Statement of Brett L. Tolman, former U. S. Attorney for the District of Utah Regarding Meaningful Criminal Justice Reform, the Recidivism Risk Reduction Act (H.R. 759) and the Senate CORRECTIONS Act (S 467) House Oversight Committee, July 15, 2015

The federal criminal justice system currently faces unprecedented and significant challenges. The prison population in the U.S. has increased dramatically over the past several decades, putting immense strain on both the human and financial capital of the Department of Justice. It is universally acknowledged that there has been a shift over the past several decades in investigative and prosecutorial practices. Instead of focusing scarce and valuable resources on the highest level of criminal conduct, today's federal system is too often pursuing the lowest level offenders, who are often over-punished due to over-aggressive guideline calculations and over-reliance on minimum mandatory sentencing laws. The federal system has, unfortunately, been neither thoughtful nor conscientious in its punishment of those it convicts. Tellingly, the U.S. has less than five percent of the world's population, but houses nearly twenty-five percent of the world's prisoners.

For drug offenses, the Department of Justice is expected to use the hammer of mandatory minimum sentences to dismantle drug trafficking. But the reality on the ground is that most prosecutions, despite resulting in significant prison sentences, only net insignificant "mules" or small-time traffickers. Long federal sentences routinely go to the lower-level targets while the "kingpins" and their drug trafficking operations continue to thrive.

This problem is not confined to the punishment of drug offenses. In the white collar world, for example, long sentences are too easily the product of manipulating the "dollar-loss figure" guideline calculations—resulting in baffling and unfortunate prosecutions. One example of this is Sholom Rubashkin, a 52-year old Jewish Rabbi with no criminal history who is serving 27 years in federal prison for financial fraud despite there being no actual financial victim of the alleged fraud.

This obsession with count stacking and maximizing every prison sentence also endangers the integrity of the criminal justice system. Law enforcement is incentivized to allow the commission of multiple offenses in order to enable federal prosecutors to stack charges and get the longest possible mandatory minimum sentence. Rather than make an arrest as soon as they have evidence of an offense, agents may watch the offenders commit one or more further crimes, which unnecessarily increases the potential for further crime victims.

Not only is the overall prison population a problem, but recidivism is endemic. Most of the low-level, non-violent offenders in our prisons are not rehabilitated during their incarceration and too often return to prison, exponentially increasing the cost to the federal system. A Bureau of Justice study from 2005 to 2008 tracked 404,638 prisoners in thirty states. The study found that 67.8 percent of prisoners were rearrested within three years of release and 76.6 percent were rearrested within five years of release. Of those who were rearrested, more than half were rearrested within the first year of their release. The study also found that property and drug offenders were the most likely to be rearrested – 82.1 percent and 76.9 percent, respectively. The result of this recidivism and the focus on incarceration instead of rehabilitation, especially

for low-level offenders, is a prison population that is becoming a real and immediate threat to public safety.

The growing prison budget is consuming an ever-increasing percentage of the DOJ's budget. Over the last 15 years, the Bureau of Prison's budget has increased from 15 percent of the DOJ's budget to more than 25 percent. The overall cost of detaining federal offenders consumes more than 30 percent of the DOJ's budget. This number has doubled since 2000. During my tenure as U.S. Attorney for the District of Utah I saw first-hand the effects of budget constraints within the DOJ. Many U.S. Attorneys' offices were unable to hire additional prosecutors and were forced to abandon law enforcement obligations and longtime partnerships. The budget, instead of law enforcement, all too often has become the absolute center of focus of the DOJ and its U.S. Attorneys.

Another troubling trend that has exacerbated the problems facing the federal prison system is the expansion of the federal criminal code and federal regulations and the associated disappearance of *mens rea*. Not only are there thousands more criminal laws than in the past, but it is easier to violate them, often without any intent. This has led to the incarceration of people who not only lack the intent traditionally required for incarceration but who often pose very little risk to society and have a similarly low risk of recidivism.

One well-known example of the federal criminal code run amok is the story of Wade Martin. In 2003, Mr. Martin, a native Alaskan fisherman, sold ten sea otter pelts to a person he believed to also be a native Alaskan, as was allowed under federal law. In fact, the person to whom he sold the otters was not a native Alaskan and Mr. Martin was arrested for violating the Marine Mammal Protection Act, which did not contain a meaningful *mens rea* element sufficient to protect Mr. Martin. Mr. Martin, facing federal criminal prosecution, pleaded guilty in 2008 to the federal offense. Though his punishment was relatively light, he carries around with him the stigma of a federal criminal record for an arguably innocent mistake and for which the statute may not have intended to meet out any punishment.

Perhaps a more extreme example is that of Dane A. Yirkovsky. In 1998, Mr. Yirkovsky, who had a felony criminal record, was working as a drywall installer and found a .22 caliber bullet underneath a carpet where he was working. He kept the bullet and put it in a box in his room. A few months later, police found the bullet during a search of Mr. Yirkovsky's room. Federal officials charged him with possession of a firearm by a felon, solely based on the .22 caliber bullet. Mr. Yirkovsky received a 15 year sentence for possession of that single .22 caliber bullet. It did not matter that Mr. Yirkovsky did not know that possession of the bullet violated the prohibition of him possessing a firearm. The mere act, without knowledge he was violating any law or associated intent, was enough to send him to prison for 15 years – exacting immense human and financial cost.

It is beyond the capacity of any person – or even any organization – to keep abreast of the ways in which they might run afoul of the more than 4000 federal criminal statutes. Moreover, a person can run afoul of many of those laws without having any knowledge the law exists or any intent whatsoever of breaking the law. Some estimates put the number of federal regulations which carry criminal penalties at over 300,000, with more promulgated every year. The Code of

Federal Regulations is over 80,000 pages. Many of these criminal regulations lack sufficient, or any, *mens rea* element. One example is the Migratory Bird Treaty Act, in which technically one could potentially be prosecuted for violating by unintentionally hitting a pigeon with a car or merely owning a cat that attacks or kills such bird. Another example is the Foreign Corrupt Practices Act, which corporations refuse to litigate because of its non-existent *mens rea* requirement. As a result, FCPA claims always settle, leaving the act unclarified and without interpretation by the courts.

According to a study by the Heritage Foundation and the National Association of Criminal Defense Lawyers, 40 percent of nonviolent offenses created or amended during the 109th and 111th Congresses had "weak" *mens rea* requirements at best. Minimal *mens rea* requirements may make sense for some crimes, such as murder, but, it is unrealistic and dangerous to reduce the standard of intent when coupled with the explosion in the number of criminal statutes. When so much conduct is made illegal, it is unrealistic to expect people to be fully apprised of what constitutes illegal conduct under the criminal code. According to a study of the American Bar Association, as of 1998, more than 40 percent of the federal criminal code created since the Civil War was enacted, was created after 1970. Two follow-up studies showed that the post-1970 pace continues unabated.

All of this violates the most basic sense of justice upon which our system is built, as the Supreme Court described in *Morissette v. United States*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle . . . .
>
> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.[1]

With the explosion of the regulatory state and its gravitation toward pursuing parallel criminal investigation and charges, the *mens rea* requirement is all the more important. Virtually all of

[1] *Morissette v. United States*, 342 U.S. 246, 250-52, 72 S. Ct. 240, 243-44, 96 L. Ed. 288 (1952); *see also United States v. Staples*, 511 U.S. 600, 619 (1994); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971).

these new crimes are *malum prohibitum* – wrong only because prohibited – instead of the historical *malum in se* – wrong in itself. The protection of *mens rea* for *malum prohibitum* crimes is important, as the only indication that they are criminal is the fact that they are found in the criminal code; basic morals or senses of right and wrong are now insufficient to escape the clutches of the federal criminal code. As Justice Scalia once put it, this is "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation" that does not deal "with the nitty-gritty."[2] But as recently affirmed by the Supreme Court, "no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed."[3] Moreover, throwing people in prison who lack any intent of wrongdoing only serves to exacerbate the challenges of an already crowded prison system.

Department heads and congressional leaders have becoming painfully aware that the growing prison population presents numerous challenges, including consuming an ever-increasing percentage of the Department of Justice's budget. According to the Statement of the Department of Justice's Inspector General before Congress on February 25, 2015, concerning the Department of Justice's budget request:

> The Department continues to face two interrelated crises in the federal prison system. First, despite a decrease in the total number of federal inmates in FY 2014, the Department projects that the costs of the federal prison system will continue to increase. Second, federal prisons remain significantly overcrowded and therefore face a number of important safety and security issues.
>
> The costs to operate the federal prison system continue to grow, resulting in less funding being available for the Department's other critical law enforcement missions. . . . For example, in FY 2000, the budget for the BOP totaled $3.8 billion and accounted for about 18 percent of the Department's discretionary budget. In comparison, in FY 2015, the BOP's enacted budget totaled $6.9 billion and accounted for about 25 percent of the Department's discretionary budget. During this same period, the rate of growth in the BOP's budget was almost twice the rate of growth of the rest of the Department. The BOP currently has more employees than any other Department component, including the FBI, and has the second largest budget of any Department component, trailing only the FBI.
>
> . . .
>
> Given this crisis in the prison system, the Department needs to better utilize programs that can assist in prison population management . . . .
>
> . . .
>
> In its FY 2014 Agency Financial Report, the Department once again identified prison overcrowding as a programmatic material weakness, as it has done in every such report since FY 2006. Yet, the federal prisons remain only slightly less crowded today than they were in FY 2006. As of October 2014, federal prisons operated at 30 percent overcapacity (as compared to 36 percent overcapacity in FY 2006), with 52 percent overcrowding at higher security facilities and 39 percent at medium security facilities. Overcrowding in the federal prison system has prevented the BOP from reducing its inmate-to-correctional officer ratio, which according to the Congressional Research Service has remained at approximately 10-to-1 for more than a decade – greater than the ratio found in the 5 largest state prison facilities. [4]

---

[2] *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).
[3] *United States v. Santos*, 533 U.S. 507, 514 (2008).
[4] https://oig.justice.gov/testimony/t150225.pdf. *See also* https://oig.justice.gov/testimony/t150507.pdf.

Further, according to the Department's official viewpoint as of May 2015:

> At the same time it focuses on prison costs, the Department must continue its efforts to ensure the safety and security of staff and inmates in federal prison and detention facilities. Prison overcrowding presents the most significant threat to the safety and security of BOP staff and inmates. In its FY 2013 Agency Financial Report, the Department once again identified prison overcrowding as a programmatic material weakness, as it has done in every such report since FY 2006. Yet, the federal prisons remain almost as crowded today as they were in FY 2006. As of June 2014, federal prisons operated at 33 percent overcapacity, with 42 percent overcrowding at higher security facilities and 40 percent at medium security facilities. Overcrowding in the federal prison system has prevented the BOP from reducing its inmate-to-correctional officer ratio, which according to the Congressional Research Service has remained at approximately 10-to-1 for more than a decade. The Department's FY 2014-2018 strategic plan includes an outcome goal to reduce system-wide crowding in federal prisons to 15 percent by FY 2018. However, as of June 2014, the BOP's Long Range Capacity Plan projects prison overcrowding to be 38 percent by FY 2018, higher than it is today. To reach the long-term outcome goal in the strategic plan, without expending additional funds to build more federal prison space or to contract for additional non-federal bed space, the Department would have to achieve a net reduction of about 23,400 federal prisoners from the June 2014 prison population, based on the existing bed space available within the federal prison facilities.[5]

There are two meaningful ways the justice system needs to be reformed to begin addressing these issues: first, on the front end, through a thoughtful editing and redrafting of current federal criminal laws and sentencing policies, including addressing the *mens rea* elements of the federal criminal code, and second, on the back end, through attentive implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to reduce the risk of recidivism, control corrections spending, and manage the prison population.

Focusing on sentencing reforms is simply not enough. The issues associated with risk and recidivism reduction must also be addressed in order to offset the out-of-control incarceration costs plaguing the federal system. In fact, increases in public safety will only come from recidivism reduction. The Department of Justice has recognized the need for such reforms.[6]

According to the Department's official viewpoint as of May 2015:

> The Department also has indicated its support for programs that provide alternatives to incarceration, coupled with treatment and supervision, in an attempt to reduce recidivism. In an August 2013 speech, the Attorney General identified state-sponsored initiatives that he said served as effective alternatives to incarceration by providing offenders the treatment and supervision designed to reduce recidivism while also reducing states' prison populations. The Attorney General also instructed all U.S. Attorneys' Offices (USAOs) to designate a Prevention and Reentry Coordinator in their respective Districts to expand on existing programs that promote the implementation of the Smart on Crime initiative. The OIG is currently conducting an audit that

---

[5] https://oig.justice.gov/challenges/2014.htm#1.

[6] http://www.justice.gov/criminal/foia/docs/2014annual-letter-final-072814.pdf. "Various efforts to reduce reoffending have yielded promising results, and legislators, prosecutors, courts, and probation offices around the country are focusing more and more on effective prisoner reentry."

> will evaluate the design and implementation of pre-trial diversion and drug court programs, variances in the usage of the programs among the USAOs, and costs savings associated with successful program participants.[7]

As such, Congress should take quick and decisive action to address the growing cost of the federal prison system and ensure that the Department of Justice can continue to run our prisons safely and securely without compromising the scope or quality of the Department's many other critical law enforcement missions.

The House of Representatives and Senate should, therefore, move swiftly to debate, markup, and pass into law H.R.759, the Recidivism Risk Reduction Act and S.467, the CORRECTIONS Act, respectively. Both bills enjoy broad bipartisan support.[8] Though some details of the bills differ, the broad prescriptions found in both are parallel and would begin addressing the issues of overcrowding in our federal prisons, would make our communities safer, and would save millions of dollars a year. Additionally, these bills would better prepare inmates to re-enter society and would help ensure that first-time offenders do not become repeat offenders. It is my opinion that these bills are the most likely of any proposal to date to have such an impact.

California offers a stark warning of the potential consequences of failing to deal with these issues through thoughtful, planned out measures – by passing H.R. 759 and S.467 – and instead allowing the terms to be dictated by the courts. This is exactly what happened in California. By 1998, California began facing pressure through lawsuits to reform its prison population, which was bursting at the seams. By October of 2006, then Governor Schwarzenegger declared a state of emergency for California's prisons, yet neither the governor nor the legislature took action to remedy the problem. Instead, in July of 2007, the Court of Appeals for the Ninth Circuit convened a three-judge panel to address the issue of California's prison population. The panel found that California's prison population violated prisoners' constitutional rights. In August of 2009, the three-judge panel ordered California to submit a plan within 45 days that would, in no more than two years, reduce the California's prison population to no more than 137.5 percent of its adult institution's design capacity. To meet that goal, California would have to release a staggering 46,000 of its 156,000 prisoners. In 2011, the Supreme Court upheld in a 5-4 ruling the panel's decision.

After releasing some 25,000 prisoners, in February of 2014, the state was allowed to extend the timetable for compliance with the order on reduction to February of 2016. However, California was ordered to immediately implement expanded parole programs and early release credits, including allowing non-violent second strike offenders to have their sentences reduced by up to one-third and to be eligible for parole when they had served half their sentences. If California were to miss any of the benchmarks on the way to its final February 2016 goal, a court-appointed

[7] https://oig.justice.gov/challenges/2014.htm#1.

[8] S.467 was introduced by Sen. John Cornyn (R-TX) and is co-sponsored by Sens. Richard Blumenthal (D-CT), Christopher Coons (D-DE), Al Franken (D-MN), Lindsey Graham (R-SC), Orrin Hatch (R-UT), Mike Lee (R-UT), Marco Rubio (R-FL), Charles Schumer (D-NY), and Sheldon Whitehouse (D-RI). H.R. 759 was introduced by Rep. Jason Chaffetz (R-UT) and is co-sponsored by Reps. Cedric Richmond (D-LA), Trey Gowdy (R-SC), and Hakeem Jeffries (D-NY).

officer was given the power to release as many inmates as needed to bring the state into compliance.

In November of 2014, California had still not implemented the parole program it had agreed to in February of that same year. Because of this, the court ordered that California do so by the beginning of January 2015. Rather than addressing the issue through careful and deliberate means, California spent years in court battling efforts to reduce its prison population. The time, effort, and money spent on these court battles would have undoubtedly been better spent devising systematic ways of reducing its prison population in a safe, deliberate manner, as other states have done. Instead, California was forced to mass release tens of thousands of inmates in a short period of time; California also started transferring much of the population burden on county jails, which were ill-equipped to take on the burden. At the end of 2014, over five years after the Ninth Circuit had ordered it to reduce its prison population, California voters passed a ballot measure easing punishment for some property and drug crimes, reducing certain felonies to misdemeanors. While the ballot initiative allowed California to meet its benchmark goal, it also resulted in an uptick in property crime, including shoplifting, grand theft, and writing bad checks. For example, in San Francisco burglaries are up 20 percent, larceny and theft are up 40 percent, and auto theft is up more than 55 percent between 2010 and 2014.

While California has been able to significantly reduce its prison population, even doing so ahead of schedule, by not getting ahead of the problem and waiting to be forced by the courts to act, it wasted valuable time and resources. When it finally started to release prisoners, it had to do it in a haphazard way, putting the public at risk and doing nothing to reduce the risk of recidivism of those it was releasing. Even the recent ballot measure and other measures by the governor's office affect only the symptom – overcrowding – while doing little if anything to alleviate the actual cause of California's massive prison population. The key ingredient missing in California's approach are effective rehabilitation programs that better prepare inmates to return to life outside of prisons, making them less likely to reoffend – which in turn reduces the prison population and associated cost to the taxpayers, and keeps the public safe.

In contrast, several states, many of which are among the most conservative in the nation, have moved in recent years to implement similar legislation as is now before Congress in H.R. 759 and S.467. Accordingly, the underlying, evidence-based reform practices found in this legislation have already been proven successful in states such as Texas, Rhode Island, Ohio, Georgia, and North and South Carolina. In Texas, for example, similar legislation led to the closure of a prison for the first time in the state's history in 2011 and another in 2013. The financial benefits were significant; in the two years after the legislation was enacted in 2007, Texas saved over $443 million. Since 2008, when the legislation was enacted in Rhode Island, the state has seen a nine percent decline in its prison population and a seven percent decrease in the crime rate. One reason for the reduction in crime is that inmates that are better prepared to re-enter communities are at a lower risk for recidivism.

At the same time, for the longer term, I also urge Congress, the Judiciary, and the Executive Branch to work together to perform fact-finding, identify, and study the effects of the front-end policies that have created imbalance, and then develop thoughtful reforms that will allow us to achieve a more appropriate balance in the federal criminal justice system.

Moreover, I urge Congress to address the oppressive, costly, and burdensome regulatory regime set forth in the federal criminal code. A few ways to begin to remedy the situation include requiring regulatory agencies to identify and list all regulations that include criminal penalties, pass a default *mens rea* provision that would apply to all regulations to which no *mens rea* element would otherwise apply, and otherwise reign in the ability of federal agencies to promulgate regulations that include criminal elements without the involvement of Congress.

The U.S. federal justice system locks up far too many people for far too long. The practice of charge stacking too often leads to sentences that are grossly disproportionate to any actual offense committed. The lowest level offenders are swept up while those who are at the head of the criminal activity are free to continue their illicit behavior. In designing our criminal justice system we must balance the interests of justice, economy, and safety. Prosecuting and imprisoning the relatively less-dangerous is extremely expensive. We should not lock them up for longer than is necessary, and once imprisoned our goal should be to make them productive members of society and reintegrate them into society as quickly and as safely as possible. Spending the vast amount of our finite time and resources on these offenders only serves to make our communities less safe as there is less time and money to pursue the worst offenders.

The principles contained in H.R.759 and S.467 have proven successful in a number of states across the country and should be implemented as soon as possible. The reforms found in these measures are no longer the political third-rails they once were. These bills would free up the time and resources of the DOJ and would better prepare inmates to become contributing members of society.

As a former law enforcement official, I know first-hand that our current system is far too costly, does not focus limited resources on the most crucial areas of enforcement, and does not prepare inmates, especially low-level offenders, to return to life outside of prison. These problems can be addressed by the legislation currently before the House and Senate. I urge members of the Oversight Committee to act quickly, before the problem becomes an emergency that must be addressed by drastic, emergency measures instead of deliberate, careful measures designed to protect the public.

1336375