

The Charles Colson Task Force on Federal Corrections
March 11, 2015
Submitted by
The Brennan Center for Justice at NYU School of Law

Dear Chair J.C. Watts, Jr., and Vice-Chair Alan Mollohan, and distinguished members of the Task Force:

Thank you for the opportunity to submit written testimony before the Task Force.

The Brennan Center for Justice at New York University School of Law¹ is a nonpartisan law and policy institute that seeks to improve the American systems of democracy and justice. The Justice Program at the Brennan Center is dedicated improving the criminal justice system so that it better reduces crime and reduces mass incarceration. The Brennan center offers testimony on two requested topics: (1) the impact of current federal prosecution, sentencing, release, and supervision policies and practices, and suggestions for reform; and (2) options to reduce the population and/or avert further growth.

I. The Impact of Current Federal Prosecution Practices and Suggestions for Reform

The Brennan Center's recent report, *Federal Prosecution for the 21st Century*, proposes a mission shift for federal prosecution: a reorientation toward the twin goals of reducing crime and reducing mass incarceration.² It recommends that the Justice Department institutionalize this

change by implementing new priorities and success measures. As explained in the next section, our research indicates that if this reform resulted in 100,000 fewer federal prisoners per year, the Justice Department would save over \$1.2 billion annually and \$19 billion over ten years – without compromising public safety.

The practices of federal prosecutors, along with other criminal justice agencies, have contributed to the drastic drop in crime over the past 20 years. Among other things, violent crime has fallen by almost half since its peak in 1991, and property crime is down 43 percent.³ The progress the U.S. has made when it comes to combatting crime is truly remarkable.

It is becoming clear to a broadening array of Americans that mass incarceration is unnecessary and harmful. Conservatives and progressives alike have come to see that the country has passed the point where its number of prisoners can be justified by the potential benefits. Prosecutors are well-positioned to create opportunities to improve public safety while also reducing the nation’s incarceration footprint. They are granted unique authority to make charging decisions, enter cooperation agreements, accept pleas, and frequently dictate sentences or sentencing ranges.

Prosecutors play an important role in shaping the ultimate sentence for a defendant, despite the guidelines. Prosecutorial charging decisions determine the “base offense level” for guideline calculations. For example, a prosecutor may charge an individual for possession of drugs in lieu of charging a defendant for possession of drugs with intent to distribute. This charging decision can play a significant role regarding where on the scale a defendant’s sentence starts.⁴

Additionally, at sentencing hearings, a prosecutor can introduce a motion to the court to reduce a defendant’s sentence if the prosecutor deems that the defendant substantially assisted the government in other criminal investigations.⁵ When prosecutors decide to bring such motions,

defendants can avoid mandatory minimum penalties and receive shorter sentences.⁶ These are just a few of the many ways that prosecutors can affect case outcomes.

The time is ripe for federal prosecutors to adopt a reformed set of priorities that reflect 21st century criminal justice goals. The Brennan Center report recommends priorities and success measures for federal prosecutors. These priorities are based on a Blue Ribbon Panel discussion with a group of former and current federal prosecutors, follow-up conversations with the panelists, and research on prosecutorial practices.

Specifically, we recommend that the Task Force urge the Justice Department to do the following:

- Articulate new priorities for federal prosecution: reducing violent and serious crime, reducing incarceration, and reducing recidivism; reducing pretrial detention;
- Provide additional funding for Offices that successfully reduce the numbers of defendants sent to prison;
- Evaluate the performance of U.S. Attorneys' Offices based on "success measures" that track progress toward these priorities;
- Modify evaluations of individual prosecutors to include similar success measures; and
- Encourage U.S. Attorneys' Offices to implement complementary changes in their individual offices.

Some of these reforms can be made legislatively through Congress. However, the Justice Department does have the authority to enact these changes.

II. Options to Reduce the Federal Prison Population

To implement this reform, the Justice Department should start by encouraging U.S. Attorneys to focus on reducing two drivers of the federal prison population: the number of nonviolent offenders sent to prison and the number of pretrial detainees held.

Nearly one-quarter of the Justice Department's budget (\$6.9 billion) is absorbed by the Bureau of Prisons.⁷ The marginal cost of incarcerating a federal prisoner is estimated at \$12,900 annually.⁸

Attached is a fiscal impact statement created by the Brennan Center, which provides a rough estimate projecting that this reform would likely result in approximately 100,000 *fewer* federal prisoners per year, saving the Justice Department over \$1.2 billion annually and \$19 billion over ten years – without compromising public safety.⁹ As explained in this fiscal impact statement, higher or lower cost savings could result depending on how deeply the reforms are institutionalized within U.S. Attorneys' Offices.

It is time to ensure federal criminal justice practices align with today's challenges and spend taxpayer dollars wisely. This reform is practical, can be implemented swiftly, and would save billions while continuing to protect public safety.

Respectfully submitted,

Lauren-Brooke Eisen
Counsel, Justice Program
lbeisen@nyu.edu

Nicole Austin-Hillery
Director and Counsel, Washington Office

Brennan Center for Justice at NYU School of Law
1140 Connecticut Ave NW, Suite 1150

Washington, DC 20036
(202) 249-7190

¹ This letter does not represent the opinions of NYU School of Law.

² LAUREN-BROOKE EISEN, ET AL., BRENNAN CTR. FOR JUSTICE, FEDERAL PROSECUTION FOR THE 21ST CENTURY (2015), *available at* https://www.brennancenter.org/sites/default/files/publications/Federal_Prosecution_For_21st_Century.pdf.

³ In the twenty years from its peak in 1991, the violent crime rate has fallen from an annual 759 crimes per 100,000 people to 387 crimes per 100,000 people. Property crime has fallen from 5140 to 2905 crimes per 100,000 people. *See UCR Data Online*, Uniform Crime Reporting Statistics, <http://www.ucrdatatool.gov/index.cfm> (providing crime statistics from 1960 to 2012).

⁴ *See* U.S. Sentencing Guidelines Manual § 1B1.3(a) (2013).

⁵ U.S. Sentencing Guidelines Manual § 5K1.1 (2011); 18 U.S.C. § 3553(e) (substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence).

⁶ U.S. Sentencing Guidelines Manual § 5K1.1 (2011); 18 U.S.C. § 3553(e) (substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence). The safety valve provides the alternative method to circumvent legislatively required mandatory minimum sentences. The criteria for that exception are quite narrow. 18 U.S.C. § 3553(f).

⁷ U.S. DEP'T OF JUSTICE, FY 2014 BUDGET SUMMARY 3, 11 (2013), *available at* <http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/11/fy14-bud-sum.pdf>.

⁸ Generally speaking, marginal costs should be used in a cost-savings calculation because average costs are likely much higher than marginal costs. The Vera Institute of Justice has estimated marginal costs as on the order of half average prisoner costs. *See generally* CHRISTIAN HENRICHSON & SARAH GALGANO, VERA INST. OF JUSTICE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS (2013), *available at* <http://www.vera.org/sites/default/files/resources/downloads/marginal-costs-guide.pdf>. The annual cost of federal prisoners (\$25,800) was estimated by averaging the reported annual costs of minimum (\$21,006), low (\$25,378), medium (\$26,247), and high security prisoners (33,930). *See* NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012), *available at* <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.

⁹ OLIVER ROEDER & NICOLE FORTIER, BRENNAN CTR. FOR JUSTICE, FEDERAL PROSECUTION FOR THE 21ST CENTURY: FISCAL IMPACT STATEMENT (2015), *available at* https://www.brennancenter.org/sites/default/files/publications/Federal_Prison_Cost_Savings_0.pdf.

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

Federal Prosecution for the 21st Century: Fiscal Impact Statement

By Oliver Roeder, Nicole Fortier¹

The Brennan Center’s recent report, [Federal Prosecution for the 21st Century](#), proposes a mission shift for federal prosecution: a reorientation toward the twin goals of reducing crime *and* reducing mass incarceration. It recommends that the Justice Department institutionalize this change by implementing new priorities and success measures.

This analysis presents the estimated budgetary cost savings of a reduction in the federal prison population achieved by implementing this reform. **At best estimate, this reform would result in approximately 100,000 fewer federal prisoners per year, saving the Justice Department over \$1.2 billion annually and \$19 billion over ten years – without compromising public safety.**¹ As explained below, higher or lower cost savings could result depending on how deeply the reforms are institutionalized within U.S. Attorneys’ Offices.

Summary of Report Recommendations

The Justice Department can implement 21st century federal prosecution by:

- Articulating new priorities for federal prosecution: reducing violent and serious crime, reducing incarceration, and reducing recidivism;
- Evaluating the performance of U.S. Attorneys’ Offices based on “success measures” that track progress toward these priorities;
- Modifying the evaluations of individual prosecutors to include similar success measures;
- Provide additional funding for Offices that successfully reduce the numbers of defendants sent to prison; and
- Encouraging Offices to implement complementary changes in their individual offices.

As Attorney General Eric Holder stated in September, “[These] concrete recommendations – that federal prosecutors should prioritize reducing violence, incarceration, and recidivism – are consistent with the aims of the Smart on Crime initiative. The new metrics [proposed] – such as evaluating progress by assessing changes in local violent crime rates, numbers of federal prisoners initially

¹ Oliver Roeder is an Economics Fellow at the Brennan Center. Nicole Fortier is a Counsel at the Center and co-author of *Federal Prosecution for the 21st Century*.

found in particular districts, and changes in the three-year recidivism rate – lay out a promising roadmap.”

The Brennan Center’s recommendations would reduce the number of inmates held by the federal Bureau of Prisons (BOP).

Federal Prison Population Affected

To implement this reform, the Justice Department should start by encouraging U.S. Attorneys to focus on reducing two drivers of the federal prison population: the number of nonviolent offenders sent to prison and the number of pretrial detainees held.

Table 1 shows federal prison admission data for the most recent year available, which is 2010. Of the 146,130 individuals admitted to the BOP, 76,473 were pretrial detainees and 58,461 were convicted of nonviolent crimes. These two categories amount to 92 percent of federal admissions. Research has shown that alternatives to incarceration – such as probation, supervision, or monitoring – could be equally effective for many of these individuals. Many pretrial detainees – by some estimate, up to 80 percent – are at low risk of failing to return to court or of committing a new crime while on release.²

Table 1: Pretrial Detainees and Nonviolent Offenders Sent to Federal Prison (2010)

Offense	Number Sentenced to Prison	Median Prison Term
Property	7,224	24 months
Drug	23,129	60 months
Public order	3,012	27 months
Immigration ³	22,251	15 months
Misdemeanor	2,745	3 months
Pretrial	76,473 (52%)	4 months
Total Nonviolent and Pretrial Inmates	134,834 (92%)	—
Total Inmates Admitted	146,130	—

Source: U.S. Department of Justice, Bureau of Justice Statistics.⁴

Using this data, we estimate three different results of this reform – a high estimate, medium estimate, and low estimate – based on how deeply the reform is institutionalized and followed:

- *High Estimate:* In this scenario, federal prosecutors would use their discretion to ensure that 80 percent of eligible prisoners and defendants would not be sent to BOP. Federal prosecutors would still take action to seek and recommend that 20 percent of defendants are detained pretrial and 20 percent of nonviolent offenders are sent to prison, despite Justice Department directives, evaluations, and incentives not to. This could result if all recommendations of the report were institutionalized, implemented, and evaluated at the Justice Department and in most U.S. Attorneys’ Offices.
- *Medium Estimate:* Prosecutors would seek and recommend that 50 percent of defendants are detained pretrial and 50 percent of nonviolent offenders are sentenced to prison. This scenario assumes a meaningful, but not wholesale, shift in practice. Given legitimate public

safety reasons to hold some nonviolent and pretrial detainees, the wide discretion afforded prosecutors, and possible challenges of implementation, this scenario may be the most likely.

- *Low Estimate:* In this scenario, prosecutors would seek and recommend that 10 percent of nonviolent and pretrial detainees are sent to BOP. This scenario assumes that prosecutors largely would not follow Department directives, evaluations, and incentives. This could result if the Department does not take steps to institutionalize this change, or if U.S. Attorneys’ Offices do not implement complementary changes.

Table 2 estimates the total number inmates not sent to prison under each scenario, taking into account typical lengths of stay.⁵

Table 2: Project Number of Inmates Diverted, by Scenario

	High Estimate	Medium Estimate	Low Estimate
Property	11,558	7,224	1,445
Drug	92,516	57,823	11,565
Public order	5,422	3,389	678
Immigration	22,251	13,907	2,781
Misdemeanor	549	343	69
Pretrial	20,281	12,676	2,535
Total	152,577	95,361	19,072

Cost Savings

Nearly one-quarter of the Justice Department’s budget (\$6.9 billion) is absorbed by the Bureau of Prisons.⁶ The marginal cost of a incarcerating a federal prisoner is estimated at \$12,900 annually.⁷

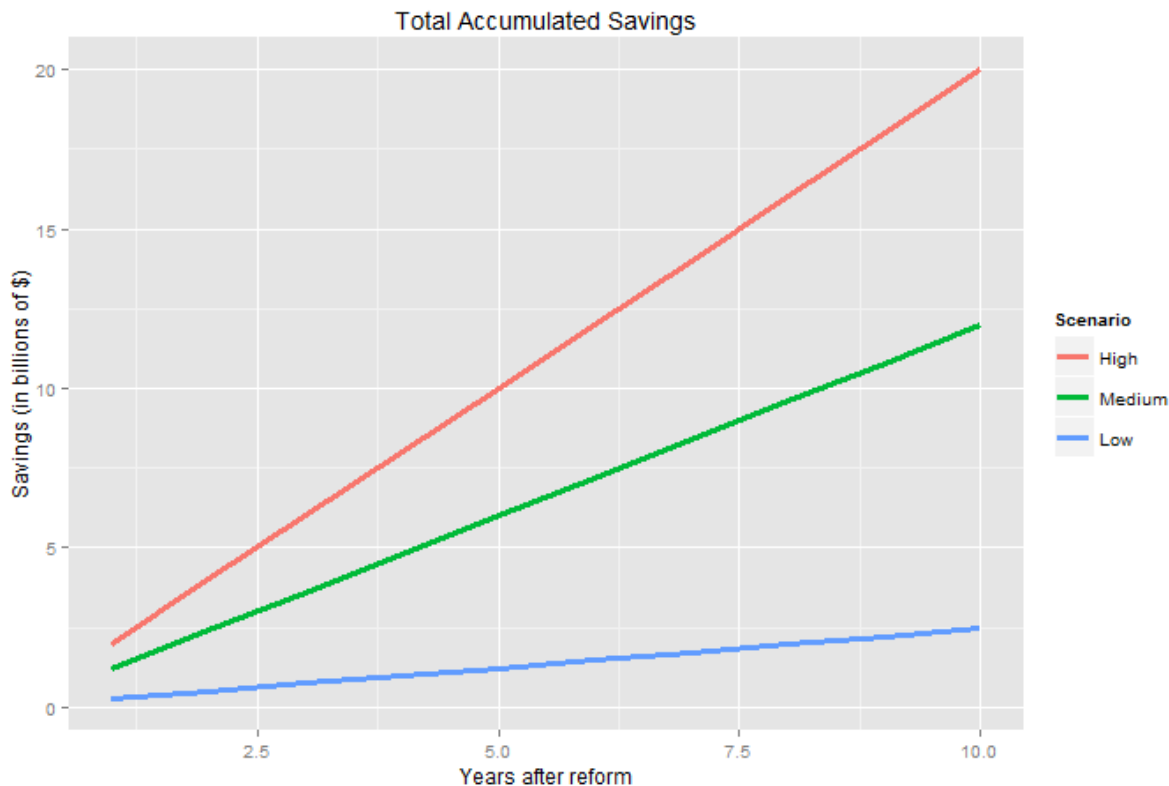
Table 3 depicts the annual amount the federal government would save by enacting each scenario.⁸

Table 3: Annual Marginal Costs Savings

High Estimate	Medium Estimate	Low Estimate
\$2.0 billion	\$1.2 billion	\$246 million

Figure 1 depicts the federal government’s total expected accrued savings over time, assuming the characteristics of federal defendants entering the prosecution system hold steady over time.

Figure 1: Ten-Year Estimated Savings



1. High Estimate: The federal government would save nearly **\$20 billion over 10 years**.
2. Medium Estimate: The federal government would save nearly **\$12 billion over 10 years**.
3. Low Estimate: The federal government would save **\$2.5 billion over 10 years**.

Notably, as the reform takes effect year after year, these practices would become more ingrained and solidified within U.S. Attorneys’ Offices. We would therefore expect to see more prisoners and defendants diverted from prison, and more cost savings than the estimates above. Additionally, these savings are based on *marginal* estimates not total cost savings, meaning they do not include cost savings if prison were to be closed.

Conclusion

The time is ripe to ensure federal criminal justice practices align with today’s challenges and spend taxpayer dollars wisely. This reform is practical, can be implemented swiftly, and would save billions while continuing to protect public safety.

ENDNOTES

¹ This analysis does not include the administrative or other costs of implementing these reforms. Nor does it include the cost of any additional public benefits drawn by released prisoners. Additional cost savings would also result from a savings in prosecutorial resources. This analysis only calculates the estimated cost savings of a reduction in the prison population.

² See, e.g., *Leading in National Standards*, PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, http://www.psa.gov/?q=leading_national_standards (stating that “on average in the District of Columbia, 80% of persons arrested and charged with a crime are released to the community, either on personal recognizance or with supervised release conditions”).

³ For the purposes of this estimation, immigration qualifies as a nonviolent offense. However, if immigration is removed from the analysis, the projected savings remain fairly consistent: Over 1 year, the federal government could still be expected to accrue nearly \$1.7 billion under the high estimate, over \$1 billion under the medium estimate, and \$210 million under the low estimate. Over 10 years, the federal government could be expected to accrue nearly \$17 billion under the high estimate, \$10.5 billion under the medium estimate, and \$2 billion under the low estimate.

⁴ MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2010 22 & tbl.13 (2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf> (providing the number of sentenced federal offenders sentenced to prison by offense in 2010); see also *id.* at 2 (finding the number of inmates in 2010 who were detained pretrial as compared to the general BOP population); see also THOMAS COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995-2010 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf> (providing number of pretrial detainees in 2010); see also THOMAS COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008-2010 8 (2012) available at <http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf> (providing average length of stay for pretrial detainees in 2010).

⁵ For more on how prosecutors can exercise discretion to achieve these changes, see pages 43 to 52 of report.

⁶ U.S. DEP'T OF JUSTICE, FY 2014 BUDGET SUMMARY 3, 11 (2013), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/11/fy14-bud-sum.pdf>.

⁷ Generally speaking, marginal costs should be used in a cost-savings calculation because average costs are likely much higher than marginal costs. The Vera Institute of Justice has estimated marginal costs as on the order of half average prisoner costs. See generally CHRISTIAN HENRICHSON & SARAH GALGANO, VERA INST. OF JUSTICE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS (2013), available at <http://www.vera.org/sites/default/files/resources/downloads/marginal-costs-guide.pdf>. The annual cost of federal prisoners (\$25,800) was estimated by averaging the reported annual costs of minimum (\$21,006), low (\$25,378), medium (\$26,247), and high security prisoners (33,930). See NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012), available at <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.

⁸ These estimated savings include savings in the current year, as well as *savings expected to accrue* in the future from avoiding long prison sentences.