

**Statement of Julie Stewart, President,  
Families Against Mandatory Minimums  
Submitted to the Subcommittee on Commerce, Justice, Science,  
and Related Agencies Appropriations  
March 21, 2013**

Chairman Wolf, Ranking Member Fattah, and members of the subcommittee, on behalf of the staff, board, and over 25,000 members of Families Against Mandatory Minimums (FAMM), I appreciate the opportunity to submit our views on funding for the Bureau of Prisons (BOP) and Department of Justice (DOJ).

Even before the sequester began, the BOP was under severe budget strain. A January 22, 2013, report from the Congressional Research Service (CRS) provides a useful summary of the extent and causes of the problems.<sup>1</sup> The number of inmates under the BOP's jurisdiction has increased from approximately 25,000 in FY1980 to nearly 219,000 in FY2012. The BOP is currently overcrowded, operating at 38% over its rated capacity; it has been operating at rates of over 25% above its rated capacity since 1998. Last week the Inspector General for the Department of Justice testified that the outlook "is bleak: the BOP projects system-wide crowding to exceed 45 percent over rated capacity through 2018."<sup>2</sup> Between FY2000 and FY2012, the per capita cost of incarceration for all inmates increased from \$21,603 to \$29,027. Over this same period, appropriations for the BOP increased from \$3.668 billion to \$6.641 billion.

Perhaps the most important number is 25. That is the percentage of DOJ's budget that BOP now consumes. In a letter sent to the U.S. Sentencing Commission last year, Assistant Attorney General Lanny Breuer, the head of DOJ's Criminal Division, argued that federal corrections spending is forcing reductions in federal assistance to states for police, prosecutors, and crime and recidivism prevention programs. He wrote:

In an era of governmental austerity, maximizing public safety can only be achieved by finding a proper balance of outlays that allows, on the one hand, for sufficient numbers of police, investigative agents, prosecutors, and judicial personnel to investigate, apprehend, prosecute, and adjudicate those who commit federal crimes. And, on the other hand, a sentencing policy that achieves public safety correctional goals and justice for victims, the community, and the offender.

Breuer called the current increases in the federal corrections budget "unsustainable" and wrote that current overcrowding in federal prisons "puts correctional officers and inmates alike at greater risk of harm and makes recidivism reduction far more difficult."

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<sup>1</sup> CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 8 (Jan. 22, 2013) [hereinafter CRS Report], *available at* <http://www.fas.org/sgp/crs/misc/R42937.pdf>.

<sup>2</sup> Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies, 9 (March 14, 2013) ("Horowitz Statement").

How did we get into such a mess? The CRS report lists four causes of federal prison population growth:

- 1) Increased numbers of federal offenses subject to mandatory minimum sentences;
- 2) The growth in mandatory minimums has led to increases in sentence ranges - and, therefore, sentence lengths - under the federal sentencing guidelines;
- 3) More crimes have been made into federal offenses; and
- 4) The elimination of parole.

FAMM has been calling for the elimination of mandatory minimum sentencing laws for more than 20 years. These laws do not permit the type of individualized consideration of facts that every American deserves. This one-size-fits-all approach to justice results in many offenders spending much more time in prison than is necessary to protect public safety. Overfull prisons drive the unsustainable growth in federal corrections costs. CRS distills the problem:

Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. . . . Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods. For example, the [U.S. Sentencing Commission or] USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more. While only offenders convicted for an offense carrying a mandatory minimum penalty are subject to those penalties, mandatory minimum penalties have, in effect, increased sentences for other offenders. The USSC has incorporated many mandatory minimum penalties into the sentencing guidelines, which means that penalties for other offense categories under the guidelines had to increase in order to keep a sense of proportionality.<sup>3</sup>

To cut unnecessary federal spending, Congress should repeal mandatory minimum sentencing laws and allow courts to craft appropriate sentences in every case. Alternatively, Congress could adopt a safety valve proposal similar to the one it passed in 1994 for drug offenses.<sup>4</sup> A safety valve would allow judges to depart below the mandatory minimum only when the unique facts of a case warrant it.

Another possible response to overcrowding put forward by CRS, which Congress should reject, is to build more federal prisons. The IG decried that solution, telling this subcommittee last week: “In an era where the Department’s overall budget is likely to remain flat or decline, it is readily apparent . . . that the Department cannot solve this challenge by spending more money to operate more federal prisons unless it is prepared to make drastic cuts to other important areas of the Department’s operations.”<sup>5</sup>

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<sup>3</sup> CRS REPORT at 8.

<sup>4</sup> See 18 U.S.C. § 3553(f) (2012).

<sup>5</sup> Horowitz Statement at 9.

The notion that incarcerating more and more people, as opposed to reserving prison space for the truly dangerous and exploring more cost-effective options for others, is dying a long-overdue death. In fact, no one better represents this change in thinking than University of Chicago economist and author Steven D. Levitt. Professor Levitt wrote several influential papers in the early- to mid-2000s concluding that pro-prison policies were a major factor in reducing crime during the 1990s. He later found, however, that as the crime rate continued to drop and the prison population continued to grow, the return on public safety diminished. Dr. Levitt recently told *The New York Times*, “In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration.” Today, Dr. Levitt says, “I think we should be shrinking the prison population by at least one-third.”<sup>6</sup>

We agree with the common sense recommendations made by both CRS in its report and by our colleagues in the criminal justice reform community in a letter we jointly sent to members of the House and Senate Appropriations and Judiciary Committees on March 5, 2013. We want to highlight just a few of those today.

**First, Congress should lean on the BOP to increase its use of community confinement.**

FAMM actively promoted Second Chance Act reforms requiring the BOP to ensure that people leaving federal prison spend up to the final 12 months “under conditions that will afford [them] a reasonable opportunity” to prepare to return to society.<sup>7</sup> The law allows BOP to provide people with up to one year in a residential re-entry center (RRC, also called a halfway house) and up to the lesser of six months or ten percent of the term of imprisonment in home confinement.<sup>8</sup>

Unfortunately, the BOP is not fully exercising its authority in this area. For example, stays in RRCs in 2010 averaged only 95 days; people released to some combination of RRCs and home detention stayed an average of 4.5 months.<sup>9</sup> BOP has begun to improve in this area, but we believe that much more needs to be done to ensure that people benefit from the full 12-month reentry period. While the BOP cites high costs and lack of space, a 2012 GAO report points out that the BOP failed to clarify the cost of RRC beds and home detention services and that it provided “no road map” to how to secure this information.<sup>10</sup>

We urge you to require the submission of the annual reports obliged by the Second Chance Act on the implementation of community corrections<sup>11</sup>; to ascertain up-to-date costs and savings possible under the program; to ask the BOP why its use of halfway houses and home detention has been so sparing; and to determine what the BOP might need to implement the Second Chance Act’s directives.

**Second, Congress should increase the amount of credit prisoners can earn for good behavior.** We support the provision in President Obama’s budget request last year that would

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<sup>6</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, THE N.Y. TIMES, Dec. 12, 2012, available at [http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0).

<sup>7</sup> 18 U.S.C. § 3624(c)(1) (2012).

<sup>8</sup> Second Chance Act of 2007, Pub. L. No. 110-199, § 251 (2008).

<sup>9</sup> GOVERNMENT ACCOUNTABILITY OFFICE, ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES’ TIME IN PRISON 17, Tbl. 2 [hereinafter GAO Report], available at <http://www.gao.gov/assets/590/588284.pdf>.

<sup>10</sup> GAO REPORT at 20.

<sup>11</sup> 18 U.S.C. § 3624(c)(5).

adjust the method of calculating good time credits for federal prisoners to add an additional seven days of good time a year and increase the amount of additional good time a prisoner could earn. According to President Obama's budget request last year, and included in the Second Chance Reauthorization Act,<sup>12</sup> making these changes would save taxpayers (and the BOP) \$41 million in the first year alone. We note that a bi-partisan effort to craft language that would allow prisoners to earn additional credit for successful participation in recidivism-reducing programs, such as education or occupational programming, is in the works. FAMM believes this plan is a good idea, and we are working with champions and conferring with members of the House and Senate on a legislative proposal to expand earned good time. If adopted, this type of plan would boost rehabilitation, reduce recidivism, and limit prison overcrowding.

**Congress should urge BOP to use its authority to grant “compassionate release.”** Last December, FAMM and Human Rights Watch published a report titled, “The Answer is No: Too Little Compassionate Release in the US Federal Prisons,” a comprehensive examination of this early release program. Congress gave federal courts the authority to grant early release – commonly referred to as “compassionate release” – for “extraordinary and compelling” reasons such as imminent death or serious incapacitation. That authority is being frustrated, however, because the BOP must first bring motions to federal court on behalf of prisoners, something BOP rarely does.

The BOP requires that prisoners be within 12 months of death or profoundly and irrevocably incapacitated to be eligible for compassionate release consideration. Since 1992, the BOP has averaged annually only two dozen motions to the courts for early release, out of a prison population that now exceeds 218,000. The BOP does not even keep records of the number of prisoners who seek compassionate release. Our report includes numerous case studies, including stories of individuals who died in prison even though they posed no threat to public safety. In such instances, taxpayers are forced to pay for expensive end-of-life medical care in addition to the already high incarceration costs.

Moreover, the BOP will not make motions to the courts on non-medical grounds, even though the legislative history of compassionate release reveals that Congress believed that non-medical circumstances could be sufficiently extraordinary and compelling to justify early release. For example, the BOP has not made motions on behalf of prisoners who seek early release to care for dying family members or when the only family member capable of caring for the prisoner's children has died and the children are in danger of entering the foster care system.

Late last month, the BOP announced a minor change that might help to streamline its process of reviewing compassionate release requests approved by wardens. It announced that it was removing its regional directors from that review process. We applaud this minor step, but believe there is so much more that can be done. The BOP should change its procedures to bring compassionate release motions to the court whenever it finds that a prisoner presents “extraordinary and compelling” reasons for release, regardless of whether BOP officials believe early release is warranted. Judges should decide whether early release is warranted. We urge you to use your oversight of the BOP's budget to promote these reforms. In addition, we believe Congress should enact legislation permitting prisoners to file motions seeking early release with

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<sup>12</sup> S. 1231, 112th Cong. (2011).

the courts after they have exhausted their administrative remedies at the BOP.

**Finally, Mr. Chairman, I would respectfully ask the subcommittee to examine one more area related to federal prisons and the Department of Justice: the Office of the Pardon Attorney (OPA).** The OPA receives a small annual appropriation, but there is good reason to believe they are not providing the level of service American taxpayers rightfully expect.

The OPA reviews applications for executive clemency and provides recommendations to the White House based on those applications. A series of investigative reports by Dafna Linzer with ProPublica (in collaboration with *The Washington Post*) revealed racial bias and possible misconduct in the pardon and commutation review process.<sup>13</sup> Her reporting led to an investigation and finding of wrongdoing by DOJ's Inspector General regarding the OPA's handling of Clarence Aaron's petition for commutation.<sup>14</sup>

Aaron is a first-time offender whose crime was arranging a meeting between two drug dealers. Though Aaron was not a dealer, buyer, or supplier, he was held accountable for the all of the drugs sold as a result of his matchmaking. The 24 year-old was sentenced to three life sentences. He has been in prison since 1993. Fortunately, the U.S. Attorney's office that prosecuted Aaron and the judge who sentenced him ultimately agreed that Aaron's sentence should be commuted. President George W. Bush's administration reportedly was interested in granting Aaron's request and sought information from the OPA.

According to the IG, the pardon attorney, Ronald Rodgers, recommended to President Bush that Aaron's request be denied. Rodgers misrepresented the views of the U.S. Attorney's office and judge. The IG report said that Rodger's advice to the president "was colored by his concern ... that the White House might grant Aaron clemency presently and his desire that this not happen." The IG referred the case to Deputy Attorney General James Cole to determine "whether administrative action is appropriate." We are not aware of any further action.

President Obama has granted clemency fewer times than any president in modern history. Because of the OPA's misconduct, we think at least part of the reason might have to do with this taxpayer-funded agency not providing honest services. Over 8,200 applications have been denied or closed administratively since 2009, which raises concerns that the OPA cannot or is not adequately reviewing each application on its current budget. We ask that your subcommittee question the DOJ about the OPA and its plans for making the office more accountable to the president and the American public.

Thank you for this opportunity to present our views.

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<sup>13</sup> The stories are collected in *Presidential Pardons, Shades of Mercy*, available at <http://www.propublica.org/series/presidential-pardons>.

<sup>14</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, OVERSIGHT AND REVIEW DIVISION, A REVIEW OF THE PARDON ATTORNEY'S RECONSIDERATION OF CLARENCE AARON'S PETITION FOR CLEMENCY (Dec. 2012), available at: <http://www.justice.gov/oig/reports/2012/s1212.pdf>.