 109th Congress (forthcoming).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00182 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.151

that may be used to justify the prohibited conduct, it is evident that there is no proper *actus reus* in these so-called crimes.

Similarly, but to a lesser extreme, when Congress makes it a federal crime to violate any foreign nation's laws or regulations governing fish and wildlife – as it has done in the Lacey Act[28] – many violations will end up being deemed "crimes" despite including no genuinely bad act. Some foreign fish and wildlife regulations may be nothing more than protectionist measures designed to favor the foreign nation's local business interests. For example, the fishing regulations of a Central American nation might require fishermen to package their catch in cardboard, perhaps only in order to provide a stimulus to business for a domestic cardboard manufacturer. If a fisherman then packs his catch taken in that nation's waters in plastic rather than cardboard and imports it into the United States – in violation of the express language of no federal or state law of the United States other than the Lacey Act – is there a proper *actus reus*?[29] Answering 'yes' leads to the absurd conclusion that Congress could, with a single sentence in a single legislative act, make it a crime to violate any and every law of every nation on earth – and that every such offense thereby includes a genuinely bad act. Such may be positive law, but they are not "crimes" in the truest sense of the word; they are merely legislatively enacted offenses that are unworthy of any free nation's criminal law.

The size of the federal criminal law compounds these problems and undermines other protections. The principle of legality, for example, holds that "conduct is not criminal unless forbidden by law [that] gives advance warning that such conduct is criminal."[30] The sheer number and disorganization of federal criminal statutes ensures that no one could ever know all of the conduct that constitutes federal crimes. Those who have tried merely to count all federal offenses – including both Professor Baker and the Department of Justice itself – have been able to provide only rough estimates. The task proves impossible because offenses are scattered throughout the tens of thousands of pages of the United States Code (not to mention the nearly 150,000 pages of the Code of Federal Regulations).[31] If criminal-law experts and the Justice Department itself cannot even count them, the average American has no chance of knowing what she must do to avoid violating federal criminal law.

Threat to Liberty

---

[28] 16 U.S.C. § 3371 *et seq.*

[29] This is no academic question. Although the reasons behind the Honduran regulation requiring cardboard packaging are unclear, U.S. federal prosecutors charged Honduran lobster fisherman David McNab and three Americans with whom he did business with alleged violations of the Lacey Act based in significant part on McNab's having packed his catch in clear plastic. McNab and two of his three fellow business associates are finishing eight-year federal prison terms despite the fact that the Honduran government certified to the U.S. Department of Justice, and also informed the federal court of appeals in an amicus brief, that the regulations in question were not in force at the time of McNab's alleged violations. *See, e.g.*, United States v. McNab, 331 F.3d 1228 (11th Cir. 2003); Tony Mauro, *Lawyers See Red over Lobster Case*, LEGAL TIMES, Feb. 18, 2004, *available at* http://www.law.com/jsp/article.jsp?id=1076428337070.

[30] WAYNE R. LAFAVE, CRIMINAL LAW 11 (4th ed. 2003).

[31] Clyde Wayne Crews, COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2007 13 (2007), *available at* http://cei.org/pdf/6018.pdf.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00183 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.152

Perhaps the central question that the Framers of the Constitution and the Bill of Rights debated, and to which they gave painstaking consideration, was how best to protect individuals from the unfettered power of government. They were well-acquainted with abuses of the criminal law and criminal process and so endeavored to place in our founding documents significant safeguards against unjust criminal prosecution, conviction, and punishment. In fact, they understood so well the nature of criminal law and the natural tendency of government to abuse it, that two centuries later, the most important procedural protections against unjust criminal punishment are derived directly or indirectly from the Constitution itself, specifically the Fourth, Fifth, Sixth, and Eighth Amendments.

But despite these protections, the wholesale expansion of federal criminal law – both as to the number of offenses and the subject matter they cover – is a major threat to Americans' civil liberties. Each time Congress crafts a criminal law covering a new subject matter, it effectively expands the power of the federal government. And the types of crimes that Congress now often creates – lacking a proper *actus reus* or a meaningful *mens rea* requirement – can effectively circumvent the Bill of Rights' procedural protections: It is little or no help to have the right to legal representation, indictment by a grand jury, or trial by a jury of your peers if the conduct you are charged with is not truly wrongful according to any reasonable definition of that word and it matters not that you acted with no intention of doing anything unlawful or otherwise wrongful.

Of similar concern, criminal offenses that exceed the limits of Congress's limited, enumerated power are breaches of one of the primary structural limitations that constitutional federalism imposes on the federal government. After countenancing for decades Congress's almost unlimited criminalization of conduct that is inherently local in nature (as long as, that is, the Constitution's Commerce Clause was invoked to justify the assertion of congressional authority) the Supreme Court rediscovered constitutional limits in *United States v. Lopez*[32] and *United States v. Morrison*.[33] In both of these cases, the Court explained that such limits on federal commerce power are consistent with and flow from the fact that Congress is a body of limited, enumerated powers.[34]

The federal offense of carjacking is a prototypical example of Congress's over-reaching assertions of federal criminal jurisdiction. The federal carjacking offense is currently defined as taking a motor vehicle "from the person or presence of another by force and violence or by intimidation."[35] The federal jurisdictional "hook" for this

[32] 514 U.S. 549 (1995).
[33] 529 U.S. 598 (2000).
[34] Some commentators have called into question the viability of *Lopez* and *Morrison* after the Supreme Court held in *Gonzales v. Raich* that the federal Controlled Substances Act (CSA) preempted California's so-called medical marijuana law. 545 U.S. 1, 32-33 (2005). But the *Raich* majority expressly distinguished its two earlier precedents, repeatedly emphasizing that the statutory scheme at issue in *Raich* (which includes the CSA as well as the Comprehensive Drug Abuse Prevention and Control Act, of which the CSA is a part) is highly comprehensive and regulates actual commerce, specifically commerce in controlled substances. *See id.* at 13, 23-28.
[35] 18 U.S.C § 2119.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00184 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.153

carjacking offense is that the vehicle must have been "transported, shipped, or received in interstate or foreign commerce," but how many vehicles have not? Actual commissions of carjackings take place almost uniformly within a single locale of a single state,[36] yet federal criminal law now purports to authorize federal prosecutors to be the ones to charge and prosecute local carjackings.

Such breaches of constitutional federalism are not mere breaches of technical and theoretical niceties, for the power to criminalize is the power to coerce and control. James Madison rightly characterized constitutional federalism as a "double security . . . on the rights of the people,"[37] and it is akin to the purpose of limited government itself: to guard against accumulation of power by a single sovereign – that is, the federal government. In sum, without constitutional boundaries on Congress's power to criminalize, there would be no limits on the power of the federal government to coerce and control Americans.

With these considerations firmly in mind, and in order to ensure that the commission can function as a principled, non-partisan body, the Act should be amended to expand the scope of the inquiry to include the problems of overcriminalization. Otherwise, the commission will be focusing on a select class of offenders and overlooking the dire threats the criminal justice system poses to Americans who never intended to engage in conduct that is unlawful or otherwise wrongful. This sort of constituent-based approach will politicize the commission and make it unnecessarily controversial, thus undermining its effectiveness. A principled, non-partisan approach presents the best opportunity for the commission to undertake a thorough and comprehensive review of the criminal justice in America and the federal criminal justice system in particular.

Conclusion

Thank you again, Mr. Chairman, Ranking Member Graham, and Members of the Committee for this opportunity to address the National Criminal Justice Commission Act of 2009 (S. 714). I look forward to providing additional information and answering any questions you may have.

---

[36] The wanton, fatal 1992 carjacking Congress used as justification for asserting federal criminal jurisdiction over almost all carjackings took place wholly within suburban Maryland. *See* Graciela Sevilla, *Basu's Slayer Sentenced to Life Without Parole*, WASHINGTON POST, Aug. 19, 1993, at B1.

[37] THE FEDERALIST No. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00185 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.154

****

The Heritage Foundation is a public policy, research, and educational organization operating under Section 501(C)(3). It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2008, it had nearly 400,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2008 income came from the following sources:

Individuals	67%
Foundations	27%
Corporations	5%

The top five corporate givers provided The Heritage Foundation with 1.8% of its 2008 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey & Pullen. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

VerDate Nov 24 2008 10:04 May 18, 2010 Jkt 056273 PO 00000 Frm 00186 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\56273.TXT SJUD1 PsN: CMORC

56273.155

http://judiciary.authoring.senate.gov/hearings/testimony.cfm

United States Senate
Committee on the Judiciary

< Return To Hearing

Statement of

The Honorable Jim Webb

United States Senator
Virginia
June 11, 2009

Remarks of Senator Jim Webb
Subcommittee on Crime and Drugs U.S. Senate Committee on the Judiciary Hearing on the National Criminal Justice Commission Act of 2009 June 11, 2009

I would like to thank you, Chairman Specter, and Ranking Member Graham for the opportunity to speak today and for cosponsoring the National Criminal Justice Commission Act of 2009. I know full well your own work in this area over many, many years and appreciate your support in this endeavor. I look forward to continuing to work with both the Subcommittee on Crime and Drugs and the Judiciary Committee to move this bill forward.

We find ourselves as a nation in the midst of a profound, deeply corrosive crisis that we have largely been ignoring at our peril.
The national disgrace of our present criminal justice system does not present us with the horrifying immediacy of the 9/11 attacks on the Twin Towers and the Pentagon, which in the end rallied our nation to combat international terrorism. It is not as visibly threatening as the recent crash in our economy.

But the disintegration of this system, day by day and year by year, and the movement toward mass incarceration, with very little attention being paid to clear standards of prison administration or meaningful avenues of re-entry for those who have served their time, is dramatically affecting millions of lives, draining billions of dollars from our economy, destroying notions of neighborhood and family in hundreds of communities across the country, and

- most importantly - it is not making our country a safer or a fairer place.

It is in the interest of every American, in every community across this land, that we thoroughly re-examine our entire criminal justice system in a way that allows us to interconnect all of its different aspects when it comes to finding proper approaches and solutions to each different component part. I am convinced that the most appropriate way to conduct this examination is through a Presidential level commission, tasked to bring forth specific findings and recommendations for the Congress to consider and, where appropriate, enact.

The National Criminal Justice Commission Act of 2009 is a product of thought, research, and reflection as an attorney, a writer, including time as a journalist twenty-five years ago, when I examined the Japanese prison system for a cover story in Parade Magazine, and as a government official.

Here in the Senate I am grateful that Senator Schumer and the Joint Economic Committee allowed us the venue of that committee to conduct hearings on the impact of mass incarceration and drugs policy. I also appreciate working with George Mason University to put together a symposium bringing people in from across the country to talk about drug policy, and collaborating with other institutions working on these issues, such as the Brookings Institution.

Once we started examining this issue over the last year people from all across the country reached out to us -- people from every political and philosophical perspective that comes into play and from all walks of life.

56273.156

Since I introduced the National Criminal Justice Commission Act of 2009 two months ago, we have seen an even greater outpouring of interest in and support for the bill. My office has engaged with more than 100 organizations, representing prosecutors, judges, defense lawyers, former offenders, advocacy groups, think tanks, victims rights organizations, academics, prisoners, and law enforcement. In the Senate, twenty-eight of my colleagues have joined me on this bill.

The goal of this legislation is to establish a national commission to examine and reshape America's entire criminal justice system, the first such effort in more than forty years.
The duties of the Commission would include making policy recommendations designed to:
• re-focus incarceration policies on criminal activities that threaten public safety;
• lower the incarceration rate, prioritizing public safety, crime reduction, and fairness;
• decrease prison violence;
• improve prison administration;
• establish meaningful re-entry programs for former offenders;
• reform drug laws;
• improve treatment of the mentally ill;
• improve responses to international & domestic criminal activity by gangs & cartels;
• and reform any other aspect of the criminal justice system the Commission determines necessary.

The Commission will be a blue-ribbon, bi-partisan panel of experts appointed by the President, the Majority and Minority Leaders in the Senate, the Speaker and Minority Leader in the House, and the Democratic and Republican Governors Associations.
The scope of the problem is vast: we have 5% of the world's population but 25% of the world's known prison population. 7.3 million Americans are incarcerated, on probation or on parole. 2.38 million Americans are in prison

– five times the world's average incarceration rate. From early in the last century until the 1980s, the number of people in prison hovered below 500,000. In the 1980s it began to skyrocket.
The elephant in the room in many discussions on the criminal justice system is the sharp increase in drug incarceration over the past three decades. Incarcerated drug offenders have soared 1200% since 1980, up from 41,000 to 500,000 by 2008. A significant percentage of persons incarcerated for drug offenses have no history of violence or high-level drug activity.

Four times as many mentally ill people are in prisons than in mental health hospitals, roughly 350,000 compared to 80,000.
African Americans are far more likely to be incarcerated for drug offenses than other groups. African Americans are 12% of the U.S. population, 14% of monthly drug users, yet are 37% of those arrested on drug charges, 59% of those convicted on drug charges, 74% of drug offenders sentenced to prison.

Corrections officers and offenders face dire conditions in many overcrowded and violent prisons. The prison system offers limited opportunities for career progression, inadequate training, potentially violent working conditions, high administrator turnover, and low accountability. In 2007, 60,500 prison inmates reported sexual victimization.

There are an estimated 1 million gang members in the United States, many of them foreign-based. Every American neighborhood is vulnerable. Gangs commit 80% of the crime in some locations. Mexican cartels, which are military-capable, have operations in 230+ U.S. cities. U.S. gangs are involved in cross-border criminal activity, working in partnership with these cartels.

We need to take a comprehensive look at our criminal justice system, including all of these issues. As a nation, we can spend our money more effectively, reduce crime and violence, reduce the prison population, and create a fairer system. It is time to take stock of what is broken and what works and modify our criminal justice policies accordingly.

Once again, I appreciate the opportunity afforded by the Chairman and Ranking Member to speak today. I would also like to thank the distinguished witnesses who have kindly agreed to give their remarks.