

**Testimony**  
**"Rising Prison Costs: Restricting Budgets and Crime Prevention  
Options"**

**Testimony before the Senate Judiciary Committee**

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Chairman Leahy, Ranking Member Grassley and members of the committee:

Thank you for the opportunity to testify today.

My name is Brett Tolman, and I am currently a shareholder at the law firm of Ray Quinney & Nebeker, PC based in Salt Lake City, Utah. I am the former United States Attorney for the District of Utah--a position I held for nearly 4 years from 2006 to 2009. As U.S. Attorney I made it a priority to protect children, to aggressively prosecute mortgage fraud, to preserve American Indian heritage, and to stem the abuse of illicit and prescription drugs. Prior to serving as US Attorney, I was Chief Counsel for Crime and Terrorism for the United States Senate Judiciary Committee under Chairman Specter and before him Chairman Hatch.

Prior to my service in the United States Senate, I was an Assistant United States Attorney for the District of Utah. As a line prosecutor in the federal system I personally prosecuted hundreds of felonies. While I prosecuted mostly violent felonies, I also participated in the prosecution of white collar criminals, drug traffickers, illegal immigrants, and others. Indeed, in my nearly a decade with the Department of Justice I was responsible for the prosecution of individuals currently serving long prison sentences--some as long as 30+ years in federal prison.

As I sit here testifying before this Committee I am honored to have served in such a remarkable institution as the Department of Justice. However, my years of service also instructed me as to the great deficiencies in the federal criminal justice system. The current one-size-fits-all approach and the warehousing of prisoners is proving to not only be dangerous to public safety but an unthoughtful misuse of precious taxpayer dollars. Experts across the political spectrum are finding themselves in agreement that the current growth of, and costs associated with, the federal corrections system is unsustainable.

According to the Bureau of Prisons Fiscal Year 2013 Budget Submission, from the 1940s to the 1980s, the population remained stable at approximately 24,000 prisoners. But it more than doubled in the 1980s, to approximately 58,000, and more than doubled again in the 1990s, to approximately 134,000. In the 2000s, the number of Federal prisoners increased another 45 percent, to approximately 210,000. The Federal prison population now closes in on a quarter-million prisoners--and will increase by an estimated 11,500 by FY2013.

Overall, the BOP is operating at 38 percent above its rated capacity, with 53 percent overcrowding at high security facilities and 49 percent overcrowding at medium security facilities. Since fiscal year 2000, the inmate to staff ratio has increased from about 4:1 to a projected 5:1 in fiscal year 2013. Such overcrowding increases the security risks for correctional officers and prisoners, and undermines the ability to provide effective recidivism reduction programming.

Meanwhile, BOP costs are growing at an alarming and unsustainable rate. From fiscal year 1998 to fiscal year 2012, the BOP enacted budget increased 113 percent, from \$3,100,000,000 to \$6,600,000,000. And BOP anticipates continued budget growth. The President's fiscal year 2013 budget request for the BOP totaled nearly \$7 Billion.

To handle this growth, the BOP has been in the business of building and activating new prisons. The Bureau has already spent \$6,200,000,000 on new construction since 1999.

And the BOP budget continues to swallow an increasing amount of the Department of Justice budget. Over the last 15 years, the enacted BOP budget has increased from 15 percent to 24 percent of the Department of Justice budget. In these fiscally lean times, funding the expanding BOP population has become a threat to other priorities, including federal law enforcement and prosecution.

This unsustainable prison growth must be addressed--for it has become a looming threat to public safety and the ironic enemy of so many of the efforts of those with a commitment to law and order.

Congress is becoming more and more aware of the grave horizon that is the federal criminal justice system--quoting from the Senate FY2012 Appropriations legislation for Commerce/Justice/Science:

*...the Committee is gravely concerned that the current upward trend in prison inmate population is unsustainable and, if unchecked, will eventually engulf the Justice Department's budgetary resources.*

And quoting from this legislation's accompanying report:

*The Committee must provide an increase of more than \$350,000,000 above fiscal year 2011 to safely guard the Nation's growing Federal prison inmate and detention*

*populations. While these activities are not considered mandatory for budget purposes, they are not truly discretionary in that the Committee has an obligation to adequately fund them regardless of budgetary constraints. Given the limited flexibility of the Federal prison and detention budget requests, and unless the inmate populations experience unforeseen decreases, the day approaches fast when Federal prisons and detention demands swallow the Justice Department's budgetary resources.*

*Given these urgent challenges within current budgetary constraints, the Committee was forced to reduce activities for which it has historically provided increases. The Committee's recommendation regrettably cuts nearly all other Federal law enforcement agencies—including the Federal Bureau of Investigation [FBI], Drug Enforcement Administration [DEA], Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF], U.S. Marshals Service, and U.S. Attorneys—by up to 2 percent from fiscal year 2011 enacted levels.*

*...Faced with these cuts, the Department of Justice, along with its State and local law enforcement and criminal justice partners, will struggle to carry out their mission and mandate to protect our Nation from terrorists, guard our neighborhoods from violent crime, and uphold the rule of law.*

The Conference Committee for the FY2012 Commerce/Justice/Science Appropriations bill was able to make adjustments and avoid immediate cuts to federal law enforcement budgets, but the message from appropriators is clear: authorizers must begin to address this problem now in order to avoid catastrophic decisions in the future.

During my tenure as US Attorney, which included roughly a year as a member of the Attorney General's Advisory Committee, I observed the budget become the absolute center of focus of the Department of Justice and its US Attorneys. More significantly, in individual US Attorneys Offices across the country, lack of funding is increasingly the reason behind failed or abandoned law enforcement obligations and partnerships. Over the last dozen years, Congress and the Department of Justice have been so focused on prosecuting and punishing crime--emphasizing "zero tolerance" and tough federal sentences--that there has been an absolute failure to recognize that without an equal focus on recidivism reduction the tough sentencing laws of the federal criminal justice system may well be the downfall of a once proud and effective agency.

Anyone who has worked with me personally or observed my tenure as a federal prosecutor would not identify me as "soft on crime." As United States Attorney I was noted as being one of the more aggressive appointees when it came to pursuing crime. I personally participated in the prosecution of Brian David Mitchell, the kidnapper of Elizabeth Smart. Notwithstanding my efforts, I can indicate to Congress that the federal criminal justice system is not the shining example of the administration of justice that it should or could be. Budgets for the US Attorney's offices are being squeezed due to the rapid growth of the BOP budget. Further, the federal system has neither been thoughtful nor conscientious in its punishment of those it convicts. In the drug arena, DOJ is expected to use the hammer of heavy mandatory minimum sentences to dismantle drug trafficking--but the reality is that most prosecutions, while resulting

in significant prison sentences, are only netting insignificant “mules” or small-time traffickers rather than those of any importance in a given drug organization. In the white collar world, long sentences are too easily the product of manipulating the “dollar-loss figure” -- resulting in baffling and unfortunate prosecutions such as Sholom Rubashkin, a 52 year old Jewish rabbi with no criminal history who is serving 27 years for financial fraud despite there not being any actual victim of fraud. Such sentences can be argued are the result of Congress’ right to punish severely particular crimes. However, being tough on crime also means more than just long sentences--it means addressing the issues associated with risk and recidivism reduction in order to offset the out-of-control incarceration costs plaguing the federal criminal justice system.

A thoughtful approach avoids the political divide that occurs between the need to punish and the need to rehabilitate. Fortunately, there are State systems that can serve as labs and test cases for the challenges now facing the federal system. Many States have implemented public policy reforms to control corrections growth and increase the effectiveness of spending in order to enhance public safety. These policy reforms include measures that employed risk and needs assessment tools, good time and earned time credits for prisoners, and improved supervision practices to reduce the likelihood of recidivism--all done with remarkable results.

While some aspects of the Federal system differ, there remain many lessons to be learned from these States. By utilizing public resources more efficiently and effectively, many States have stopped the upward trajectory of their prison populations. Some have actually reversed course. In fact, 2009 was the first time in 38 years in which the combined State prison population declined. At the same time, these States have realized declining crime rates and increased public safety. According to the Federal Bureau of Investigation, violent crime has fallen every year since 2006. The States have proven it is possible to successfully reduce prison populations and costs while maintaining and even improving public safety.

In Texas, for example, the Legislative Budget Board recommended building 7 to 8 new prisons in the mid-2000s. Instead, bipartisan reforms were passed and signed into law. Texas allocated \$241,000,000 in 2007 for additional diversion and treatment capacity, and these investments are estimated to have generated a short-term net savings of \$443,900,000 by rendering the need to create additional prison units unnecessary. In 2008, Texas’ incarceration rate fell 4.5 percent while the average State incarceration rate increased 0.8 percent. In 2009, Texas’ prison population dropped by another 1,563 inmates. By the summer of 2011, Texas closed a prison for the first time in its history. They have saved approximately \$2,000,000,000 through their thoughtful approach to incarceration, rehabilitation and recidivism reduction. Meanwhile, the crime rate in Texas has dropped by 12.8 percent, and its violent crime rate has dropped at a greater degree than the rest of the Nation.

The federal government should take this opportunity to not only learn from this, but to take the lead in developing a corrections system that metes out punishment but with an eye toward recidivism reduction in order to defray unsustainable costs of incarceration. In fact, the federal system should be the model.

But under our current system we have a one-sized-fits-all approach. And recent proposals to fix the Good Time Calculation and to establish an Earned Time credit to help with overcrowding are no different. Prisoners are all lumped together, without distinctions as to the nature of their federal convictions, or their risk of recidivism. A person who commits a non-violent drug offense or a white collar fraud earns the same amount of time-off of his federal sentence as the person convicted of violent felonies, terrorism, or sexual crimes against children. It is beyond comprehension why the federal system treats all offenders the same--without any analysis of their risk of recidivism.

States such as Texas, oft criticized for being too tough in its enforcement of criminal laws, has proven there is a better approach to incarceration. Many of my colleagues--former US Attorneys and high-ranking former officials in the Department of Justice--are emphasizing the need for "meaningful criminal justice reform" and "overhauling" the federal criminal justice system because of the fear of inaction or wrong action by Congress. Congress needs to recognize now the need to model the federal criminal justice system on many of the proven reforms made by thoughtful state criminal justice systems. If not, then the federal system will be forced to make knee-jerk decisions based on financial crises rather than measured and considered decisions proven to reduce recidivism while lowering costs. Anyone observing the prisoner releases in California, caused by monumental budget crises, understands the need to make more thoughtful and proactive based decisions at the federal level.

Risk assessment tools should be used to classify every Federal offender as low, medium, or high risk of recidivism. Then prisoners should be incentivized to complete recidivism reduction programs, graduate from higher to lower risk levels, and earn early transfers into prerelease custody options, including home confinement for those in the lower risk categories. Likewise, prisoners should be demoted for unsatisfactory performance and repeated violations of rules and requirements. This would make a considerable difference in the costs of incarceration and in avoiding the revolving-door nature of criminal behavior.

While many details must be addressed in fashioning a solution to the current federal incarceration and budget problem, the foundation for meaningful reform already exists in the responses made by States who arrived at such crossroads far earlier.

Proponents of inaction argue that anything done will amount to releasing criminals and consequently result in increased crime. Such conclusions fly in the face of data collected in those states that have discovered a better way and are enjoying the benefits of reduced recidivism, decreased incarceration costs and reductions in crime rates. Further, the fear of being seen as "not tough on crime" is overshadowing the reality of benefits through thoughtful enforcement and correctional reforms.

Ignoring recidivism reduction programs and the lessons learned in states like Texas will ensure that the federal criminal justice system will make decisions born out of crises rather than thoughtful considerations--which very well may simply mean an inability to protect this country from serious federal crimes.

I look forward to working with Senators on both sides of the aisle to craft a bipartisan Federal solution that builds on the successes of the states and helps to make the Federal criminal justice system the model.

Thank you Chairman Leahy, Ranking Member Grassley and members of the Committee.