



The Smart on Crime Coalition

SMART
ON CRIME

Recommendations
for the Administration
and Congress

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Administration and Congress

The Smart on Crime Coalition

The efforts of the Smart on Crime Coalition* are coordinated by the Constitution Project. The Constitution Project (TCP) brings together unlikely allies—experts and practitioners from across the political spectrum—in order to promote and safeguard America’s founding charter. TCP is working to reform the nation’s broken criminal justice system and to strengthen the rule of law through scholarship, consensus policy reforms, advocacy, and public education. More information about the Constitution Project is available at <http://constitutionproject.org/>.

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PROJECT COORDINATOR

Adrienne Lee Benson
The Constitution Project
1200 18th Street, NW, Suite 1000
Washington, DC 20036
(202) 580 – 6931
abenson@constitutionproject.org

EDITORIAL CONSULTATION

Hogan Lovells, LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637 5600
www.hoganlovells.com

* Note that each participant only formally endorses the particular chapters in this list, and may not necessarily endorse the principles expressed in other chapters.

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Smart on Crime: Recommendations for the Administration and Congress provides the 112th Congress and the Administration with analysis of the problems plaguing our state and federal criminal justice systems and a series of recommendations to address these failures. It provides a comprehensive examination of the criminal justice system, from the creation of new criminal laws to ex-offenders' reentry into communities after serving their sentences. Our broad recommendations range from helping to restore and empower victims to identifying ways to protect the rights of the accused.

Americans depend on the criminal justice system to maintain our safety and security. We expect the system to effectively deter crime and punish offenders, and rehabilitate those who have served their sentences. We also demand that it treat victims and their families with compassion and provide justice and safety for all Americans. We insist that it be fair, reliable and accurate. Yet, too frequently, these laudable—but daunting—goals go unmet.

Central to our mission is offering recommendations that achieve these goals, while reflecting the economic realities and acknowledging the new priority of return on investment. Today, budget shortfalls and economic distress are plaguing states and placing greater burdens on the federal government. States are confronting budget crises that threaten all facets of the criminal justice system, including courts, prisons, police departments, prosecutors, and public defenders.

To effectively tackle these challenges, we must abandon heated rhetoric and explore policies based not on ideology, but on evidence. We must come together to forge a system that works for everyone. For this reason, *Smart on Crime* incorporates cost-effective, evidence-based solutions to address the worst problems in our system.

Unfortunately, since the initial publication of *Smart on Crime* in 2009, too little has been accomplished. We continue to see our criminal codes and sentences—and, therefore, the demand on law enforcement, prosecutors, and prisons—expand. At the same time, resources for indigent defense decline, forensic labs operate without enforceable standards, and scores of individuals are exonerated after serving years in prison, too often because our federal courts are not permitted to rectify errors. We release offenders without support systems, with significant restrictions that continue punishment rather than protect society, preventing them from effectively and safely reentering society. We fail to treat victims with respect and to implement principles of restorative justice designed to make victims whole.

Due to the undeniable human costs and the overwhelming fiscal costs, Americans of all political stripes, particularly professionals with experience in every aspect of the criminal justice system, recognize that the system is failing too many, costing too much, and helping too few. *Smart on Crime* embodies the most promising recommendations that have arisen out of this growing awareness of the crisis.

THE SMART ON CRIME COALITION

The Smart on Crime Coalition has re-convened to provide the 112th Congress and the Administration with a comprehensive view of the federal government's role in improving criminal justice systems. The Coalition is comprised of more than 40 organizations and individuals, who participated in developing policy recommendations across 16 broad issue areas.

These organizations and individuals represent the leading voices in criminal justice policy. Coalition members focus their efforts on such diverse and varied areas as combating unnecessary expansions of criminal law, advocating for improvements to investigatory and forensic science standards, ensuring that persons accused of crimes have an opportunity to receive a fair trial, helping persons who have served their sentences successfully reenter their communities, and protecting the rights and dignity of victims of crime.

The Coalition, with experts and advocates spanning the criminal justice system, is particularly troubled by the budget crises plaguing states and placing greater burdens on the federal government. To address this concern, the Coalition has expanded its membership since first convening in 2008, and has consulted a broad array of experts representing a diversity of philosophies and points of view. Our dedication to exploring all options means that *Smart on Crime* focuses on providing non-ideological, cost-effective, and evidence-based solutions to address the worst problems in our system.

For ease of reference, a list of participants and the chapters which they endorse follows the Executive Summary. Note that each participant only formally endorses the particular chapters in this list, and may not necessarily endorse the principles expressed in other chapters. The decision of a group not to sign on to a chapter does not necessarily indicate an opposition to the policies proposed; some participants were limited by issue area or by other factors.

MISSION AND SCOPE

Smart on Crime seeks to provide federal policymakers in both Congress and the Administration a comprehensive, systematic analysis of the current challenges facing state and federal criminal justice systems and recommendations to address those challenges. The main focus of *Smart on Crime* is the steps the federal government can take to improve federal criminal justice and support states seeking to improve their own systems.

While justice cannot be reduced to dollars and cents on a balance sheet, *Smart on Crime* endeavors to examine policy proposals that reflect the reality that resources at both the state and federal level are scarce. As a consequence, the recommendations in this

report seek to be cost-effective and, to the extent possible, contain costs in all facets of the system. Most importantly, these recommendations eschew ideology and focus on evidence-based approaches that aim to improve the system for all its participants.

Smart on Crime is organized into 16 chapters, each of which discusses a particular area of criminal justice policy. This report is premised on the idea that to successfully confront the crises in the criminal justice system, we must fully understand the nature of the problems, the context in which the problems arose and in which they continue to exist, and the manner in which recommendations will best address the problem. Thus, each chapter:

- **Identifies the issue**
- **Provides a history and summary of the problems**
- **Proposes specific recommendations**
- **Identifies the role of Congress, the Administration and the judiciary in implementing recommendations**
- **Identifies experts who can provide further analysis**
- **Refers readers to further resources that provide additional depth and research**
- **Provides primary policy contacts available for further inquiries**

The reader should feel free to contact any of the primary policy contacts listed in each chapter for more information.

PRINCIPLES OF REFORM

Embodied in *Smart on Crime* are five basic principles the Coalition considers foundational, which Congress, the Administration and the judiciary should always consider when contemplating improvement to the criminal justice system. These principles include:

Fair — The criminal justice system should provide access to all safeguards the U.S. Constitution, state and federal laws, and common sense afford. These include, but are not limited to, guaranteeing the presumption of innocence, providing effective representation, ensuring equal access to a fair day in court for all people charged with crimes, and eliminating policies that create improper disparities. Fairness also requires working towards a restorative justice system that treats victims with respect and compassion.

Accurate — Efforts to keep communities safe and secure must include safeguards to ensure that law enforcement policies and practices employed to investigate, charge, and prosecute individuals are appropriate and accurate.

Effective — The goal of the criminal justice system is to protect the public and punish blameworthy activity. Therefore, to ensure an effective system, policymakers should evaluate any proposed recommendation to determine that it increases public safety and regulates conduct that truly rises to a level that justifies its criminalization.

Proven — All strategies and practices that the criminal justice system employs should meet evidence-based or, when possible, scientific standards of effectiveness. This will improve law enforcement, investigation, prosecution, and punishment. It will also increase the public faith and trust in the system by minimizing mistakes and improving results.

Cost-Efficient — State and federal governments annually spend billions of dollars on the criminal justice system. In the current economic climate, the country literally cannot afford to maintain a status quo that fails too many. While justice cannot be reduced to dollars and cents on a balance sheet, any changes to the system must be considered with concern for cost efficiency.

THE SMART ON CRIME COALITION - 2011

American Bar Association
American Bar Association Standing
Committee on Legal Aid & Indigent
Defendants
American Civil Liberties Union
American Psychological Association
Americans for Forfeiture Reform
Amnesty International
Brennan Center for Justice at New York
University School of Law
Campaign for Fair Sentencing of Youth
Campaign for Youth Justice
Center for Children's Law and Policy
Coalition for Juvenile Justice
Constitution Project
Council of State Governments
Criminal Justice Policy Foundation
D.C. Prisoners' Project of the Washington
Lawyers' Committee for Civil Rights and
Urban Affairs
Drug Policy Alliance
English & Smith
Families Against Mandatory Minimums
Human Rights Watch
Independent Consultant, Innocence Project
Innocence Project
Institute for Justice
Just Detention International
Law Enforcement Against Prohibition
Law Office of Margaret Love
Phyllis Lawrence (Independent Consultant)
Leadership Conference Education Fund
Legal Action Center
National Association for the Advancement of
Colored People Legal Defense & Educational
Fund, Inc.
National Association of Criminal Defense
Lawyers
National Juvenile Justice Network
National Legal Aid & Defender Association
Neufeld Scheck & Brustin, LLP
New Jerseyans for Alternatives to the Death
Penalty
Open Society Institute
Open Society Policy Center
Prison Fellowship
The Raben Group
The Sentencing Project
David Udell (National Center for Access to
Justice)

PROJECT COORDINATOR

Adrienne Lee Benson
The Constitution Project
1200 18th Street, NW, Suite 1000
Washington, DC 20036
(202) 580 - 6931
abenson@constitutionproject.org

CONTRIBUTORS BY CHAPTER**CHAPTER 1: OVERCRIMINALIZATION OF CONDUCT, OVERFEDERALIZATION OF CRIMINAL LAW,
AND EXERCISE OF ENFORCEMENT DISCRETION**

American Bar Association
American Civil Liberties Union
Families Against Mandatory Minimums
National Association of Criminal Defense Lawyers

CHAPTER 2: ASSET FORFEITURE

Americans for Forfeiture Reform
Criminal Justice Policy Foundation
English & Smith, LLP
Institute for Justice
National Association of Criminal Defense Lawyers

CHAPTER 3: FEDERAL INVESTIGATIONS

Innocence Project

CHAPTER 4: FEDERAL GRAND JURIES

American Bar Association
National Association of Criminal Defense Lawyers

CHAPTER 5: FORENSIC SCIENCE

Innocence Project
National Association of Criminal Defense Lawyers
National Legal Aid and Defender Association

CHAPTER 6: INNOCENCE ISSUES

Innocence Project

CHAPTER 7: INDIGENT DEFENSE

American Bar Association
Brennan Center for Justice
Constitution Project
National Association for the Advancement of Colored People Legal Defense and Education Fund
National Legal Aid and Defender Association

CHAPTER 8: JUVENILE JUSTICE

American Psychological Association
Campaign for the Fair Sentencing of Youth
Campaign for Youth Justice
Center for Children’s Law and Policy
Coalition for Juvenile Justice
Just Detention International
Phyllis Lawrence, Restorative Justice and Capital Mitigation Specialist
National Juvenile Justice Network
Sentencing Project
RFK Juvenile Justice Collaborative

CHAPTER 9: FEDERAL SENTENCING

American Bar Association
American Civil Liberties Union
Drug Policy Alliance
Families Against Mandatory Minimums
Law Offices of Margaret Love
National Association for the Advancement of Colored People Legal Defense and Education Fund
National Association of Criminal Defense Lawyers
National Legal Aid and Defender Association
Sentencing Project

CHAPTER 10: IMPROVING THE PRISON SYSTEM

ACLU National Prison Project
ACLE Washington Legislative Office
D.C. Prisoner's Project
Families Against Mandatory Minimums
Just Detention International
Law Offices of Margaret Love
Legal Action Center
National Legal Aid and Defender Association
Open Society Policy Center
Prison Fellowship

CHAPTER 11: DEATH PENALTY

American Bar Association
Amnesty International
Constitution Project
National Association for the Advancement of Colored People Legal Defense and Education Fund
The Raben Group

CHAPTER 12: FIXING MEDELLÍN: ENSURING CONSULAR ACCESS THROUGH COMPLIANCE WITH INTERNATIONAL LAW

Amnesty International
Constitution Project
The Raben Group

CHAPTER 13: PARDON POWER & EXECUTIVE CLEMENCY

American Civil Liberties Union
Criminal Justice Policy Foundation
Families Against Mandatory Minimums
Law Offices of Margaret Love

CHAPTER 14: REENTRY: ENSURING SUCCESSFUL REINTEGRATION AFTER INCARCERATION

Brennan Center for Justice
Jennifer Collier
Council of State Governments
Drug Policy Alliance
Legal Action Center
Open Society Policy Center
The Sentencing Project

CHAPTER 15: VICTIMS ISSUES & RESTORATIVE JUSTICE

Just Detention International
Phyllis Lawrence, Restorative Justice Consultant and Capital Mitigation Specialist
Prison Fellowship

CHAPTER 16: SYSTEM CHANGE

Brennan Center for Justice
Council on State Governments
Families Against Mandatory Minimums
Innocence Project
The Sentencing Project

CHAPTER 1: OVERCRIMINALIZATION

There are over 4,450 criminal offenses scattered through the federal criminal code, as well as untold numbers of federal regulatory criminal provisions. Congress routinely creates and amends federal criminal offenses, too often in response to a newsworthy problem for which a new federal law will provide no additional protection or safety.

Recommendation: Adopt rules and reporting requirements to stem overcriminalization and overfederalization. Congress should amend their rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic referral to the judiciary committee. Congress should also enact mandatory reporting legislation for all new or modified criminal offenses and penalties requiring the federal government to produce a standard, public report assessing the purported justification, costs, and benefits of all new or modified criminalization.

Recommendation: Enact default mens rea rules. Congress should enact legislation that specifically directs federal courts to read a protective, default *mens rea* requirement into any criminal offense that lacks one and to apply any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense.

Recommendation: Codify the Common-Law Rule of Lenity. Congress should enact legislation codifying the common-law rule of lenity, which directs a court, when construing an ambiguous criminal law, to resolve the ambiguity in favor of the defendant.

Recommendation: Enact the Attorney-Client Privilege Protection Act and issue executive order to preserve its protections. Congress should pass legislation and the Administration should issue an executive order barring federal prosecutors and investigators in all federal agencies from pressuring companies to waive their attorney-client privilege, work product privilege, or employee' legal rights in return for cooperation credit, with certain exceptions.

CHAPTER 2: ASSET FORFEITURE

Asset forfeiture has become an important part of our legal framework, and it can be a powerful crime control weapon. Unfortunately, due to the steady erosion of procedural protections, forfeiture powers often skew law enforcement priorities in ways that threaten individual rights.

Recommendation: Curb the abuses of federal and state forfeiture powers. Congress should pass comprehensive legislation to curb abuses of federal and state forfeiture powers and fulfill the original intent of the bipartisan Civil Asset Forfeiture Reform Act and related state reforms. The Administration should issue an executive order or encourage agency rulemaking to limit or forbid the use of equitable sharing to circumvent state law.

Recommendation: Safeguard the rights of defendants and third parties with basic procedural reforms. Congress should pass comprehensive legislation to ensure fair procedures for the accused and third parties in criminal forfeiture proceedings, and to curtail the government’s use of criminal forfeiture as an end run around civil asset forfeiture reforms. This would include safeguarding the accused’s rights to a fair procedure for determining what is subject to criminal forfeiture, limiting the use of so-called personal “money judgments” in lieu of orders forfeiting specific property, and safeguarding the rights of third parties who have an interest in the property subject to forfeiture.

CHAPTER 3: FEDERAL INVESTIGATIONS

Public confidence in the criminal justice system requires the best possible evidence be available at trial and that the procedures and practices used to obtain that evidence are designed to provide the most accurate results possible. Enabling more reliable investigations will curb wrongful convictions and accurately identify the perpetrators of crime.

Recommendation: Support eyewitness identification reform measures. Congress should pass legislation requiring federal law enforcement agencies to adopt and implement eyewitness identification procedures shown by reliable, scientifically-supported evidence to minimize the likelihood of misidentification. Alternatively, the President should issue an executive order requiring the promulgation of federal standards for federal law enforcement agencies—grounded in best practices and scientifically-supported research—with respect to eyewitness identification procedures.

Recommendation: Support the mandatory recordation of custodial interrogations. Congress should pass legislation requiring federal law enforcement agencies to electronically record all custodial interrogations. Such legislation would allow the court to render inadmissible any unrecorded statement or confession. Alternatively, the President should issue an executive order to require the electronic recordation of all custodial interrogations.

Recommendation: Fund measures that support the states’ preservation of biological evidence. Congress should fully fund all measures it has previously authorized that would aid state and federal law enforcement in preserving biological evidence and increasing access to post-conviction DNA testing.

Recommendation: Regulate the use of incentivized testimony. Congress should pass legislation that would regulate the use of incentivized informants by adopting best practices and policies designed to address the issues of reliability related to incentivized testimony. Alternatively, the President should issue an executive order that outlines best practices and policies for use of incentivized information by federal prosecutors and investigators.

Recommendation: Permit crime scene comparisons to CODIS and IAFIS. Congress should pass legislation to enable federal judicial orders of comparisons of crime scene DNA and fingerprint

evidence to relevant databases: the Combined DNA Index System (CODIS) and Integrated Automated Fingerprint Identification System (IAFIS). Alternatively, the Executive Branch should clarify, through executive order or other policy guidance, that CODIS and IAFIS administrators should be responsive to judicial orders requesting such comparisons.

CHAPTER 4: FEDERAL GRAND JURIES

The federal grand jury was originally intended to serve both a screening and investigative function; however, modern grand jury procedures are incompatible with this screening function. The current allocation of power in federal grand juries is completely at odds with the constitutional responsibilities (not to mention considerable burdens) of grand jury service.

Recommendation: Enhance the role of federal grand jurors and address the institution's long-neglected shortcomings. Congress should pass comprehensive legislation to strengthen the grand jury's screening function, empower grand jurors, and protect the rights of witnesses, subjects, and targets of grand jury investigations. The Department of Justice's United States Attorney's Manual includes certain admonitions regarding the conduct of grand jury investigations; the Department and its personal should adhere to the manual's proscriptions.

CHAPTER 5: FORENSIC SCIENCE

In the landmark 2009 report, *Strengthening Forensic Science in the United States: A Path Forward*, the National Academy of Sciences made a number of recommendations to bring forensic science in line with validated life and physical sciences and ensure that forensic science is applied scientifically, consistently, and fairly in the legal system.

Recommendation: Coordinate federal agencies to create scientific forensic standards. Congress should direct the National Science Foundation to perform research to validate forensic techniques, and the National Institute for Standards and Technology to develop standards for forensic science methods and practice. If the task of overseeing accreditation of laboratories, certification of forensic practitioners, compliance, and enforcement is assigned to the Department of Justice, this function must be completely independent from the Department's law enforcement function.

CHAPTER 6: INNOCENCE ISSUES

Across the nation, 265 wrongfully convicted individuals have been exonerated through post-conviction DNA testing since 1989. Collectively, these men and women served more than 3,370 years in prison for crimes they did not commit. In 116 of the nation's first 255 DNA exonerations, the true perpetrators were identified in the process of settling claims of innocence; while free, many of them had gone on to commit additional serious crimes while the innocent languished behind bars.

Recommendation: Ensure effective administration of the Justice for All Act. Congress should reauthorize the Justice for All Act. The incentives and programs it created, which were originally enacted by a bipartisan Congress to facilitate the testing of DNA post-conviction—and thus, the discovery of the wrongly convicted and the real perpetrators, must continue to be enforced and funded. In addition, Congress should consider amending the Act to include language that will more easily allow for the disbursement of program funds.

Recommendation: Establish a federal commission that would address the causes and remedies of wrongful convictions. Congressional members should reintroduce the National Criminal Justice Commission Act, and ensure that innocence issues are included in the Commission’s work. Absent legislative action, the President should issue an executive order establishing a presidential innocence commission.

Recommendation: Exempt compensation to the wrongfully convicted from federal income tax. Congress should enact the legislation similar to the Wrongful Convictions Tax Relief Act of 2010, which would amend the Internal Revenue Code to clarify that wrongful conviction compensation packages are not subject to federal income tax.

CHAPTER 7: INDIGENT DEFENSE

Indigent defense services in the United States remain in a perpetual state of crisis. States are failing to meet their constitutional responsibilities to provide effective, independent counsel, while the federal government’s funding preferences create further resource imbalances between law enforcement and indigent defense systems.

Recommendation: Ensure adequate funding, staffing, and training for state indigent defense systems. Congress should address the funding disparity that cripples the provision of indigent defense, by fully funding existing programs like the John R. Justice Prosecutors and Defenders Act, encouraging states to use existing federal grants to support all components of the criminal justice system including indigent defense, and encouraging states to adopt civil infraction reform, which would relieve some of the current burden placed on indigent defenders. The Department of Justice could use current grant programs to increase indigent defense training and technical assistance for states.

Recommendation: Increase transparency in expenditure of federal taxpayer money by the states. Congress should reauthorize the Justice for All Act with the requirement that recipients of federal grant money for criminal justice indicate the recipient’s intended indigent defense expenditures and report back to the Bureau of Justice Assistance the recipient’s actual indigent defense expenditures. The Department of Justice should strengthen existing regulations to increase transparency in state spending of federal grants.

Recommendation: Establish accountability for violations of individual liberty by state and local government. Congress should provide the Department of Justice with the authority to bring suit against those states or local governments that fail to protect the individual liberty of persons within their jurisdictions by providing inadequate counsel or no counsel to indigent defendants.

Recommendation: Establish national standards for indigent defense services. Congress should adopt national standards, based on the American Bar Association's *The Ten Principles of a Public Defense Delivery System*, for adequate indigent defense. The Department of Justice should use these standards as the basis by which it evaluates states' indigent defense systems.

Recommendation: Increased independence of federal defender funding and policies. Congress should establish an independent, non-partisan federal program for federal defense that possesses funding and oversight responsibilities to reduce the conflict of interest that arises when a public defender is beholden to the opposing party (the state) or to the judge for funding. The Department of Justice should formalize the criminal defense functions of the Access to Justice Initiative as an Office of Public Counsel Services (OPCS) within the Department of Justice tasked with developing objectives, priorities and a long-term plan for federal support of state and local indigent defense systems.

CHAPTER 8: JUVENILE JUSTICE

The United States incarcerates more youth than any other country in the world. Every day in America there are over 80 thousand youth incarcerated in juvenile facilities and another 10 thousand youth who are held in adult jails and prisons. Unfortunately, far too many children are held in dangerous conditions where they can be pepper-sprayed, hog-tied, or sexually assaulted. These policies have the unintended consequence of increasing, not decreasing, crime. They are also extremely costly. The good news is that we know how to fix these problems. Our recommendations have a broad base of support from juvenile justice advocates, attorneys, and system stakeholders and spell out in greater detail what the problems are and how to solve them.

Recommendation: Restore the federal leadership role in juvenile justice policy. Congress should reauthorize the Juvenile Justice and Delinquency Prevention Act and ensure that states have the necessary guidance and resources to create and sustain cost-effective juvenile systems that both enhance public safety and treat court-involved youth age appropriately. In light of state budget crises, Congress should restore federal investments in state and local juvenile justice reform efforts. Furthermore, the President must appoint a competent Office of Juvenile Justice and Delinquency Prevention Administrator.

Recommendation: Prevent crime and divert youth from the justice system. Too many children end up in our justice system because of mental health problems or school-related problems, and these youth should be handled differently. Congress should pass the Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support, and Education (PROMISE) Act to implement and fund evidence-based practices to prevent delinquency and gang involvement. Additionally, the Office

of Juvenile Justice and Delinquency Prevention should help states and localities prevent and reduce the use of out of home placements, by supporting community-based alternatives to incarceration.

Recommendation: Prevent dangerous confinement conditions in the juvenile justice system.

Congress should work to improve conditions of confinement for youth in juvenile facilities. The Department of Justice should enact and enforce national standards protecting youth from sexual abuse.

Recommendation: Remove youth from the adult criminal justice system. Congress should extend Juvenile Justice and Delinquency Prevention Act protections to keep youth out of adult facilities. Congress should amend the Juvenile Justice and Delinquency Prevention Act to extend the jail removal and sight and sound protections of the Act to all youth, regardless of whether they are awaiting trial in juvenile or adult court. The Department of Justice must enact standards to protect youth from sexual abuse and help states remove youth from adult facilities.

End the practice of sentencing youth to life without parole. Congress should end the practice of sentencing youth tried and convicted in federal court to life without parole, and instead require review after ten years for any person incarcerated in federal prison for a crime committed when they were under the age of 18.

Recommendation: Help youth successfully reenter their communities. Congress should increase its focus on and funding for youth in the reauthorization of the Second Chance Act. Congress should also work to improve the education of incarcerated youth.

CHAPTER 9: FEDERAL SENTENCING

There is no doubt that our enormous prison populations are driven in large measure by our sentencing policies, which favor incarceration over community-based alternatives or rehabilitation. We spend enormous amounts of money keeping people in prison; money that in many cases would be better spent treating addiction or funding community-based programs to reduce recidivism. Moreover, our federal prison population is largely made up of non-violent and low-level offenders. While incarceration at modest levels has some impact on crime, we are now long past the point of diminishing returns in the cost-effectiveness of our vastly expanded prison system. Too many people are locked up and many for far too long without evidence that the length or sometimes even the very fact of incarceration makes our communities safer or otherwise serves any legitimate purpose of punishment.

Recommendation: Completely eliminate the crack cocaine sentencing disparity and make reform retroactive. Congress should pursue complete elimination of the crack cocaine sentencing disparity, which was reduced from 100:1 to 18:1 as the result of the Fair Sentencing Act of 2010. In addition, the Fair Sentencing Act must be strengthened by retroactive application of its provisions through executive, legislative or judicial branch action, so that those incarcerated pursuant to the previous sentencing scheme receive relief.

Recommendation: Improve and expand federal safety valves for mandatory minimum sentencing.

Congress should amend the current safety valve laws to allow judges to undertake a step-by-step inquiry into such things as the circumstances of the offense and the history and characteristics of the offender in order to provide appropriate sentences.

Recommendation: Create sunset provisions for new mandatory minimums. Congress should subject all new mandatory minimums to a five-year sunset provision or create a sunset commission that will offer recommendations to Congress ahead of reauthorization of mandatory minimum legislation.

Recommendation: Apply stacking provision only to true recidivists. Congress should pass legislation to ensure that individuals who carry a firearm while committing a violent crime or drug trafficking offense face the 25-year mandatory minimum for repeat offenses only if they have been previously convicted and served a sentence.

Recommendation: Expand federal statutory authority for deferred adjudication. Congress should enact a statute permitting individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation.

Recommendation: Expand alternatives to incarceration in federal sentencing guidelines. The United States Sentencing Commission should amend the Sentencing Guidelines to broadly expand the availability of alternatives to incarceration. In particular, the Commission should expand the use of alternative sentences for offenders whose crimes are associated with substance abuse or mental illness and who pose no substantial threat to the community.

Recommendation: Expand the Residential Drug Abuse Program to makes its sentence reduction opportunities available to a larger pool of deserving individuals. The Attorney General should issue a memorandum directing the Bureau of Prisons to administer the sentence reduction incentive consistent with federal law and to ensure that it be made available to all prisoners with detainers and that the planning be done far enough in advance to ensure that qualified prisoners receive the full benefit Congress intended to bestow.

Recommendation: Clarify and expand good time conduct credit calculations. Congress should pass legislation similar to the Prisoner Incentive Act, which would rewrite the good time statute to make clear that a prisoner serving a sentence of over one year may earn up to 54 days of good time credit per every year of his sentence. Congress should also pass legislation similar to the Literacy, Education, and Rehabilitation Act that would provide credit toward service of sentence for satisfactory participation in designated prison programs.

Recommendation: Permit sentence reductions for extraordinary and compelling circumstances. The Attorney General should signal his intention that the Sentencing Reform Act be used as Congress originally intended by providing a guidance memo laying out support for use of the power to reduce a sentence for extraordinary and compelling circumstances. Congress should also extend

and expand elderly prisoner home confinement release programs to address the rising cost of confining elderly prisoners who no longer pose public safety risks.

Recommendation: Add a federal public defender as ex-officio member of the United States Sentencing Commission. Congress should add a federal public defender to the Commission to improve the quality and accuracy of the Commission's work and the transparency and neutrality of the Commission's proceedings.

Recommendation: Reduce all drug guidelines indexed to mandatory minimums by two levels. The United States Sentencing Commission should reduce all drug guideline range triggers by two levels so that the corresponding mandatory minimum is at the top of the range for any given drug, not below it. This will ensure that the guideline ranges correspond with the mandatory minimums while providing additional flexibility to judges in cases where the mandatory minimum is not applicable.

CHAPTER 10: PRISONS

Critical reforms to our prison system are necessary. We must address the high incidence of sexual assault and rape in our nation's correctional facilities; return the rule of law to U.S. prisons and jails; end over-reliance on the use of solitary confinement and long-term isolation; reduce recidivism; and improve transparency in the world's largest prison system.

Recommendation: The Prison Rape Elimination Act should be fully implemented. Congress should fully fund the Prison Rape Elimination Act to realize the full benefits of the law, including grants to states and county to address prison rape, which have not been funded since 2006. Congress should also hold oversight hearings to ensure that the Department of Justice is meeting its obligations under the law. The Attorney General should ratify national standards to address sexual violence in detention and establish meaningful compliance monitoring of the standards.

Recommendation: Address conditions of confinement. Congress should pass the Prison Abuse Remedies Act to correct provisions in the Prison Litigation Reform Act that too severely restrict a prisoner's ability to address violations of his or her rights and thereby hold prison officials accountable for those violations. Congress should also reauthorize the Deaths in Custody Reporting Act and pass a strengthened Juvenile Justice and Delinquency Prevention Act. Congress should also pass the Private Prison Information Act, which would subject private prisons to the same Freedom of Information Act provisions as the Federal Bureau of Prisons. Finally, Congress should hold an oversight hearing on conditions at Bureau of Prisons facilities. Similarly, the Department of Justice Office of the Inspector General should exercise its authority to review and evaluate the Bureau of Prisons and the Department should zealously enforce the Civil Rights for Institutionalized Persons Act to investigate and bring suits against state and local institutions, including jails, prisons, and youth detention centers, that violate the law.

Recommendation: Reduce recidivism and increase effective rehabilitation. Congress and the

Administration should pursue policies that better prepare prisoners for reentry following the completion of their sentences at the federal and state level. These include a variety of policies, a few of which include drug treatment programs, alternatives to incarceration for non-violent offenders, access to educational programs and job training, and coordination between prison programs and communities.

Recommendation: Reduce the use of long-term isolation and build effective alternatives. Congress should introduce a bill limiting the use of long-term isolated confinement in Bureau of Prisons facilities. Additionally, the GAO should conduct a study of the effectiveness and availability of mental health care in the Bureau of Prisons generally and for prisoners confined to long-term isolated confinement, and the Bureau of Prisons should adopt policies and practices for its use of long-term isolation consistent with the standards established by the ABA's the ABA's Criminal Justice Standards on the Treatment of Prisoners.

CHAPTER 11: DEATH PENALTY

The death penalty, as currently applied, is in urgent need of reform. Capital defendants are too often not afforded adequate legal representation or a fair trial. Furthermore, alarming racial disparities exist in the application of the death penalty. The failure to provide even basic fairness in the systems leads to an incontrovertible truth: the death penalty is a "broken system." Despite these grave concerns, since the 1996 passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts have been severely constrained in their ability to vindicate the constitutional rights of individuals convicted of crimes in state and federal courts.

Recommendation: Reform habeas corpus to address damage caused by AEDPA. Congress should amend the federal *habeas* statute to address the damage AEDPA has wrought in federal *habeas corpus* over the past fifteen years. Congress should revise the statute of limitations, exhaustion requirements, and procedural default standards, as well as eliminate federal court deference to state court interpretations of constitutional and federal law and restrictions on successive *habeas* petitions.

Recommendation: Creating safeguards against racially biased capital prosecutions. Congress should seek to address the disproportionate application of the federal death penalty to defendants of color. Congress should commission an independent study of the federal death penalty system to examine racial disparities, prejudicial errors, adequacy of counsel, and other inequities in capital prosecutions, and make recommendations for legislative reform. The Department of Justice should also revise its policies and regulations to ensure greater consistency and fairness in the application of the federal death penalty.

Recommendation: Protecting the mentally ill from execution. Congress should exempt people with severe mental illness and/or developmental disabilities from capital prosecution. Even without legislative action, the Department of Justice should adopt a policy that exempts people with severe mental illness and/or developmental disabilities from capital prosecutions.

Recommendation: Provide adequate counsel in capital prosecutions. Congress should increase federal defender independence from the federal judiciary. Giving the judiciary control over defense functions creates a conflict of interest. Federal defenders would be able to operate more effectively and efficiently if the judiciary no longer appointed counsel or approved budgets for experts and other resources at any stage of a federal death penalty case, including post-conviction review.

CHAPTER 12: FIXING MEDELLÍN

In 2005, President Bush withdrew from the Vienna Convention on Consular Relations' Optional Protocol concerning the Compulsory Settlement of Disputes. Additionally, in 2008 the Supreme Court held that the Vienna Convention on Consular Relations was unenforceable against states absent implementing legislation. The effect was that foreign nationals who had improperly been denied access to their consulate upon their arrest in the U.S. had no remedy in court. Because rights and obligations under the Optional Protocol are entirely reciprocal, the decision to withdraw also stripped U.S. citizens abroad of a binding enforcement mechanism for their right to access their consulate when detained or arrested outside of the U.S.

Recommendation: The U.S. should rejoin the optional protocol. The President should rejoin the Optional Protocol. In the interim, the House and Senate Judiciary and Foreign Relations Committees should examine the impact of our withdrawal from the Optional Protocol on U.S. citizens living, working, and traveling abroad.

Recommendation: Pass legislation implementing Avena. Congress should pass legislation providing foreign nationals with judicial remedies for violations of their rights under the Vienna Convention on Consular Relations. The President should also require the Department of State and the Department of Justice to provide further education and support to state and local law enforcement about the right to consular access and compliance with this obligation going forward.

CHAPTER 13: PARDON POWER & EXECUTIVE CLEMENCY

With the rapid growth of the federal prison population and the expansion of legal barriers to reentry, the President's pardon power can and should play a central operational role in the federal criminal justice system. Despite its importance, during the past several administrations the pardon power has fallen into disuse, and the Justice Department has neglected its historical role as steward of the pardon power.

Recommendation: Make granting clemency a strategic priority for the White House. The Administration should develop a strategic plan for the use of the pardon power to advance the president's criminal justice agenda, both within the executive branch and outside of the executive branch, and with the public. It should identify the functions of clemency in the federal justice system, both to reduce prison sentences and to recognize and reward rehabilitation, and consider whether charges in the law may be in order to reduce the need for clemency. It should make public standards to guide those who wish to apply for clemency and those who are responsible for reviewing and making recommendations on clemency applications.

Recommendation: Make the process for administering the pardon power more independent, efficient, and accountable. The Administration should consider removing the pardon administrative process from the Justice Department and placing it in an independent board of appointees (possibly a panel of retired federal judges) that could operate with a degree of independence from federal prosecutors and give the president additional protection from political pressure. Alternatively, if the pardon advisory function remains in the Justice Department, those tasked with the performing this function should have a clear mandate to carry out the president's direction and sufficient resources to do so. A senior official in the White House Counsel's office should be assigned to advise the president on pardon matters and to review clemency recommendations on a regular basis. The president should have regularly-scheduled opportunities to review and act on clemency requests with his counsel.

CHAPTER 14: REENTRY

Reentry is critical to achieving the public safety and the rehabilitation goals of our criminal justice system. Many obstacles stand between the individual with a criminal record and successful reentry. Policies that create barriers to successfully reintegrating into one's community make it increasingly difficult for ex-offenders to become contributing members of their communities.

Recommendation: Reauthorize and fully fund the Second Chance Act.

Congress should reauthorize and appropriate sufficient funds for the Second Chance Act Reauthorization. The Second Change Act makes possible the development and testing of program models, the introduction of different approaches to successful reentry and the dissemination of information and research to guide states as they address the complex challenge of prisoner reentry.

Recommendation: Provide persons reentering communities the resources to encourage successful reintegration. Congress should pass legislation and the Administration should pursue executive action that encourages successful reintegration by balancing public safety with efforts to eliminate counterproductive stigmatization of persons who have served their sentences. This should include extending federal voting rights, removing unfair barriers to housing, and expanding employment opportunities for people released from prison. It should also include restoring welfare and food stamp benefits, and repealing or reducing the unintended impact of the financial aid ban for individuals with drug felony convictions. Congress and the Administration should also support expanding access to drug, alcohol and mental health treatment.

Recommendation: Expand and improve legal mechanisms for individuals to obtain relief from collateral consequences. Congress should enact an authority to permit individuals charged with certain federal crimes to avoid a conviction record by successfully completing a period of probation. This could achieve the goals of public safety and rehabilitation without unnecessarily and permanently stigmatizing individuals.

CHAPTER 15: VICTIMS RIGHTS AND RESTORATIVE JUSTICE

The failure to incorporate victims' perspectives in the criminal justice can result in victims feeling frustrated by the lengthy processes of the traditional system, the evidentiary rules which do not permit their questions to be asked, and the lack of compliance with restitution orders. Even more troubling, victims are too often unwilling to report crimes or participate in the traditional criminal justice system, making convictions more difficult. Restorative justice approaches can reduce recidivism, cut costs, and improve victims' satisfaction with the system.

Recommendation: Establish and fund a National Commission on Restorative Justice. Congress should establish and fund a National Commission on Restorative Justice to study the effectiveness of restorative justice programs in serving the needs of victims and communities and supporting offender accountability and competency. Absent congressional action, the President should establish a Task Force on Restorative Justice within the DOJ Office of Justice Programs to explore the creation of a national strategy and action plan directed at supporting and expanding the use of restorative approaches at the local, state and federal level.

Recommendation: Expand funding streams for victims of crime. Congress should create a restitution fund, expand judicial discretion in restitution orders, and permit the use of forfeiture funds to improve likelihood of victims receiving restitution. Congress should also raise the cap on expenditures from the Victims of Crime Fund to provide services to victims. The Department of Justice could aid Congress by establishing an advisory committee to provide recommendation for altering the cap. The Department of Justice should also amend its guidelines regarding use of money from the Fund to ensure its goals are being met.

CHAPTER 16: SYSTEM CHANGE

Americans are calling for broad reform to address the affordability, accountability and accuracy of the criminal justice system. Over the past few decades, prison populations have expanded, state and federal spending on the criminal justice system has exploded, and communities across the nation have suffered. We are in dire need of an honest, level-headed examination of the policies that have led us to this place and what can be done to improve the system.

Recommendation: Create a National Criminal Justice Commission. Congress should authorize and fund a National Criminal Justice Commission to conduct a comprehensive review of the criminal justice system by a bipartisan panel of experts that would make thoughtful, evidence-based recommendations for reform. Absent congressional action, the President should establish an independent National Criminal Justice Commission by executive order or other administrative process.

Recommendation: Pass and implement the Justice Reinvestment Act. Congress should pass legislation to provide states with resources to develop and to implement data-driven, cost-saving corrections policies. This will help states increase public safety while cutting prison costs and

reinvesting the savings into alternatives to incarceration, such as community corrections and programs proven to reduce recidivism.

Recommendation: Evaluate and limit racial and ethnic disparities. Congress should pass legislation similar to the Justice Integrity Act to establish pilot programs to evaluate issues of racial and ethnic fairness in the practices of U.S. Attorney offices. Congress should mandate “Racial Impact Statements” for any proposed sentencing legislation to enable Congress to evaluate potential racial or ethnic disparities, and to consider alternative policies that could accomplish the goals of proposed sentencing legislation without causing racial disparity. Congress should also pass legislation similar to the Byrne/JAG Program Accountability Act to assess and limit racial and ethnic disparity in state, local and tribal systems that receive federal funding through the Byrne JAG Grant Program.