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Introduction

- I am very pleased this Committee and distinguished members of both parties have come together to identify ways we can improve the federal criminal justice system. We applaud Congress for examining various options for reining in unnecessary criminal laws that are properly the province of state governments, revising mandatory minimums for nonviolent offenses, implementing evidence-based practices in community supervision, improving programming within federal prisons, and strengthening reentry. As an organization committed to the Tenth Amendment and the founders' vision of states serving as laboratories of innovation, I am pleased to share with you today that many states, particularly those led by conservative Governors, have taken these steps and found great success in reducing costs, and much more importantly, reducing their crime rate. I am attaching a document that summarizes the recent successful reforms in many states.

- Keeping Americans safe, whether accomplished through our military or justice system, is one of the few functions government should perform and perform well. As crime began increasing in the 1970's, Americans and particularly conservatives were correct to react against the attitudes and policies that stemmed from the 1960's, which included an "if it feels good, do it" mentality and a tendency to emphasize purported societal causes of crime while disregarding the fundamental individual responsibility for crime. In the ensuing couple of decades, a six-fold increase in incarceration occurred, some of which was necessary to ensure violent and dangerous offenders were kept off the streets.

- However, the pendulum shift, while necessary, went too far, sweeping too many nonviolent, low-risk offenders into prison for long terms while at the same time new research and techniques have emerged on everything from drug courts to actuarial risk assessments to electronic monitoring to pharmacological interventions to treat heroin addiction. One of the most recent and promising models is the Hawaii HOPE Court launched by former federal prosecutor Steve Alm that utilizes swift, sure, and commensurate sanctions, which has reduced

substance abuse and re-offending by two-thirds.[1] With all of these advancements, just as we recognize that locking up violent offenders and international drug kingpins continues to make us safer, we must also follow the examples of many states that demonstrate utilizing more alternatives for low-level, low-risk offenders can lead to better public safety outcomes at a lower cost to taxpayers.

- The astronomical growth in the breadth of federal criminal law is in tension with the primary constitutional role of state and local governments in the area of criminal justice. With more than 4,500 federal statutory offenses on the books, and hundreds of thousands of regulations carrying criminal penalties, it is time to right-size the federal criminal law as part of a broader effort to revive federalism and the Tenth Amendment. We recommend that all necessary federal criminal laws be consolidated into one federal criminal code with clear *mens rea* requirements, which will make it simple for the average citizen to determine what is prohibited, and that agency regulations be precluded from carrying criminal penalties unless expressly authorized by Congress. In the 1970's, Dick Thornburgh, serving as the Assistant Attorney General for the Justice Department's Criminal Division under President Ford, urged Congress to create a unified criminal code.[2] It was a good idea then, and it is only more urgently needed now as the volume, scope, and complexity of federal criminal laws continues to grow.

About the Texas Public Policy Foundation & Right on Crime

- Since 1989, the Texas Public Policy Foundation has served as the state's free-market think tank and in 2005 I launched our Center for Effective Justice. Our work in Texas which included research, data analysis, and legislative testimony helped shape Texas' historic shift in criminal justice policy in 2007 away from building more prisons to instead strengthening alternatives for holding nonviolent offenders accountable in the community, such as drug courts. Since making this shift, Texas has achieved a drop in its incarceration rate by more than 12 percent and, most importantly, a drop in its crime rate by more than 24 percent, reaching its lowest level since 1968.[3] Taxpayers have avoided spending more than $2 billion on new prisons.

- Building on the Texas success, we launched Right on Crime in 2010. Our Statement of Principles signed by conservative leaders such as Jeb Bush, Newt Gingrich, Rick Perry, Bill Bennett, Grover Norquist, and J.C. Watts, as well as leading experts in the field such as John DiLulio and George Kelling, explains how conservative principles such as personal responsibility, limited government, and accountability should apply to criminal justice policy. Our focus areas include: 1) maximizing the public safety return on the dollars spent on criminal justice, 2) giving victims a greater role in the system through restorative justice approaches and improving the collection of restitution, and 3) combating

overcriminalization by limiting the growth of non-traditional criminal laws. Right on Crime does not endorse or oppose legislation, but continues to highlight how these principles can be applied at all levels of government.

- Over the past few years, we have worked with our counterpart free-market think tanks and conservative Governors and legislators across the country to advance tough and smart criminal justice reforms, which in most cases have passed unanimously or with just a few votes against. Examples include Georgia, South Carolina, Ohio, and Pennsylvania. These legislative packages have shared many similarities, such as strengthening and expanding alternatives such as drug and other problem-solving courts, reducing penalties for low-level drug offenses while still holding these offenders accountable and requiring treatment, reinvesting a share of prison savings into proven community corrections and law enforcement strategies, imposing swift, certain, and commensurate sanctions for non-compliance with community supervision terms, implementing earned time policies that incentivize offenders to succeed, and instituting rigorous, outcome-oriented performance measurements to hold the system accountable for lowering recidivism. Also, in Georgia, the mandatory minimum safety valve for drug cases in the successful legislative package spearheaded by Governor (and former prosecutor) Nathan Deal is very similar to pending federal legislation.

- While in the last two years, state incarceration rates have been declining, the federal prison system continues to grow. Since 1980, the number of federal prisoners has grown by over 700 percent, while the U.S. population has only grown by slightly more than 32 percent.[4] Some 46.8 percent of federal inmates are drug offenders.[5]

Mandatory Minimums for Nonviolent Offenders

- In 1999, Ed Meese told the *New York Times*, "I think mandatory minimum sentences for drug offenders ought to be reviewed. We have to see who has been incarcerated and what has come from it." More than two decades later and four years after Ed Meese became one of the signatories to our Right on Crime Statement of Principle, today we have that opportunity to do that. As you consider recalibrating mandatory minimums that apply to nonviolent offenses, we think the following factors should be taken into account:

  - Judges and juries have much more information as to the specific facts of the case, yet mandatory minimums prevent the judge and jury from considering the defendant's background and especially his risk level. Research shows that actuarial risk assessments can accurately determine that two offenders who committed the same offense pose very different levels of risk to the community.

- Some mandatory minimums result in excessive prison terms, particularly following the abolishment of parole in the federal system. For example under 21 U.S.C. § 851(a), if a federal defendant is convicted of as little as 10 grams of certain drugs and has one or more prior convictions for a "felony drug offense," the mandatory minimum is 20 years with a maximum of life in prison. If there were two prior "felony drug offenses" that the prosecutor files notice of, life in federal prison is mandatory. Notably, a prior "felony drug offense" can be satisfied by a state misdemeanor in states where a misdemeanor is punishable by one or more years behind bars and even a diversionary disposition in state court. Furthermore, there is no limit on how old the prior offense can be and in some cases it has been decades old. Also, the current safety valve for federal drug cases is too narrow, as it applies to only 24 percent of cases even though only 7 percent of those charged were considered leaders, supervisors, or managers.[6]

- Most federal drug offenders are not violent. Of the 22,300 federal drug offenders sentenced in FY 2013, half had little or no prior criminal record and 84% had no weapon involved in the crime – and most of the 16% who did merely possessed the weapon.[7] Despite these facts, 97 percent of all federal drug offenders went to prison in FY 2013, and 60% received mandatory minimum sentences of five, 10, 20 years or life without parole.[8] Yet, of drug offenders sentenced in FY2012, just 28 defendants (.1%) received a seven-year increase under 18 U.S.C. § 924(c) for brandishing a firearm, and just 44 (.2%) received a ten-year increase, either for discharging a weapon or possessing a more dangerous type of weapon. Only 89 (.37%) of the 23,758 defendants sentenced under USSG §2D1.1 in FY2012 received the 2-level increase under (b)(2) for having "used violence, made a credible threat to use violence, or directed the use of violence." Just 6.6 percent received any increase for playing an aggravating role in the offense, and only .4 percent received a super-aggravating adjustment under §2D1.1(b)(14).

- There are many cases where federal judges have lamented in the record that the sentence they are forced to give by the applicable mandatory minimums is unjust and far beyond what is needed to sufficiently punish and ensure public safety. Among those are the case of college student Michael Wahl just this year in Florida who received ten years for growing marijuana in his apartment due to a § 851 enhancement for drug possession case two decades earlier. An Iowa 40 year-old man named Robert Riley was sentenced to mandatory life in federal prison for selling 10 grams of drugs, including the weight of the blotter paper they were attached to, due to the prosecutor filing § 851 enhancements based on prior drug convictions involving small amounts. The judge said the sentence he was forced into was "unfair" and wrote a letter supporting presidential clemency which has proven futile so far. In addition to the drug cases, there are also many problematic cases involving guns

otherwise legally owned by persons previously convicted of any crime punishable by more than a year behind bars. Some such defendants have received mandatory terms of 10 to 40 years even when the prior offense was nonviolent and decades ago and the gun they currently possessed was otherwise legal and not being used for any illicit purpose. In one such case where the gun was a sixty year-old hunting rifle used to hunt turkey in rural Tennessee, the judge described the 15 year mandatory term he was forced to impose as "too harsh."

- A Rand Institute study found mandatory minimums for nearly all drug offenders are not cost-effective, although long sentences for major international drug kingpins trafficking enormous quantities were found to be cost-effective.[9]

- Mandatory minimums do not allow for input from the victim in cases where there is one. Research has shown that in some cases victims do not want the maximum prison term and that restitution is much more likely to be obtained if an alternative sentence is imposed.[10]

- Mandatory minimums have not met the goal of achieving uniformity in sentencing. Mandatory minimum sentences can actually create geographical sentencing disparity, because whether to charge someone with an offense carrying a mandatory minimum is entirely up to prosecutors – and the 94 US Attorney offices around the country have different charging policies and practices. For example, a defendant in the Northern District of Iowa "who is eligible for a § 851 enhancement is 2,532% more likely to receive it than a similarly eligible defendant in the bordering District of Nebraska," a defendant in the Eastern District of Tennessee is "3,994% more likely to receive" the enhancement than in the Western District. *United States v. Young*, __ F. Supp. 2d __, 2013 WL 4399232 (N.D. Iowa 2013). The USSC's 2011 report found that the charging and application of the 18 USC 924c penalties, for example, depended greatly on where the crime was committed – nearly half of all cases came from just three districts in 2010, despite no difference in the prevalence of that offense conduct among all districts. (p. 276).

- Mandatory minimums were implemented in large part due to concerns with excessive use of judicial discretion, but judicial adherence to drug sentencing guidelines is relatively high overall. An overreliance of mandatory minimums effectively results in a massive transfer of discretion from judges to prosecutors, since the sentence is dictated by what charges and notices are filed. Indeed, it is prosecutors, not judges, who are responsible for the largest proportion of deviations from the guidelines in drug cases. In FY2013, only 17.8% of below-guidelines sentences for drug offenders were initiated by the court for *Booker* reasons.[11] More than 38% of below-guideline sentences for

drug offenders in FY 2013 came at the urging of prosecutors for reasons Congress has sanctioned (Table 45 of USSC 2013 Sourcebook).

- Mandatory minimums are not necessary to encourage defendants to plea. Some 96.9% of federal cases are resolved by plea, with only 3.1% going to trial.[12] These figures are very high for every category of cases, even those to which mandatory minimums do not apply. For example, 99.4% of immigration cases result in pleas, as do 93.4% of fraud cases. In fact, the U.S. Sentencing Commission found that those convicted of an offense carrying a mandatory minimum penalty pled guilty at a slightly lower rate (94.1%) than offenders who were not convicted of an offense carrying a mandatory minimum penalty (97.5%).[13] Furthermore, offenders facing longer mandatory minimum penalties were less likely to plead guilty.

- We do recognize the value of appropriate sentencing ranges to guide the discretion exercised by judges and juries as well as judges being aware of the sentencing patterns of their colleagues. If mandatory minimums were revised for certain nonviolent offenses and/or if the safety valve was expanded, judges in each circuit could be asked to annually review data comparing their sentencing patterns in similar cases with those of their colleagues. In short, policymakers should not be forced to choose between the false dichotomy of a sentencing regime that is entirely rigid and one with no limits and monitoring to constrain discretion.

- It is important to remember that, even if mandatory minimums did not apply to certain drug cases, these offenders would be going to federal prison. Recent experience illustrates that federal judges would generally impose tough sentences even if Congress dialed back mandatory minimums in such cases. For example, even after the crack/power disparity was narrowed in 2010, those convicted in subsequent crack cases received an average prison term of 97 months.

- We appreciate the outstanding work that most prosecutors do at all levels of government. We have heard the concern that prosecutors in some jurisdictions have excessive caseloads and mandatory minimums provide the leverage needed to quickly extract plea bargains that are satisfactory to them, but the better way to address this concern is to ensure there are sufficient prosecutors to properly examine the facts of each case and, when necessary, fully prosecute those cases that merit a trial. The growth in the Bureau of Prisons, however, is consuming an ever greater share of the Department of Justice budget, the same budget that funds federal prosecutors.

- It is useful to note that Texas generally does not have mandatory minimums, except for repeat seriously violent offenses, but still has long provided for meaningful [and appropriately stringent] sentencing ranges and penalties for

criminal offenses. In the recent groundswell of state policy innovations in this area, a number of states have addressed their mandatory minimums. For example, in 2010, South Carolina eliminated mandatory minimums for the manufacture, distribution, dispensing, delivery or purchase of drugs below certain weight thresholds for first and second offenses. Delaware reduced its mandatory minimum sentences for many drug trafficking offenses in 2003. In 2013, Georgia provided judges with a "safety valve" for departing below mandatory minimums for trafficking and manufacturing, if certain findings were made. Reductions in state mandatory minimums does not appear to have had an adverse impact on crime, as the crime rates have continued to decline in these states. Since the reforms in South Carolina 2010, the crime rate has decreased by 14 percent.

Beyond Mandatory Sentencing: Other Federal Criminal Justice Reforms

- The criminal justice reforms in some states like Texas have not dealt with mandatory minimums because Texas only had minimum prison terms for repeated seriously violent offenses. However, at the federal level, since mandatory minimums affect many cases, including many nonviolent cases, comprehensive reform approaches should address both mandatory minimums and other changes that do not involve sentencing laws such as earned time and strengthening reentry.

- Our recent paper "The Verdict on Federal Prison Reform" focuses on policy changes that are backed by empirical research and proven success in the states.[14] These include: utilizing validated risk and needs assessments, earned time policies, strengthening alternatives to incarceration such as problem-solving courts and electronic monitoring, reducing collateral consequences of convictions that make it harder for rehabilitated ex-offenders to find employment, and strengthening reentry. With regard to both alternatives to incarceration and reentry, we suggest considering subcontracting in some instances with state, local, and non-profit agencies, as this can be more efficient than the federal government reinventing the wheel, particularly in areas where there are not that many federal offenders on probation or on supervised release.

- Congress must also act to rein in overcriminalization by reducing the number of superfluous criminal laws, consolidating all necessary criminal laws into one unified criminal code, adopting a rule of construction that applies a strong *mens rea* protection where the underlying statute is unclear, codifying the rule of lenity[1], and removing the authority of agencies to apply criminal penalties to regulations unless expressly authorized by Congress.

[1] This canon of statutory interpretation provides that, if there are two objectively reasonable meanings of a statute, the court should adopt the one that is favorable to the defendant. The rule of lenity has a long pedigree in Western law (See *United States v. Wiltberger,* 18 U.S. 76, 95 (1820)("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.") and has been applied

- When it comes to conduct that is properly criminalized, limited federal criminal justice resources should be refocused on areas where the federal government is uniquely situated to supplement the role of states and localities, such as matters involving homeland security and international drug and human trafficking. The garden variety drug, property, or even violent offense that occurs on one street corner can and should be addressed by prosecution at the local and state levels. Congress and the administration should look at how to develop mechanisms, such as guidelines and performance measures, to ensure federal prosecutorial resources are being appropriately prioritized.

- In addition to considering the statutory penalties for various crimes, we urge the Commitee to examine collateral consequences. One example is the federal law that requires states to suspend the driver's licenses of all individuals convicted of any drug offense, even a misdemeanor. While those who are driving while inebriated with any substance should be taken off the road, this issue should be dealt with at the state and local levels. States should not be subject to losing federal transportation funds based on their policy in this area, as the threat of withholding unrelated funds involves coercion that undermines the framework of federalism embodied in the Tenth Amendment.

Reforming Solitary Confinement

- As conservatives, we are appropriately skeptical of government that is too large, too intrusive, and too costly, and we insist on accountability and transparency. Government is at its most restrictive when it imposes solitary confinement so it is only appropriate that we bring a critical focus to this issue rather than succumb to an out of sight, out of mind mentality. While we recognize solitary confinement is needed in some instances, policies and practices must be implemented to ensure it is not unnecessarily used to the detriment of public safety, taxpayers, and justice.

- The U.S. Bureau of Prisons (BOP) maintained approximately 12,400 inmates in solitary confinement at the time of the May 2013 General Accounting Office (GAO) report, although BOP officials claim the segregated population has declined since then. Many more inmates are so housed in state prisons, which typically means 23 hours alone in a small cell with no stimulation or interaction with other people. The GAO report found that the use of solitary confinement has

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on occasion by the U.S. Supreme Court and federal appellate courts in recent years. It is tied to the core principle that citizens should have fair notice as to what is a crime, since a statute capable of an objectively reasonable interpretation whereby the conduct at issue would not be prohibited would, thereby, fail to provide such notice. By codifying the rule of lenity, Congress can ensure it is uniformly applied.

been growing in the federal prison system despite a lack of any available evidence that this practice was increasing safety for inmates and staff.[15] The GAO report also for the first time revealed the actual cost of solitary confinement on the federal level, finding that it amounts to $78,000 per inmate per year, nearly three times that of housing inmates in the general population.[16] Since the time of the last Senate hearing on solitary confinement, BOP has agreed to begin an audit that will, for the first time, lead to some outside scrutiny of BOP's use of segregation.

- The research in this area and the recent successes that several states have achieved in both reducing solitary confinement and improving order in their correctional facilities suggests that there are changes in policies and practices from which both the BOP and state prison systems can benefit.

- While often viewed primarily as a moral issue, solitary confinement has significant implications for public safety. First and foremost, prisons must discontinue the practice of releasing inmates directly from solitary confinement to the public. A study in Washington state found that inmates released directly from the Supermax prison, which consists entirely of solitary confinement, committed new felonies at a rate 35 percent greater than that for inmates of the same risk profile released from the general population.[17] Additionally, a greater percentage of the new crimes committed by those released from solitary confinement were among the most serious violent felonies.[18]

- Despite this finding, many states continue to release inmates directly from solitary confinement, with more than 1,300 such releases in 2011 in Texas alone.[19] In 2013, a Colorado inmate released directly from solitary confinement murdered the state's director of corrections, Tom Clements. Alarmingly, dating back to 2002, half of those released from Colorado prisons who subsequently committed murder served time in solitary confinement, with some discharged directly to the street. However, as documented below, major changes are underway that are significantly reducing overall solitary confinement in Colorado and those discharged directly from this custody level, with the latter figure falling from 221 in 2004 to 70 in 2013.[20]

- The average American may understandably wonder, if an inmate is too dangerous for the general population of a prison, how can they live next to me the next day? While inmates who have served their entire sentence must by law be released, this date is not a mystery to corrections officials. Stepping them down to a lower level of custody at least several months prior to release is not too much to ask.

- While it is commonsensical to most people that someone who was subjected to 23 hours a day in a cell with no stimulation will have great difficulty reentering society the next day, the negative effects of solitary confinement on those who were mentally ill even prior to entering solitary confinement are well documented.

The Journal of the American Academy of Psychiatry Law noted: "The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence. Suicides occur disproportionately more often in segregation units than elsewhere in prison."[21] One study found that 45 percent of prisoners in solitary confinement suffered from serious mental illness, marked psychological symptoms, psychological breakdowns, or brain damage.[22]

- Fortunately, jurisdictions are increasingly demonstrating that the use of solitary confinement can be safely reduced. One of the most stunning examples of downsizing solitary confinement comes from Mississippi. In 2007, Mississippi had 1,300 inmates in solitary confinement while today there are only 300.[23] This downsizing has saved Mississippi taxpayers $6 million, because solitary confinement costs $102 per day compared to $42 a day for inmates in the general population.[24] Most importantly, violence within Mississippi's prisons and the recidivism rate upon release are both down, with violence dropping nearly 70 percent.[25]

- Maine is a similar success story. In 2011, the state prison in Warren instituted a plan to reduce long-term segregation which has resulted in a decline in the segregated population from 139 in August 2011 to between 35 and 45 inmates just a year later.[26] Importantly, Maine Corrections Commissioner Joseph Ponte said the downsizing of solitary confinement has led to "substantial reductions in violence, reductions in use of force, reductions in use of chemicals, reductions in use of restraint chairs, reductions in inmates cutting [themselves] up — which was an event that happened every week or at least every other week…The cutting has] almost been totally eliminated as a result of these changes."[27]

- Some of the changes involved reducing the duration of solitary confinement – for example, those segregated for drugs can now graduate out of confinement and stay in the general population as long as they pass drug tests. Moreover, there was a change in the chain of command. Rather than the shift captain being able to place an inmate in segregation for more than three days, the segregation unit manager and the housing unit manager must agree after this period to continue the segregation and that decision must be ratified by the Commissioner.

- Similarly, in the last decade, Ohio dramatically reduced its solitary confinement population from 800 to 90 prisoners.[28] Additionally, from September 2011 to September 2013, Colorado cut the number of inmates in solitary confinement from 1,505 to 662. The number of mentally ill offenders in solitary confinement has fallen even more sharply.

- It is important to note that prison staff do not necessarily want more inmates to be in solitary confinement. In fact, in January 2014, the association representing Texas prison guards, AFSCME Texas Correctional Employees Local 3807,

called for reducing the solitary confinement of death row inmates, noting that because "inmates have very few privileges to lose," staff become easy targets.[29]

- More broadly, any intervention that reduces prison violence is likely to reduce solitary confinement by avoiding the incidents that often lead to it. One of the best models for promoting order in prisons is the parallel universe model embraced by Arizona in 2004 through the "Getting Ready" program, which won the innovation award from the Harvard University JFK School of Government. The parallel universe model attempts to make prison more like ordinary life in that how the inmate is treated is directly related to their behavior. For example, inmates who are exemplary, both in completing educational and treatment programs, holding a job inside of prison, and maintaining an unblemished disciplinary record, have a longer curfew and receive better food. Since the program was implemented, inmate violence has decreased by 37 percent, inmate-on-staff assaults by 51 percent, and inmate suicides by 33 percent.[30] So many inmates are working through the program that they have contributed more than $1 million to a fund for victims of crime, and recidivism rates of participants are 35 percent lower than for similar inmates.[31]

- By the same token, the swift and certain sanctions model that is so successful in the HOPE Court certainly has a place inside prisons. It is a bit more challenging to apply a matrix of intermediate sanctions in prison because there are fewer privileges that inmates have that can constitutionally be withheld, as compared with those on probation or parole. However, such sanctions can include withholding access to the commissary, withholding access to the phone and mail except to communicate with an attorney, relocation to a less desirable cell or higher security unit and away from any inmate with whom they have a dispute, and even short stints in solitary confinement of 24 to 72 hours. Required anger management programming should also be available as a response to misconduct. While inmates who instigate force causing serious bodily harm to a staff member or other inmate should be placed in solitary confinement for a significant period of time rather than dealt with through intermediate sanctions, these intermediate sanctions can address the more common, less severe disciplinary infractions before they escalate to that point.

- However, perhaps the most effective sanction is sometimes not available due to policies that result in a large share of inmates serving all or nearly all of their sentence behind bars, regardless of their behavior. Those inmates eligible for parole typically realize that their record of behavior inside prison will be a major factor in whether they will be approved for parole. In those states with good time or earned time policies, the only way an inmate can earn time off their sentence is through good behavior, though under earned time policies they often must go beyond that by completing treatment, educational, and vocational programs. Yet, the federal government and many states abolished parole in the 1990's, even for

nonviolent offenders. Some of these same states such as Florida also adopted so-called truth-in-sentencing policies that require even nonviolent offenders to serve 85 to 90 percent of their sentences beyond bars.

- However, a 2013 a study conducted by the Pew Charitable States Public Safety Performance Project of New Jersey of inmates released from prison found that comparable inmates placed on parole supervision committed 36 percent fewer new offenses, casting doubt on policies such as the abolishment of parole that have led to more inmates maxing out their entire term behind bars.[32] Not only does the elimination of parole and requirements that inmates serve virtually all their time in prison put prison growth on auto-pilot, these policies create another drawback that is relevant here. That is, many inmates know that, unless they go so far as to commit another crime in prison, they will be released on the same date or virtually the same date regardless of their behavior. The same drawback applies to life without parole sentences, which while justified in many of the cases in which they are imposed due to the heinousness of the crime and a pattern of violence, are being served by inmates in Louisiana for offenses such as marijuana and stealing a belt.[33] While Louisiana is the state with the most nonviolent offenders serving life without parole, the federal system dwarfs all states, accounting for two-thirds of the 3,278 prisoners serving life without parole in 2013 for nonviolent offenses. By reducing the share of inmates, particularly nonviolent inmates, who must serve all or virtually all of their entire terms behind bars, we can ensure that more inmates have an incentive to avoid the types of misconduct that often lead to solitary confinement.

- The successful experiences of several states and the empirical research in this area lead to many recommendations that can reduce the unnecessary use of solitary confinement while promoting order in correctional facilities. These include:

    - End the practice of releasing inmates directly from solitary confinement.
    - Ensure that there is an oversight mechanism, whether that is an ombudsman or the head of the department, to review decisions to keep an inmate in solitary confinement beyond 72 hours. This is particularly important in states like Texas where inmates can be placed in solitary confinement simply for being a suspected gang member, a determination which is prone to human error.
    - Provide a means for inmates to earn their way out of solitary confinement, such as through a period of exemplary behavior and gang renunciation, if they were not placed there for instigating force that caused serious bodily injury to a staff member or other inmate.
    - Eliminate rules that make all inmates in solitary confinement ineligible for any programing and allow such inmates access to constructive reading materials, including educational course books.

- Enhance training for prison personnel in de-escalation techniques, mental illness, and mental retardation, issues which often lead to solitary confinement. Some states such as Nebraska are looking at having some higher level prison guard positions filled by individuals with degrees in areas such as social work who are better equipped to not just respond to behavior, but change it.
- Implement a parallel universe model that creates incentives for positive behavior and self-improvement.
- Create a matrix of intermediate sanctions that must be used prior to placing an inmate in solitary confinement for more than 72 hours, unless that inmate has instigated force that caused serious bodily injury to a staff member or other inmate.
- For many inmates, allow for earned time, thereby reducing the number of "dead-enders" and allowing for substantial variation in time served based on the inmate's performance.
- Reduce overcrowding through sentencing reform. Overcrowding can contribute to the overuse of solitary confinement by leading to an insufficient number of guards to control inmates in the general population and making it more difficult to separate inmates and groups of inmates who may have issues with one another.
- Utilize "missioned housing," which are separate, smaller correctional settings, for inmates in segregation as protective custody, such as former police officers and those who have recently exited a gang, as well as for mentally ill and developmentally delayed inmates who were segregated due to an inability to follow orders. These inmates who did not harm another inmate or staff member should not be subject to 23 hours of solitary confinement alongside those who committed acts of violence behind bars. The Wisconsin model of Special Management Units provides an example of such "missioned housing" for these types of inmates.
- Reexamine prison construction and renovation plans to ensure unnecessary Supermax/solitary confinement beds are not added. Even if additional maximum security capacity is needed, the vast majority or all of the beds can be general population beds.
- Improve availability of data. For example, there is no reliable data on the number of inmates in different types of segregation (punitive versus protective) and very little data at all on local jails and immigration detention centers.

Conclusion

- The successes of many states in reducing both crime and costs through reforms anchored in research and conservative principles provide a blueprint for reform at the federal level. By learning from what is working in the states and taking steps to ensure the federal role in criminal justice does not intrude on the constitutional

purview of state and local governments, Congress can focus federal resources on those areas where it can most uniquely contribute to advancing public safety and the rule of law. We are encouraged by the remarkable vision and leadership of the distinguished members of this Committee and look forward to being of assistance in any way we can.

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[1] "Program Evaluation Results," Hawaii State Judiciary's HOPE Probation Program, http://www.hopeprobation.org/about/program-evaluation-results.

[2] Dick Thonburgh, "Codification and the Rule of Law," http://www.justice.gov/ag/aghistory/thornburgh/1990/01-22-90.pdf.

[3] Marc Levin, "The Texas Model: Adult Corrections Reform, Lower Crime, Lower Costs," Texas Public Policy Foundation, Sept. 2011, http://www.texaspolicy.com/sites/default/files/documents/2011-09-PB44-TexasModel-AdultCorrections-CEJ-MarcLevin.pdf.

[4] The Sentencing Project, "The Expanding Federal Prison Population" (Mar. 2011) 1. Internal citations omitted.

See also "Federal Bureau of Prisons FY 2013 Budget Request," before the House Subcommittee on Commerce, Justice, Science, and Related Agencies (Mar. 6, 2012). Statement of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, 3. Noting "substantial ongoing challenges" posed by overcrowding.

[5] Federal Bureau of Prisons Quick Facts, http://www.bop.gov/news/quick.jsp.

[6] U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at Tbls. 37, 39, 40, 44, (2012), http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm.

[7] All data come from U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[8] U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013.

[9] Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa , "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?," Rand Institute, MR-827-DPRC, 1997, 217 pp., ISBN: 0-8330-2453-1

[10] "The 1997 Iowa Adult Crime Victimization Survey," Center For Social and Behavioral Research University of Northern Iowa, April 1998, http://www.csbs.uni.edu/dept/csbr/pdf/CRI_Crime_Victimization_Survey-1998.pdf. "Empowering and Restoring Crime Victims," Texas Public Policy Foundation, http://www.texaspolicy.com/sites/default/files/documents/Empowering%20and%20Restoring%20Crime%20Victims.pdf.

[11] U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 168-69 (2011), http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[12] U.S. Sentencing Commission, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table11.pdf.

[13] U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 168-69 (2011), http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[14] Marc Levin & Vikrant Reddy, "The Verdict on Federal Prison Reform," Texas Public Policy Foundation, July 2013, http://www.texaspolicy.com/sites/default/files/documents/2013-07-PP24-VerdictOnFederalPrisonReform-CEJ-LevinReddy.pdf

[15] "Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing, General Accounting Office, May 2013, http://www.gao.gov/assets/660/654349.pdf.

[16] *Ibid.*

[17] David Lowell, et. al., "Recidivism of Supermax Prisoners in Washington State," *Crime & Delinquency,* Oct.2007, vol. 53 no. 4 633-656, http://cad.sagepub.com/content/53/4/633.abstract.

[18] *Ibid.*

[19] Testimony of Travis Leete, Texas Criminal Justice Coalition, April 17, 2013, http://www.texascjc.org/sites/default/files/uploads/HB%201266%20Testimony%20(Ad%20Seg%20Review).pdf.

[20] Jennifer Brown and Karen Krummy, "Half of parolees who murdered spent time in solitary confinement,"
Denver Post, Sept. 23, 2013, http://www.denverpost.com/parole/ci_24140370/half-parolees-who-murdered-spent-time-solitary-confinement. Rick Raemish, "My Night in Solitary," *New York Times,* Feb. 20, 2014, http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?_r=0.

[21] Jeffrey L. Metzner, MD and Jamie Fellner Esq., "Solitary Confinement and Mental Illness in U.S. Prisons: A Challengefor Medical Ethics," *J Am Acad Psychiatry Law* 38:1:104-108 (March 2010), http://www.jaapl.org/content/38/1/104.full.

[22] D. Lovell, Patterns of disturbed behavior in a supermax population, *Criminal Justice and Behavior*, 35, 985-1004 (2008).

[23] Randall Pinkston, "Mississippi Rethinks Solitary Confinement," CBS News, May 18, 2013, http://www.cbsnews.com/news/mississippi-rethinks-solitary-confinement/.

[24] *Ibid.*

[25] Terry Kupers et al., "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison
Classification and Creating Alternative Mental Health Programs," Criminal Justice and Behavior 36 (2009): 1037-
50, https://www.aclu.org/files/images/asset_upload_file359_41136.pdf.

[26] Alex Barber, "Less restriction equals less violence at Maine State Prison," *Bangor Daily News,* June 15, 2012, http://bangordailynews.com/2012/06/15/news/state/less-restriction-equals-less-violence-at-maine-state-prison/.

[27] *Ibid.*

[28] Terry Kupers et al., "Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison
Classification and Creating Alternative Mental Health Programs," Criminal Justice and Behavior 36 (2009): 1037-
50, https://www.aclu.org/files/images/asset_upload_file359_41136.pdf.

[29] Nicholas Flatow, "Texas Prison Guards Vie For Less Solitary Confinement." *Think Progress,* Jan. 30, 2014, http://thinkprogress.org/justice/2014/01/30/3223731/texas-prison-guards-vie-solitary-confinement/#.

[30] Ann Coppola, "A Parallel Universe," Correcitons.com, http://www.corrections.com/news/article/20339.

[31] *Ibid.*

[32] The Pew Charitable Trusts, "The Impact of Parole in New Jersey," November 2013. Available at: http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_NJParole-Brief.pdf

[33] "A Living Death: Life Without Parole for Nonviolent Offenses," American Civil Liberties Union, November 2013, https://www.aclu.org/files/assets/111213a-lwop-complete-report.pdf.