

Reducing Prison Populations: One of Many Needed Criminal Justice Reforms

Focusing the Presidential Debates

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Nature of the Problem:

Fundamentally, prisons in the United States are significantly overcrowded. Addressing this issue is one of a number of needed criminal justice reforms. With less than 5% of the world's population, the United States, at federal and state levels, has presently incarcerated about 25% of the persons imprisoned world-wide. One widely cited study (see below) has concluded that this comparatively high level of incarceration does not have any substantial positive effect on the crime rate. Further the expense of maintaining correctional facilities and related criminal justice agencies in the United States amounts to approximately \$260 billion annually. The average cost per year to incarcerate a federal prisoner is \$26,359 and consumes one-third of the budget of the Department of Justice; funds needed on an annual basis to maintain a prisoner in a state prison are between two to three times the amounts allocated in such state for each elementary school student. Many other criminal justice issues abound: e.g., dealing with conviction of innocent individuals and over criminalization.² Meaningful efforts to reduce prison populations may best be initiated now by the creation of a high-level commission as discussed below.

Establish by Executive Order, a Presidentially-appointed and well-funded bipartisan commission with a mandate to take all appropriate action to:

- Establish priorities for the commutation and other reductions of imposed sentences for federal offenses and to streamline the process for executing such determinations on a fast track basis;
- Recommend to the United States Sentencing Commission that it accelerate further efforts to adopt lower minimum sentencing guidelines for non-violent offenses;
- Encourage prompt enactment by Congress of legislation reducing statutory mandatory minimum sentences for narcotics offenses and other non-violent crimes;
- Study and take into account how European nations have managed prison terms, resulting in significantly smaller prison populations; and, following European models, develop proposals to significantly reduce sentencing (except in the most serious of cases) for narcotics and other non-violent crimes, and to utilize alternative non-custodial sanctions;

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² This paper is focused on addressing prison overpopulation. Reducing convictions of innocent persons can be addressed by improving public defender programs, lessening erroneous eye witness testimony, reducing prosecutorial misconduct, and judicial intervention when warranted. De-criminalization of activities not being viewed as posing a significant challenge to public health or safety is another area for needed reform.

- Recommend that federal criminal justice funding for states be restricted to only those states which achieve significant reductions in numbers of incarcerated persons and which remove onerous and unnecessary constraints on job hiring of former inmates;
- Recommend increased spending for training of inmates and treatment for drug abuse and mental impairments; and
- Include officials from state authorities in the deliberations of the Commission with a view to encouraging similar action on the part of state governments.

Background:

Current Impetus and Bipartisan Support. As widely reported,³ in the wake of announcing commutations of sentences for 46 drug offenders, the President expressed his intention to take steps this year to revamp the criminal justice system, including sentencing guidelines and to call on Congress to act. In the October 7, 2015 edition of *The Washington Post*, it was reported that the Justice Department is preparing to release some 6,000 inmates from federal custody beginning at the end of the month. This action is attributed to reduction in minimum sentencing guidelines for many non-violent crimes which can be applied retroactively. A prisoner who is affected can apply to a federal judge to reassess and reduce his or her sentence.⁴

As reported in *The New York Times*⁵, the Justice Department set criteria last year for incarcerated persons who might qualify for commutation: generally, non-violent inmates who have served more than 10 years and would not have received as lengthy a sentence under current sentencing rules.⁶ The *Times* article also points out that overhauling the criminal justice system has become a bipartisan venture as candidates seeking a 2016 Presidential nomination have focused on the issue and lawmakers from both parties are collaborating on legislation.

Bills (S.502 and H.R. 920) seeking enactment of “The Smarter Sentencing Act of 2015” have been introduced and reported to committee in both Houses. Similar bills were introduced in the prior Congress. According to Families against Mandatory Minimums (“FAMM”), the proposed legislation would reduce certain 20-year, 10-year, and 5-year mandatory minimum drug sentences to 10, 5 and 2 years respectively. The bills would permit some 8,800 federal prisoners who are imprisoned for crack cocaine crimes to seek fairer sentencing in line with the Fair Sentencing Act which reduced, prospectively, the disparity between crack and powder cocaine offenses. The Department of Justice estimates that such enactment will lead to saving \$24 billion over 20 years, and remove the need for construction of more than a dozen prisons and the hiring of thousands of new correctional officers.⁷ As reported by MSNBC, the Smarter Sentencing Act bills have not proceeded due to lack of sufficient committee support. However, a new bill, titled “The Sentencing Reform and Corrections Act of 2015,” was announced by and

³ E.g., “Obama Issues Reductions of Sentences in Drug Cases,” *The New York Times*, A1 (July 14, 2015).

⁴ Sari Horwitz, “6,000 to leave prison early,” *The Washington Post*, p. A1 (Oct. 7, 2015). See also Michael s. Schmidt, “US to Begin Freeing 6,000 from Prison,” *The New York Times*, p. A1 (Oct. 7, 2015). 18 USC Sec. 3582(c) provides statutory authority for action by federal judges to reduce sentences if certain conditions are met.

⁵ *Ibid.*

⁶ Other conditions also apply, see New Clemency Initiative, www.justice.gov/pardon (discussed *infra*).

⁷ www.famm.org/s-502-the-smarter-sentencing-act.

with the support of the Senate Committee on the Judiciary on October 1, 2015 which encompasses the essential elements of the Smarter Sentencing Act and other measures.⁸ A similar House bill is to be introduced on October 8, 2015 by the House Judiciary Committee Chairman and Ranking Member on October 8, 2015.⁹

A study by the Brennan Center for Justice at New York University School of Law (the “Brennan Center”) states that dealing with mass incarceration is now “one of the few issues on which the left and right are coming to agree, [and] notably, Republicans are leading the charge.”¹⁰ As reported in *The Washington Post* in August 2015, Charles Koch, the conservative billionaire, has become an advocate of sentencing reform.¹¹

In Congressional testimony in July 2015,¹² John Malcolm, a senior official with the Heritage Foundation, notes that Congress is considering a number of reform proposals such as reducing federal mandatory minimum laws, which Malcolm observed ultimately swept more broadly than Congress originally intended. Malcolm also addresses a concern that reducing mandatory minimum laws will reduce incentives of low-level drug dealers to cooperate in an effort to indict and convict organizers of such activity. He contends that even if mandatory minimum laws were revised “there would still be plenty of incentives for defendants to cooperate against ‘bigger fish.’” To bolster his contention, Malcolm notes that over 30 states have rolled back mandatory sentences, and he points to a recent report by The Pew Charitable Trusts, that over the period 2008-10, ten states that cut their imprisonment rates experienced greater drops in crime than ten states that increased such rates.¹³

Statistics. As mentioned above, a widely cited statistic found in studies regarding incarceration is that with less than 5% of the world’s population, the United States, at federal and state levels, has presently incarcerated about 25% of the persons imprisoned world-wide.¹⁴ As pointed out in the Economist Article, the Brennan Study concludes that this comparatively high level of incarceration does not have any substantial positive effect on the crime rate.¹⁵ As of October 1, 2015, 205,795 persons are in federal or related custody.¹⁶ As of December 31, 2014,

⁸ Senators Announce Bipartisan Sentencing Reform and Corrections Act, www.judiciary.senate.gov/ (Oct. 1, 2015); www.msnbc.com/msnbc/bipartisan-breakthrough-criminal-justice-reform.

⁹ www.judiciary.house.gov/index.

¹⁰ Imimai Chettiar *et al* (editors) “Solutions: American Leaders Speak Out on Criminal Justice,” 124 (April 27, 2015) (the “Brennan Study”). See also generally, Eli Lehrer, “Responsible Prison Reform,” *National Affairs* (Summer 2013)

¹¹ “Unlikely Allies,” *The Washington Post*, A1 (Aug. 16, 2015)

¹² John G. Malcolm, Testimony, House Committee on Oversight and Government Reform (July 24, 2015) (“Malcolm Testimony”) (Mr. Malcolm is a Heritage Foundation Director and Senior Legal Fellow and former Justice Department Deputy Assistant Attorney General). See also, Natalie Johnson, “‘A Matter of Life or Death’: Senators, Obama Unite on Push for Criminal Justice Reform,” Natalie Johnson, dailysignal.com (Jul. 14, 2015) (report on criminal justice reform bills being finalized by the Senate Judiciary Committee).

¹³ *Ibid.*

¹⁴ *The Economist* 11 (Jun. 20, 2015) (“Economist Article”).

¹⁵ *Ibid.*

¹⁶ www.bop.gov/about/statistics

in the United States 1,561,500 persons are incarcerated in state and federal systems.¹⁷ The US incarceration rate has helped drive down crime, though there is a debate as to how much.¹⁸

Costs and Effect on Educational Funding. A July 28, 2015 Brennan Center piece, points out, as mentioned above, that the cost of maintaining correctional facilities and related criminal justice agencies in the United States amounts to approximately \$260 billion annually.¹⁹ Funds needed on an annual basis to maintain a prisoner in a state prison are between two to three times the amount allocated in such state for each elementary school student; e.g. in New York: \$18,000 per student vs. \$58,000 per inmate.²⁰ The Malcolm Testimony notes that the cost per year to incarcerate a federal prisoner is \$30,620.²¹ On September 30, 2015, Education Secretary Arne Duncan asked states and cities to dramatically reduce incarceration terms for nonviolent crimes and to use the estimated \$15 billion in savings to substantially raise teacher pay in high poverty schools.²²

Another commentator on this issue, Steven Hawkins, points out that “more money must go to schools than to prisons before high-crime neighborhoods can truly be reformed.” He points out that while states continue to spend more on education than incarceration, the percentage of funds used for the latter is increasing meaning that funds for the former is decreasing. Mr. Hawkins cites the example of Los Angeles where over \$1 billion is spent annually to incarcerate people from communities with high crime rates, but the Los Angeles Unified School budget was projecting a deficit of \$640 million for 2010-11.²³

Besides funding federal prison operations and construction, the US Government subsidizes state and local criminal justice costs in the amount of approximately \$3.8 billion annually. The Brennan Study recommends that such spending should be provided only to such states that reduce crime and prison populations.²⁴

Violent Offenders. The Obama Administration has as a goal the reduction of prisoner incarceration, and recently, the President, in a well-publicized event, commuted the sentences of 46 federal prisoners convicted of drug offenses.²⁵ However, Fordham Law Professor John Pfaff maintains that the President is wrong in his approach to focus on dealing only with the incarceration of persons convicted for non-violent acts.²⁶

¹⁷ www.bjs.gov/index

¹⁸ *The New York Times*, Apr. 23, 2008. Relatedly, since the mid-1970s, prison populations have increased sevenfold while the general population has increased by only 50%. Stephanos Bibas, “Prisoners without Prisons,” *National Review* 27 (Sept. 21, 2015).

¹⁹ Inimai Chettiar, “Mr. President, Lead on Prisons: Obama Can Force More Criminal Justice Reform,” www.brennancenter.org, (Jul. 28, 2015).

²⁰ www.money.cnn.com. Virginia Governor McAuliffe has established the Commission on Parole Review to evaluate the Virginia Corrections System, which costs \$1.1 billion per year to operate. See Terry McAuliffe, “A Closer Look at Virginia’s Prisons and Parole,” *The Washington Post* C4 (Aug. 30, 2015).

²¹ John G. Malcolm, , Testimony, House Committee on Oversight and Government Reform (July 24, 2015)

²² “Education secretary: Reduce incarceration,” *The Washington Post*, A# (Oct. 1, 2015)

²³ Steven Hawkins, “Education vs. Incarceration,” prospect.org (Dec. 6, 2010).

²⁴ Inimai Chettiar et al (editors) “Solutions: American Leaders Speak Out on Criminal Justice,” 128 (April 27, 2015).

²⁵ *The New York Times*, “Obama Issues Reductions of Sentences in Drug Cases,” p. A11, July 14, 2015.

²⁶ John Pfaff, “The wrong path to penal reform,” *The Washington Post* A15 (Jul. 27, 2015); see also Susan Grigsby, “Why Dropping Federal Mandatory Minimum Sentences Will Not Solve all of our Prison Problems,”

Professor Pfaff points out that while nearly half of all federal inmates were convicted for drug offenses, only about 14% of all persons incarcerated in the United States are in the federal corrections system. Professor Pfaff notes that more than half of state prisoners are serving time for violent offenses, and since 1990, 60% of the growth in state prison populations has come from incarcerating violent offenders. So Professor Pfaff points out the realism, and also a “political third rail,” that governments will need to reduce the prison terms that violent offenders face if the “breathtaking prison population” is to be reduced. Professor Pfaff urges that the President needs to explain that “extremely long sentences, even for violent offenders, are generally counter-productive by pointing to studies that show that such punishments do not really deter crime and that offenders pose less risk of recidivism as they enter their 30s and 40s.”²⁷ University of Pennsylvania law professor Stephanos Bibas agrees with this analysis, stating that President Obama’s narrative “does not fit the facts,” as “prison growth has been driven mainly by violent and property crimes, not drugs.”²⁸ Professor Bibas is referring to state incarcerations which make up 88% of the total prison population in the United States.²⁹

III-effects of Long Term Sentences. Professor Bibas argues that more thought needs to be given about ways to hold wrongdoers accountable while minimizing the damage done to families. Crime needs to be punished and condemned “unequivocally,” but to do so in ways which reinforce rather than undercut family values. He makes an interesting analogy to punishment for crime committed in colonial America, when few guilty person faced long term separation but were subjected to brief (although sometimes brutal) punishment.³⁰ The Economist Article notes the ineffectiveness of detaining persons with fifty year sentences which does not deter crime five times as much as a ten year sentence, though it costs more than five times as much.³¹ Of course certain very long sentences are justified in circumstances where a death sentence or life imprisonment without possibility of parole might have been appropriate, such as conviction of a person in a position of trust who has engaged in espionage which has gravely injured US national security or cost the lives of US persons.

United States Sentencing Commission (“USSC”). Most federal criminal laws, not including narcotics offenses, carry only maximum sentences.³² The USSC since 1984 has promulgated sentencing guidelines which include minimum periods of incarceration and are to be used by the federal judiciary in imposing sentences. The guidelines and amendments thereto,

www.dailykos.com/story2015/08/16 (Aug. 16, 2015)(The majority of state prisoners are incarcerated for violent crime convictions).

²⁷ *Ibid.* Professor Pfaff also blames the over-population on more aggressive prosecutors in bringing increasing numbers of felony chargers. See also, David Brooks, “The Prison Problem,” *The New York Times* Sect A p.27 (Sept. 29, 2015)(Pfaff is “wonderfully objective, nonideological and data-driven.”)

²⁸ Stephanos Bibas, “Prisoners without Prisons,” *National Review* 27 (Issue dated Sept. 21, 2015).

²⁹ Email exchange with Professor Bibas (Sept. 16,2015).

³⁰ Stephanos Bibas, “Prisoners without Prisons,” *National Review* 27 (Issue dated Sept. 21, 2015). The harmful effect of long term incarceration on families was a major subject of the September 27, 2015 HBO production, VICE Special Report: Fixing the System.

³¹ *The Economist* 11 (June 20, 2015) (“Economist Article”).

³² In addition to narcotics offenses, federal law provides mandatory minimum sentences for certain firearms, immigration, identity theft, sexual activity involving children, explosives, aircraft hijacking, murder, kidnapping, bank robbery, white collar, piracy and miscellaneous offenses. See, “Federal Mandatory Minimums,” *Families against Mandatory Minimums*, www.famm.or (Aug. 6, 2012).

as adopted by the USSC, take effect unless Congress objects. A number of current proposals are to take effect in November 2015. The USSC Chair testified in 2014 before a House committee task force regarding USSC priorities which include the reduction of federal mandatory minimum penalties, particularly relating to narcotics offenses.³³ The USSC has identified as a priority reducing the cost of federal incarceration which now exceeds well over \$6 billion per year. As indicated in the testimony, the USSC unanimously recommended that Congress (1) reduce the statutory mandatory minimum penalties for drug trafficking; (2) make the Fair Sentencing Act of 2010 retroactive regarding disparity in penal treatment of crack and powdered cocaine; and (3) allow sentences below mandatory minimum penalties for additional non-violent drug offenses.³⁴

Commutation. As mentioned above, this summer the President commuted sentences of 46 drug offenders.³⁵ Similar action could be taken with respect to a significant additional number of non-violent offenses such as the approximate 5000 federal inmates currently serving long sentence related to crack cocaine. The Brennan Center reports that currently there are approximately 100,000 inmates in federal prisons for low-level drug crimes.³⁶ Last year the Department of Justice established a new clemency initiative intended to prioritize clemency applications for inmates meeting six criteria.³⁷ Further action should be taken to commute federal the sentences of offenders whose convictions related to crack cocaine to the minimum sentence for powdered cocaine offenses and, as appropriate, persons convicted of other non-violent crimes who demonstrate a habitual non-violent nature.

Also Families against Mandatory Sentencing (“FAMM”), as set forth on its website, led an effort to have the sentencing guidelines for crack cocaine violations applied retroactively in 2007 making 20,000 prisoners eligible for sentence reductions. In 2014, FAMM worked to have the USSC reduce the guidelines for terms of drug sentences. As a result more than 40,000 inmates serving time for drug offenses are eligible to have their sentences recalculated and released early.³⁸ FAMM has been in the forefront of seeking to have Congress take action on reducing mandatory minimum sentences.

The Pardon Attorney. The Office of the Pardon Attorney within the Department of Justice³⁹ reviews requests for pardons and commutations of federal convictions and makes recommendations for action by the President pursuant to his Constitutional clemency power.⁴⁰ During the Obama Administration some 17,761 requests for clemency have been received. 89

³³ Patti Saris, Testimony, House Judiciary Committee Task Force on Over-Criminalization (Jul. 11, 2014) (USSC Chair).

³⁴ *Ibid.*

³⁵ E.g., “Obama Issues Reductions of Sentences in Drug Cases,” *The New York Times*, A1 (July 14, 2015).

³⁶ Imimai Chettiar et al (editors) “Solutions: American Leaders Speak Out on Criminal Justice,” 124 et seq. (April 27, 2015). See also generally, Eli Lehrer, “Responsible Prison Reform,” *National Affairs* (Summer 2013)

³⁷ New Clemency Initiative, www.justice.gov/pardon (Apr. 23, 2014)(Initiative sets forth the following conditions an inmate must meet for clemency action: (1) serving a sentence which would likely have been substantially lower currently; (2) considered a non-violent low-level offender without ties to large scale criminal organizations or gangs; (3) served at least ten years; (4) no significant criminal history; (5) demonstrated good conduct in prison; and (6) no history of violence).

³⁸ famm.org/about/board-and-staff/julie-stewart.

³⁹ www.justice.gov/pardon.

⁴⁰ The President “shall have Power to grant Reprieves and Pardons for Offenses against the United States,…” Constitution, Article II, Section 2, clause 1.

have been granted as of August 31, 2015 including the 46 announced by the President this past summer.⁴¹

Presidential Commission. In the Brennan Study, former Senator James Webb concluded:

Now is the time to revive the push for a national commission to address the overall issue of mass incarceration. A national commission is needed to conduct a top to bottom review of our nation's entire justice system.⁴²

As Senator Webb elaborates, he initiated such an effort with proposed legislation in 2009 which was not enacted. His article identifies many of the complex issues relating to mass incarceration and spells out how such a commission should be organized. Given the many entities which must be involved in a successful effort to effectively reduce the size of US prison populations, the creation of such a high-level and well-funded commission is an important step in bringing about solutions to the problem.

Bills to create such a commission have been introduced in Congress with little success. The President could create an effective commission by executive order without having to pursue a lengthy and possibly unsuccessful congressional route. Historically it is interesting to note that in 1967, President Lyndon Johnson, in responding to urban riots which had occurred across the nation, appointed the 11-member Kerner Commission which produced a widely-read report proposing a series of reforms to deal with conditions which led to the riots.⁴³

European Approaches and Adoption of Alternatives to Imprisonment for Routine Non-Serious Offenses. A 2013 opinion article in *The New York Times* points out that based on a "new" report, the Federal Republic of Germany ("FRG") and the Netherlands incarcerate persons at about one-tenth the rate of the United States and under conditions geared toward social reintegration.⁴⁴ The article notes that American and European systems differ in every imaginable way and points to the FRG belief that public safety is ensured not simply by imprisonment but by successfully reintegrating prisoners into society. Non-serious offenses carry penalties of fines, probation and community service, and where incarceration is imposed a very high percentage of sentences are 12 months or less. While the article does not identify the report, it may have been: "Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States."⁴⁵ This article points out that officials from Colorado, Georgia and Pennsylvania have begun to apply some European practices in their jurisdictions such as expanding prosecutorial discretion to divert offenders, including higher risk persons and those charged with more serious offenses; and using community-based sanctions rather than incarceration.

⁴¹ www.justice.gov/pardon.

⁴² Imimai Chettiar *et al* (editors) "Solutions: American Leaders Speak Out on Criminal Justice," 117 (April 27, 2015).

⁴³ Imimai M. Chettiar, "Why President Obama must act on mass incarceration," msnbc.com/Obama-mass-incarceration-commission (Apr. 24, 2014). President Gerald Ford established a Clemency Board for the sole purpose of recommending clemency for certain violators of US military service laws. Executive Order 11803 (Sept. 16, 1974)

⁴⁴ Editorial Board, "Lessons from European Prisons," *The New York Times* (Nov. 7, 2013).

⁴⁵ Ram Subramanian and Alison Shames, "Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States," Vera Institute of Justice (2013).

Relatedly one of the conclusions in the Brennan Study is that criminal laws should be changed to remove prison as an option for most low level non-serious offenses except in extraordinary circumstances. Another conclusion is to mandate effective treatment for persons with mental health and addiction issues (one-half of persons incarcerated in the United States suffer from such issues) which for non-serious crimes may serve as an alternative to incarceration.⁴⁶ The establishment of a “health court” is proposed for Montgomery County Maryland, which would channel into community-based programs some non-violent offenders charged with such offenses as trespassing, public urination or vandalism.⁴⁷ Also Fairfax County, Virginia is launching a program to reduce the number of mentally ill inmates by diverting nonviolent offenders into treatment in lieu of incarceration⁴⁸

Conclusion:

Regarding the topic of criminal justice reform, clearly much is being uttered by commentators and political leaders in the United States from which can be drawn at least one conclusion: the prison populations at federal and state levels are way too large resulting in diverting substantial government funds from other important programs and not serving any useful purpose with respect to a number of prisoners serving long terms for non-violent, and possibly some violent, crimes. Addressing this problem will take much more than rhetoric but White House prioritization and high level effort, such as the establishment of a Presidential Commission as discussed above, to further analyze the existing situation and take concrete action based on such analysis to reduce the populations through two basic approaches:

- (1) Releasing, by means of commutation, persons now incarcerated who are deemed not to constitute any reasonable threat to public safety, and
- (2) Reducing the number of persons sentenced to incarceration with long sentences for non-violent and possibly some violent acts.

Such actions to achieve these goals can be undertaken through executive, congressional and judicial initiatives.

⁴⁶ Imimai Chettiar et al (editors) “Solutions: American Leaders Speak Out on Criminal Justice,” 124 (Apr. 27, 2015). See also generally, Eli Lehrer, “Responsible Prison Reform,” National Affairs (Summer 2013)

⁴⁷ “Treatment, not jail time,” *The Washington Post*, (Jul. 26, 2015).

⁴⁸ Justin Jouvenal, “A push for aid instead of jail,” *The Washington Post*, C1 (Aug. 9, 2015).