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The Federal Prison Population Buildup: Options for Congress

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Summary

Since the early 1980s, there has been a historically unprecedented increase in the federal prison population. The total number of inmates under the Bureau of Prisons' (BOP) jurisdiction increased from approximately 25,000 in FY1980 to over 205,000 in FY2015. Between FY1980 and FY2013, the federal prison population increased, on average, by approximately 5,900 inmates annually. However, the number of inmates in the federal prison system has decreased from FY2013 to FY2015.

Some of the growth is attributable to changes in federal criminal justice policy during the previous three decades. These changes include increases in the number of federal offenses subject to mandatory minimum sentences, changes to the federal criminal code that have made more crimes federal offenses, and the elimination of parole.

The growth in the federal prison population can be a detriment to BOP's ability to safely operate their facilities and maintain the federal prison infrastructure. The Government Accountability Office (GAO) reports that the growing number of federal inmates has resulted in an increased use of double and triple bunking, waiting lists for education and drug treatment programs, limited meaningful work opportunities, and increased inmate-to-staff ratios. These factors can contribute to increased inmate misconduct, which negatively affects the safety and security of inmates and staff.

The burgeoning prison population has contributed to mounting operational expenditures for the federal prison system. BOP's appropriations increased more than $7.1 billion from FY1980 ($330 million) to FY2016 ($7.479 billion). As a result, BOP's expanding budget is starting to consume a larger share of the Department of Justice's overall annual appropriation.

Should Congress choose to consider policy options to address the issues resulting from the growth in the federal prison population, policymakers could choose options such as increasing the capacity of the federal prison system by building more prisons; investing in rehabilitative programming (e.g., substance abuse treatment or educational programs) as a way of keeping inmates constructively occupied and potentially reducing recidivism after inmates are released; or placing more inmates in private prisons.

Policymakers might also consider whether they want to revise some of the policy changes over the past three decades that have contributed to the steadily increasing number of offenders being incarcerated. For example, Congress could consider options such as (1) modifying mandatory minimum penalties, (2) expanding the use of Residential Reentry Centers, (3) placing more offenders on probation, (4) reinstating parole for federal inmates, (5) expanding the amount of good time credit an inmate can earn, and (6) repealing federal criminal statutes for some offenses.

Congress is currently considering legislation (e.g., S. 2123, H.R. 3713) that would put into effect some of the policy options discussed in this report, including expanding the "safety valve" for some low-level offenders, allowing inmates to earn additional good time credit as a part of a risk and needs assessment system, and reducing mandatory minimum penalties for some offenses.

Contents

A Brief Overview of the Issues Related to Prison Population Growth 2
Select Policy Options 3
Continuing or Expanding Current Correctional Policies 3
Expanding the Capacity of the Federal Prison System 3
Investing in Rehabilitative Programs 4
Placing More Inmates in Private Prisons 5
Changing Existing Correctional and Sentencing Policies to Reduce the Prison Population 7
Changes to Mandatory Minimum Penalties 7
Alternatives to Incarceration 8
Early Release Measures 11
Modifying the "Safety Valve" Provision 16
Repealing Federal Criminal Statutes for Some Offenses 17

Tables

Table A-1. Number of Inmates Under BOP's Jurisdiction and the Number and Capacity of and Overcrowding in BOP Facilities 19

Appendixes

Appendix. Select BOP Data 19

Contacts

Author Information 21

The Bureau of Prisons (BOP) is the largest correctional agency in the country in terms of the number of prisoners under its jurisdiction.[1] BOP was established in 1930 to house federal inmates, professionalize the prison service, and ensure consistent and centralized administration of the federal prison system.[2]

At the end of 1930, BOP operated 14 facilities that held approximately 13,000 inmates.[3] By the end of 1940, BOP had expanded to 24 facilities that held approximately 24,000 inmates.[4] The number of inmates in the federal prison system, with a few fluctuations, remained at approximately 24,000 for the next four decades.[5] Then, beginning in FY1980, the federal prison population started a nearly unabated, three-decade increase. The total number of inmates under BOP's jurisdiction increased from approximately 25,000 in FY1980 to over 205,000 in FY2015.[6] Between FY1980 and FY2013, the federal prison population increased, on average, by approximately 5,900 inmates annually. However, the number of inmates in the federal prison system decreased from FY2013 to FY2015.

The U.S. Sentencing Commission (USSC), BOP, and scholars have identified several policy changes over the past three decades that have contributed to the growth of the federal prison population:

- increases in the number of federal offenses subject to mandatory minimum sentences,
- changes to the federal criminal code that have made more crimes federal offenses, and
- the elimination of parole.[7]

There are a number of policy avenues lawmakers could consider should Congress choose to address the growth in the federal prison population. Several options—such as expanding the capacity of the federal prison system, continued investment in rehabilitative programs, and placing inmates in private prisons—either continue or expand current correctional policies. However, Congress might also consider changing some existing correctional or sentencing policies as a means of addressing some of the issues related to the growth of the federal prison population. Some of these options include placing some inmates in alternatives to incarceration, such as probation, or expanding early release options by allowing inmates to earn more good time credit or allowing inmates to be placed on parole once again. Congress could consider reducing the amount of time inmates are incarcerated in federal prisons by repealing mandatory minimum

[1] E. Ann Carson, *Prisoners in 2014*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 248955, Washington, DC, September 2015, p. 3.

[2] U.S. Department of Justice, Bureau of Prisons, *About the Bureau of Prisons*, p. 1.

[3] U.S. Department of Justice, Bureau of Prisons, *Historical Information*, http://www.bop.gov/about/history/.

[4] Ibid.

[5] Ibid.

[6] Data on the number of inmates in the federal prison system is provided in the **Appendix**.

[7] For more information on this issue, see U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Washington, DC, October 2011; Erik Luna and Paul G. Cassell, "Mandatory Minimalism," *Cardozo Law Review*, vol. 32, no. 1 (September 2010); James E. Felman, on behalf of the American Bar Association, statement before the United States Sentencing Commission in the Hearing on Mandatory Minimums, May 27, 2010; Kamala Mallik-Kane, Barbara Parthasarathy, and William Adams, *Examining Growth in the Federal Prison Population, 1998 to 2010*, The Urban Institute, Washington, DC, September 2012; and U.S. Department of Justice, Bureau of Prisons, *Historical Information*, http://www.bop.gov/about/history/.

penalties for certain offenses or reducing the length of the mandatory minimum sentence. Finally, policymakers could consider repealing federal criminal statutes for some offenses.

Congress is currently considering legislation that would put into effect some of the policy options discussed in this report, including expanding the "safety valve" for some low-level offenders, allowing inmates to earn additional good time credit as a part of a risk and needs assessment system, and reducing mandatory minimum penalties for some offenses.[8]

A Brief Overview of the Issues Related to Prison Population Growth

The Government Accountability Office (GAO) reported that BOP faces several challenges resulting from the increasing number of inmates placed under its supervision.[9] According to GAO, BOP reported

- increased use of double and triple bunking, which brings together for longer periods of time inmates with a higher risk of violence and more potential victims;
- waiting lists for education and drug treatment programs, which can pose a threat to institutional security by increasing inmate idleness and may decrease recidivism-reducing benefits these programs can provide;
- limited meaningful work opportunities, which can also contribute to inmate idleness;
- crowded visiting rooms, which can make it difficult for inmates to visit with their families; and
- increased inmate-to-staff ratios, which can compromise institutional safety by increasing staff overtime and stress while reducing staff-inmate communication.

GAO also noted that the growing federal prison population is taxing BOP's infrastructure, which was designed to manage a smaller prison population. BOP is also facing increasing maintenance costs as older facilities age.

The burgeoning prison population has contributed to mounting operational expenditures for the federal prison system.[10] BOP's appropriations increased more than $7.1 billion from FY1980 ($330 million) to FY2016 ($7.479 billion). BOP's expanding budget is starting to consume a larger share of the Department of Justice's (DOJ) overall annual appropriations, meaning that funding for the federal prison system might start to crowd out funding for other DOJ initiatives.

[8] For more information on criminal justice reform legislation, see CRS Report R44246, *Sentencing Reform: Comparison of Selected Proposals*, by Jared P. Cole and Charles Doyle; CRS Report R44492, *The Sentencing Reform Act of 2015 (H.R. 3713): A Summary*, by Charles Doyle; and CRS Report R44087, *Risk and Needs Assessment in the Criminal Justice System*, by Nathan James.

[9] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743, September 2010.

[10] Congress funds BOP's operations through two accounts: Salaries and Expenses (S&E) and Buildings and Facilities (B&F). The S&E account (i.e., the operating budget) provides for the custody and care of federal inmates and for the daily maintenance and operations of correctional facilities, regional offices, and BOP's central office in Washington, DC. It also provides funding for the incarceration of federal inmates in state, local, and private facilities. The B&F account (i.e., the capital budget) provides funding for the construction of new facilities and the modernization, repair, and expansion of existing facilities. Appropriations for BOP going back to FY1980 are provided in the **Appendix**.

In FY1980 appropriations for BOP accounted for 15% of the total amount appropriated for DOJ; in FY2016 it was 26%.[11]

Select Policy Options

The growth in the federal prison population over the past three decades has resulted in an increasingly expensive federal prison system that is overcrowded and aging and where facilities might not be staffed at an optimal level. Congress could choose to address the mounting number of federal inmates either in the context of existing correctional policies or by changing the current policies.

Continuing or Expanding Current Correctional Policies

Under the umbrella of continuing existing policies, Congress could consider addressing issues related to the burgeoning federal prison population by (1) expanding the capacity of the federal prison system, (2) continuing to invest in rehabilitative programming, (3) placing more inmates in private correctional facilities, or some combination of the three.

Expanding the Capacity of the Federal Prison System

Arguably one of the most straightforward approaches for managing the steadily increasing number of federal inmates is to expand the capacity of the federal prison system. Congress could choose to mitigate some issues related to federal prison population growth by appropriating more funding so BOP could expand prison capacity to alleviate overcrowding, update and properly maintain existing facilities, and hire additional staff. While a large-scale expansion of the federal prison system might help reduce overcrowding, it takes several years for a prison to be built and be ready to accept inmates. If Congress chooses to appropriate funding for an expansion of BOP's infrastructure, it could be several years before overcrowding is reduced.

There may be some concern that Congress might invest a significant amount of funding in expanding BOP's capacity and then the prison population will drop. The number of federal inmates has decreased in each of the past two fiscal years (see **Table A-1**). Even so, the federal prison system is still operating at 23% over capacity. Should Congress choose to invest in a wide-scale expansion of prison capacity, and the prison population decreases in the future, the surplus bedspace could allow BOP to close some of its older facilities. Expanding prison capacity would generally require more maintenance and need higher staff-to-inmate ratios to safely operate.

Critics contend that expanding the capacity of the federal prison system does not address the growth of the federal prison population since the early 1980s. Also, this policy option would not resolve the issue of the rising cost of the federal prison system; in fact, it could exacerbate it. However, alternatives that would reduce the federal prison population would most likely involve prosecuting fewer people in federal courts, providing ways for inmates to be released before they served a significant portion of their sentences, putting more inmates into diversionary programs, or placing more offenders on some form of community supervision. If Congress does not seek to take any of these steps, a large-scale expansion of the federal prison system might be the sole way to manage the effects of an increasing prison population. Some may argue that in order to protect public safety Congress should appropriate the funding necessary to expand the federal prison

[11] For more information on BOP's appropriations see CRS Report R42486, *Appropriations for the Bureau of Prisons (BOP): In Brief*, by Nathan James.

system rather than adopt policy changes that would reduce the prison population through early releases, alternatives to incarceration, or fewer prosecutions.

Investing in Rehabilitative Programs

A review of the literature on rehabilitative programs (e.g., academic and vocational education, cognitive-behavioral programs, and both community- and prison-based drug treatment) suggests that there are enough scientifically sound evaluations to conclude that these programs are effective at reducing recidivism, which could potentially help stem growth in the federal prison population in the future.[12] BOP offers a variety of rehabilitation programs such as academic and vocational education, work programs through the Federal Prison Industries (FPI), substance abuse treatment, and cognitive-behavioral programs that focus on promoting pro-social behavior. One possible option for reducing the federal prison population would be to ensure that BOP has adequate resources to provide rehabilitative services to inmates. At a time when some policymakers are considering reducing discretionary funding for federal agencies, there might be some effort to restrain the growth of BOP's appropriations, including for rehabilitative services. BOP has to administer the federal prison system within the funds appropriated for it by Congress. If BOP does not have sufficient resources, it might not be able to provide rehabilitative programming to all inmates who need it.

It could be argued that in order to reduce the growing cost of operating the federal prison system, BOP should reduce funding for rehabilitative programming and invest solely in providing for the subsistence of inmates and maintaining a level of staffing that is adequate to ensure that federal prisons are secure. However, reducing programming opportunities might result in more inmate idleness, which might in turn result in more inmate misconduct. Moreover, BOP is authorized to reduce an inmate's sentence by up to one year for successfully completing a residential substance abuse treatment program; therefore, reducing programming opportunities could hamper one of the few avenues BOP has for releasing inmates early. It is also possible that BOP might be able to realize some long-term cost savings by successfully rehabilitating inmates. For example, research by the Washington State Institute for Public Policy (WSIPP) suggests that effective rehabilitation programs can result in cost savings.[13]

As policymakers consider the appropriate level of funding for BOP in light of concerns about the federal deficit and potential freezes or reductions in non-defense discretionary spending, they may consider whether it is prudent to increase resources for BOP's rehabilitative programs in the near term in order to realize potential long-term benefits. The size of the effect that decreased recidivism among federal offenders would have on BOP's budget would depend on how many new inmates BOP incarcerates. If new commitments exceed the number of inmates released who do not return to prison, then the demand for prisons, personnel, and inmate programs and services would continue to grow, although possibly at a slower rate. If the number of new commitments is less than the number of inmates released who do not return to prison, then the demand for prisons, personnel, and inmate programs and services would decrease. However, even if the growth of the federal prison population slows, the demand for increased BOP appropriations may continue.

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[12] Doris Layton MacKenzie, *What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents* (New York: Cambridge University Press, 2006), pp. 331-333, hereinafter, "*What Works in Corrections*."

[13] Steve Aos, Marna Miller, and Elizabeth Drake, *Evidence-based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Washington State Institute for Public Policy, Olympia, WA, October 2006.

Placing More Inmates in Private Prisons

BOP has placed an increasing share of federal inmates in contract facilities as a way of managing the growth in the federal prison population. Congress might also consider whether *more* federal inmates should be housed in private facilities as a means of reducing crowding in federal prisons and potentially reducing the cost of operating the federal prison system. The number of inmates under BOP's jurisdiction held in contract facilities has generally increased since the early 1980s. However, the growth in the number of inmates held in contract facilities is mostly the result of more inmates being placed in Residential Reentry Centers (RRCs) at the end of their sentences. Most BOP inmates held in private correctional facilities are low security, non-citizen offenders. The debate about whether to house inmates in privately operated correctional facilities has been framed by two overarching questions: (1) can private facilities incarcerate inmates at a lower cost and (2) can private facilities provide services that are equal or superior to the services provided in public institutions?

BOP attempted to answer these questions, with two evaluations of the Taft Correctional Institution (TCI), which was operated as a private facility as a part of a demonstration project.[14] One evaluation of TCI and three similar BOP facilities[15] was conducted by Abt Associates, Inc, while another was conducted by BOP's Office of Research. Both the Abt and BOP evaluations found that TCI was cheaper to operate on a per diem basis than the three comparable BOP facilities, but the two evaluations offer different conclusions as to how much was saved by operating TCI as a private institution.[16] The two primary reasons for the different conclusions are economies of scale[17] realized by TCI and differences in how per diem rates were calculated.[18]

Both analyses found that TCI had an assault rate that was lower than what would have been expected based on the composition of its inmate populations, but so did two of the other three

[14] The conference report (H.Rept. 104-863) for the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208) incorporates, by reference, language from the Senate report (S.Rept. 104-353) to accompany the Senate committee-reported version of H.R. 3814 (104th Congress), that requires BOP to undertake "a 5-year prison privatization demonstration project" involving the facility that BOP built in Taft, CA. The Taft Correctional Institution is still operating as a private facility. After the contract with the Geo Group expired in 2007, the contract was recompeted and it was awarded to Management and Training Corporation.

[15] The three similar facilities included in the evaluation were FCI Yazoo City, FCI Elkton, and FCI Forrest City.

[16] The Abt analysis concluded that the average per diem cost of incarceration for the three BOP-operated facilities in FY1999 was 18.9% greater than the per diem cost of incarceration for TCI; in FY2000 it was 20.0% greater; in FY2001 it was 17.5% greater; and in FY2002 it was 14.8% greater. In comparison, BOP analysis concluded that the average per diem cost of incarceration for the three BOP-operated facilities in FY1999 was 4.0% greater than the per diem cost of incarceration for TCI; in FY2000 it was 5.4% greater; in FY2001 it was 0.3% greater; and in FY2002 it was 2.2% greater. Gerry Gaes, "Cost, Performance Studies Look at Prison Privatization," *NIJ Journal*, no. 259 (March 2008), p. 33.

[17] "Economies of scale" generally refers to the increase in efficiency of production that accompanies expanded production. In economic terms, this means that the average cost of the good produced decreases and production increases because fixed costs are shared over an increased number of goods. In terms of BOP evaluation of TCI, "economies of scale" would refer to the decreased per prisoner costs resulting from spreading the prison's operating costs over a greater number of inmates.

[18] TCI had on average 300 more inmates each year than the three BOP-operated prisons, which means that TCI was able to take advantage of economies of scale that decreased average costs. In the BOP analysis, the researchers adjusted for these economies of scale by estimating what expenditures would have been for the BOP facilities if they had prison populations similar to TCI. In addition, the Abt analysis assumed that BOP would not provide many resources to support TCI's operations, resulting in a large amount of savings from reduced indirect overhead costs. The BOP analysis assumed that BOP would continue to incur some overhead expenses related to overseeing TCI. As such, BOP included a 10%-12% overhead rate in its analysis. Gerry Gaes, "Cost, Performance Studies Look at Prison Privatization," *NIJ Journal*, no. 259 (March 2008), p. 34.

BOP-operated facilities in the study (the other BOP-operated facility had an assault rate that was similar to what would have been expected). However, random drug testing showed that inmates in TCI were more likely to use drugs than inmates in other BOP facilities. TCI also had two escapes from inside the facility's secure perimeter over a roughly four-year period. In comparison, BOP had three escapes from a secure prison during the same time period, even though BOP was operating over 100 facilities at the time.

Research that reviewed the results of state and local efforts to privatize correctional systems generally found that it is questionable whether privatization can deliver lower costs and whether services provided by private prisons are comparable to services provided by public prisons.[19] One of the first studies to quantitatively summarize the results of several evaluations of prison privatization efforts found that regardless of whether the prison was privately or publicly operated, the economies of scale, the prison's age, and the prison's security level were the most significant determinants of the daily per diem cost.[20] The researchers concluded that "[a]lthough specific privatization policy alternatives may result in modest cost savings ... relinquishing the responsibility of managing prisons to the private sphere is unlikely to alleviate much of the financial burden on state correctional budgets."[21] Their conclusions are echoed by a review of the literature on privatization. In this analysis, the researchers concluded "that prison privatization provides neither a clear advantage nor disadvantage compared with publicly managed prisons. Neither cost savings nor improvements in quality of confinement are guaranteed through privatization."[22] However, even though both studies limited their analyses to the most methodologically sound evaluations, these evaluations are still limited to the same issues described above, namely, what costs are considered when the evaluators calculated whether privatization could lower correctional costs.

Placing more inmates in private facilities could help alleviate overcrowding in federal prisons without the need to invest in a large-scale expansion of federal prison bedspace. Expanding capacity through contracting for additional bedspace rather than building new prisons could give Congress the flexibility to reduce capacity if the federal prison population decreased in the future. However, research suggests that moving federal prisoners into private prisons might not help to control the rising costs of the federal prison system. Also, medium and high security facilities are the most crowded,[23] and BOP is less inclined to place medium and high security inmates in private facilities. Congress might also consider whether it wants to place a greater portion of the federal prison population in the custody of private operators when BOP has less direct oversight over the day-to-day operations of private facilities.

[19] Travis C. Pratt and Jeff Maahs, "Are Private Prisons More Cost-effective Than Public Prisons? A Meta-analysis of Evaluation Research Studies," *Crime and Delinquency*, vol. 45, no. 3 (July 1999), pp. 358-371; Dina Perrone and Travis C. Pratt, "Comparing the Quality of Confinement and Cost-effectiveness of Public Versus Private Prisons: What We Know, Why We Do Not Know More, and Where to Go From Here," *The Prison Journal*, vol. 83, no. 3 (September 2003), pp. 301-322; Brad W. Lundahl, Chelsea Kunz, and Cyndi Brownell, et al., "A Meta-analysis of Cost and Quality of Confinement Indicators," *Research on Social Work Practice*, vol. 19, no. 4 (July 2009), pp. 383-394.

[20] Travis C. Pratt and Jeff Maahs, "Are Private Prisons More Cost-effective Than Public Prisons? A Meta-analysis of Evaluation Research Studies," *Crime and Delinquency*, vol. 45, no. 3 (July 1999), p. 367.

[21] Ibid., pp. 367-368.

[22] Brad W. Lundahl, Chelsea Kunz, and Cyndi Brownell, et al., "A Meta-analysis of Cost and Quality of Confinement Indicators," *Research on Social Work Practice*, vol. 19, no. 4 (July 2009), p. 392.

[23] Data provided by the U.S. Department of Justice, Bureau of Prisons.

Changing Existing Correctional and Sentencing Policies to Reduce the Prison Population

Policymakers might also consider whether they want to revise some of the changes that have been made to federal criminal justice policy over the past three decades. A confluence of these changes has resulted in an increasing number of offenders being sent to federal prisons. Should Congress decide to change federal criminal justice policy to try to reduce the number of inmates held in federal prisons, policymakers might start by considering which offenders are incarcerated and the length of their sentences.

Changes to Mandatory Minimum Penalties

The U.S. Sentencing Commission (USSC) concluded that, in part, mandatory minimum penalties have contributed to the growing federal prison population. It might be argued that some or all mandatory minimum penalties should be repealed as a way to manage the growth of the federal prison population. Allowing defendants to be sentenced using the federal sentencing guidelines could allow for more individualized sentencing, thereby allowing the court to mete out punishment using an array of variables that reflect a more nuanced analysis of a defendant's culpability. Opponents of widespread use of mandatory minimum penalties contend that they are a blunt instrument with which to determine a proper sentence. The USSC reported that "certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute."[24] Also, to the extent that mandatory minimum penalties have contributed to sentence inflation as a result of the USSC incorporating them into the federal sentencing guidelines, repealing some mandatory minimum penalties might reduce the amount of time inmates serve in federal prison.

Proponents of the continued use of mandatory minimum penalties contend that after the Supreme Court's ruling in *United States v. Booker*[25] and its progeny (e.g., *Gall v. United States*[26] and *Kimbrough v. United States*),[27] which rendered the sentencing guidelines effectively advisory, Congress has a responsibility to set minimum penalties for some offenses as a way to limit judicial discretion, thereby preventing unwanted sentencing disparities. It has been argued that mandatory minimum penalties promote uniformity and fairness for defendants, transparent and predictable outcomes, and a higher level of truth and integrity in sentencing.[28] Also, should Congress choose to repeal some or all mandatory minimum penalties, policymakers would relinquish their ability to control the amount of time inmates serve for certain offenses.

Even if Congress chooses not to repeal any mandatory minimum sentences, policymakers could review current mandatory minimum penalties to ensure that they are (1) not excessively severe,

[24] U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Washington, DC, October 2011, p. 345 (hereinafter "*Mandatory Minimum Penalties in the Federal Criminal Justice System*").

[25] 543 U.S. 220 (2005).

[26] 552 U.S. 38 (2007).

[27] 552 U.S. 85 (2007).

[28] Erik Luna and Paul G. Cassell, "Mandatory Minimalism," *Cardozo Law Review*, vol. 32, no. 1 (September 2010), p. 11.

(2) narrowly tailored to apply only to those offenders who warrant such punishment, and (3) applied consistently.[29]

Alternatives to Incarceration

During the 1980s many states instituted a series of alternatives to incarceration as a way to respond to an increasing number of convicted offenders and wide-scale prison overcrowding.[30] Prior to this, sentencing options were limited to incarceration or probation. However, there was growing sentiment that while some crimes were too severe to be punished by placing the offender on probation, they were not severe enough to warrant incarceration. Therefore, states started to develop a series of alternative sentences that fell somewhere between probation and incarceration. These alternatives included house arrest, electronic monitoring, intensive supervision, boot camps, split sentences, day reporting centers, fines, and community service.[31] These programs provide graduated sanctions that might be more appropriate than either probation or incarceration, and provide a higher level of offender restraint and accountability than traditional probation. Some also provide higher levels of treatment or services for problems such as substance abuse, low education levels, and unemployment.

A majority of the evaluations of intensive supervision and electronic monitoring programs found that there was no significant difference in recidivism rates between offenders sentenced to alternatives to incarceration and offenders in control groups.[32] This means that increasing surveillance and control of offenders' activities does not decrease their criminal activities. Ironically, while these programs were created as a means of reducing the number of incarcerated individuals, the increased surveillance might increase the probability that violations of the terms of probation will be detected, which could increase the number of inmates as probationers are often incarcerated for technical violations. One shortcoming of the research is that since most intensive supervision programs increase the probability of detection, there is no way to tell if the underlying level of criminality changed between the treatment and control groups; that is, the increased probability of detection might mean that offenders in the control group are simply more likely to be caught when they commit crimes, even though offenders in the control group commit crimes at the same, or even higher, rate. Also, the research tended to focus on whether the restraining aspects of the program could reduce recidivism. Some evaluations found that inmates who received treatment while participating in an intensive supervision program were less likely to be arrested.[33]

Placing More Inmates on Probation

Congress could consider whether there are alternative ways to properly manage offenders convicted of committing relatively minor crimes without sending them to prison. One policy option Congress could consider is amending penalties for some offenses to allow more defendants to be placed on probation rather than being sentenced to a period of incarceration. However, the *Booker* decision that rendered the federal sentencing guidelines advisory might influence any debate Congress would have over who would be placed on probation. The sentencing guidelines placed substantial restrictions on when courts could sentence defendants to

[29] *Mandatory Minimum Penalties in the Federal Criminal Justice System,* p. 368.

[30] *What Works in Corrections,* p. 304.

[31] Ibid.

[32] Ibid., p. 306.

[33] Ibid., p. 318.

probation. Under Section 5B1.1 of the sentencing guidelines, defendants can only be placed on probation if their sentence under the guidelines is equal to or less than 15 months. Nonetheless, after the Supreme Court's ruling in *Booker*, federal judges are not required to impose a sentence within the range calculated under the sentencing guidelines. Therefore, judges can impose probation for offenders unless (1) the defendant has been convicted of a class A or B felony,[34] (2) probation is statutorily precluded as a sentencing option, or (3) the defendant is sentenced to a term of imprisonment for the same or different offense that is not a petty offense.[35]

Data show that the risk of recidivism for probationers is the highest during the first year after being placed on probation.[36] It has been argued that surveillance and services should be front-loaded (i.e., more intensive at the beginning of a term of probation) to try to mitigate recidivism and other negative consequences that might occur during the first year that an offender is serving on probation.

A common argument from advocates of decreasing the use of incarceration is that it is cheaper to supervise an offender in the community than it is to incarcerate that individual. The Administrative Office of the U.S. Courts reports that the average annual cost of probation supervision was $3,909 per probationer in FY2014.[37] In comparison, the average annual cost of incarceration for FY2014 was $30,621 per inmate. However, some of the lower cost of probation relative to incarceration might be the result of fewer and lower-risk offenders being placed on probation. It is possible that the annual cost of probation would increase if Congress expanded the number of people placed on probation and implemented some of the changes discussed below.

Should Congress choose to expand probation as a sentencing option for more offenses, research suggests that probation programs that use a validated risk assessment tool to sort offenders into high- and low-risk groups and focus resources and supervision on higher-risk offenders might be more effective at reducing recidivism.[38] Research also suggests that probation programs that offer a mix of evidence-based treatment that is delivered to offenders who are the most likely to benefit from it along with surveillance are more effective at reducing recidivism than surveillance-only probation.[39] As one expert noted, "'[t]reatment' alone is not enough, nor is 'surveillance' by itself adequate. Programs that can increase offender-to-officer contact *and* [emphasis original] provide treatment have reduced recidivism."[40] Researchers have found that participants in probation programs that subject probationers with substance abuse issues to frequent random drug testing and that require probationers who violate the terms of their probation to serve intermediate sanctions, such as a short stay in jail, are less likely to recidivate than those who were on regular

[34] A class A felony is an offense where the maximum term of imprisonment authorized is life imprisonment or death. A class B felony is an offense where the maximum term of imprisonment authorized is 25 years or more. 18 U.S.C. §3559(a).

[35] 18 U.S.C. §3561(a).

[36] Joan Petersilia, "Community Corrections: Probation, Parole, and Prisoner Reentry," in *Crime and Public Policy*, ed. James Q. Wilson and Joan Petersilia (New York: Oxford University Press, 2011), p. 519 (hereinafter, "Community Corrections: Probation, Parole, and Prisoner Reentry").

[37] Administrative Office of the U.S. Courts, "Did You Know? Imprisonment Costs 8 Times More Than Supervision," June 18, 2015 (document on file with author).

[38] Community Corrections: Probation, Parole, and Prisoner Reentry, pp. 521-522. For more information on the use of risk and needs assessment in the criminal justice system, see CRS Report R44087, *Risk and Needs Assessment in the Criminal Justice System*, by Nathan James.

[39] Ibid., p. 522.

[40] Ibid.

probation.[41] Another option Congress might consider is allowing probationers who strictly adhere to their conditions of probation to be released from probation early. Research has shown that an earned discharge strategy can reduce recidivism.[42]

Expanding the Use of Residential Reentry Centers

Congress could also consider extending BOP's authority to place inmates with short sentences who are deemed to be low security risks directly into Residential Reentry Centers (RRCs, i.e., halfway houses). However, a *New York Times* (*Times*) investigation of halfway houses in New Jersey found cases of inmates committing new crimes after escaping and instances of lax security because counselors were either poorly trained, outnumbered, or feared for their safety; inmate-on-inmate violence; and questionably delivered rehabilitative services.[43] Further, a DOJ Office of the Inspector General (OIG) audit of RRCs raised questions about RRCs' adherence to contract requirements for supervising inmates.[44] The *Times* report suggests that several of the problems experienced in the halfway houses that were the subject of its investigation resulted from the New Jersey Department of Corrections and local sheriffs' departments using halfway houses as a means of reducing prison and jail overcrowding, which resulted in inmates with violent histories and/or who were convicted for violent offenses being placed in halfway houses. These inmates were then supervised by employees with little training, who were not correctional officers and who, in some instances, feared the inmates because they were substantially outnumbered. This suggests that if Congress wanted to use RRCs as a way of reducing overcrowding in federal prisons that placement in RRCs would be best if limited to low-level, non-violent offenders. The *Times* article includes accounts from staff who reported fearing for their safety while patrolling the halfway houses at night because of lax security and high inmate-to-staff ratios. This might mean that should RRCs be used as a way to reduce the number of inmates held in federal prisons, BOP would need to ensure that RRCs have properly trained and adequate staff and that the RRCs have satisfactory security measures in place. The findings from the OIG audit suggest that BOP might need to increase its oversight of the RRCs it contracts with. This could mean that BOP would need additional staff and an increase in its travel budget so BOP staff could make more frequent visits to RRCs.

If policymakers were concerned about whether RRCs are a valid alternative to placing some offenders in federal prison, Congress could choose to provide funding for a program that would allow the federal government to contract with local jails to provide short-term bedspace. One possible example is the Cooperative Agreement Program (CAP) whereby the U.S. Marshals Service (USMS) provided capital investment funding to local jails in exchange for guaranteed bedspace for federal detainees.[45] While the CAP was limited to securing bedspace for people in the custody of the USMS (i.e., people who have not yet been convicted of a crime), it is possible that such a program could be expanded to allow the federal government to expand local jail capacity in order to secure bedspace for some lower-level federal inmates who are serving short sentences. It is likely that jails would be more secure than RRCs. In addition, jails are staffed by correctional officers, who might be better prepared to supervise federal inmates.

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[41] Kevin McEvoy, "HOPE: A Swift and Certain Process for Probationers," *NIJ Journal*, no. 269 (March 2012), p. 17.

[42] Community Corrections: Probation, Parole, and Prisoner Reentry, p. 524.

[43] Sam Dolnick, "As Escapees Stream Out, a Penal Business Thrives," *New York Times*, June 17, 2012, p. A1.

[44] U.S. Department of Justice, Office of the Inspector General, *Audit of the Federal Bureau of Prisons' Contracting for and Management of Residential Reentry Centers*, Audit Report 12-20, Washington, DC, March 2012.

[45] Funding for this program was discontinued after FY2004.

Congress could also consider whether to require courts to place certain offenders in RRCs for violating the terms of their supervised release rather than returning them to prison. As mentioned, BOP might not save a significant amount of money by placing a greater number of inmates in RRCs, but by placing more of these short-term inmates in RRCs BOP would have additional bedspace. In addition, BOP would not have to invest time and money into re-processing the offender through the prison system. This is not to suggest that all inmates who have their supervised release revoked would be suitable for RRC placement. Indeed, inmates who are arrested and/or convicted for serious offenses would most likely need to be placed in a secure facility. However, offenders who have their supervised release revoked for technical violations (e.g., repeatedly failing drug tests) might be suitable for placement in a less secure environment that still allows for monitoring of their actions.

All of the alternatives to incarceration discussed above place the offender in the community, which means there is some level of risk that the offender could commit new offenses, because even though the offender would be supervised, the level of supervision would most likely provide a lower level of control over the individual's actions than would be provided by correctional officers in a secure environment.

Early Release Measures

One possible way to reduce the growth of the federal prison population would be to expand the early release measures for federal inmates. There are several options Congress could consider if policymakers wanted to expand early release options for federal inmates, including (1) reinstating parole, (2) expanding good time credits, and (3) expanding the conditions under which courts could reduce sentences pursuant to 18 U.S.C. Section 3582(c)(1)(A).

Reinstating Parole

One option Congress might consider is whether to reinstate parole in the federal system. Inmates sentenced for an offense in a federal court committed after November 1, 1987, are not eligible to be released on parole. Parole is one way correctional authorities can release inmates who are deemed to be at a low risk for recidivism and place them in community supervision for the remainder of their sentences.

Should Congress consider reinstating parole for federal inmates, there are several salient issues that policymakers might think about. First, how would a parole system work within the current determinate sentencing structure used in federal courts? Traditionally, discretionary parole has been combined with an indeterminate sentencing structure (i.e., a system whereby the court could impose a sentence for a crime within a range prescribed in law). Indeterminate sentences allow the court to tailor sentences to each defendant, but this gives rise to concerns about whether some sentences are arbitrary and unfair. For example, two defendants convicted for similar crimes might receive different sentences depending on which judge happens to be presiding over their cases. When combined with a parole board's discretion over when, if ever, someone would be granted parole, two defendants convicted of similar crimes could end up serving significantly different amounts of time in prison.

Congress sought to limit the discretion of the federal judiciary and the executive branch when it eliminated parole and replaced indeterminate sentencing with the sentencing guidelines. Parole might not be irreconcilable with a determinate sentencing structure. Courts could continue to use sentencing guidelines as a guidepost for determining a defendant's sentence and each inmate could then be eligible for parole after serving a certain portion of his or her sentence. However, should Congress allow federal inmates to be eligible for parole, it would grant the executive

branch, through the U.S. Parole Commission (hereinafter, "commission"), some measure of control over determining how much time an inmate serves in prison. Congress might choose to limit some of the commission's discretion by setting a higher threshold for determining what portion of an inmate's sentence must be served before he or she is eligible to be placed on parole.[46]

Should Congress choose to reinstate parole for federal inmates, another key question would be whether eligibility would be made retroactive to inmates who were sentenced for federal crimes after November 1, 1987. Making eligibility for parole retroactive could potentially reduce the federal prison population in a shorter amount of time than it would if only newly convicted inmates were eligible for parole consideration. However, it would appear likely that the commission and the U.S. Probation and Pretrial Services office would need increased resources in order to properly manage what would likely be a significant increase in their caseloads.

There might be some concern about whether allowing federal inmates to be released on parole would pose a threat to public safety. Concerns about recidivism are not unfounded. Research published by the Bureau of Justice Statistics found that approximately three-quarters (76.6%) of inmates released in 2005 were rearrested within five years and approximately half (55.4%) were convicted for a new crime.[47] Concerns about offenders committing new crimes while on parole have led some jurisdictions to implement intensive supervision programs where parolees are subject to more rigorous conditions of release and more frequent contacts with a parole officer. While intensive supervision programs might in theory reduce the likelihood that parolees commit new offenses while in the community, the body of research on intensive supervision programs suggests that these programs do not reduce recidivism.[48] Depending on how recidivism is defined, intensive supervision programs may actually increase "recidivism" because they are more likely to detect technical violations of the conditions of release.[49] This can create a paradox for policymakers: parole might be considered as a means of reducing the prison population, but it might actually increase the number of inmates in prisons as more return to prison for violating the conditions of parole. Should Congress choose to reinstate parole, policymakers might consider evidence-based measures so that parole helps as many inmates successfully transition back into the community as possible. The options Congress could consider are similar to those outlined above for successful probation programs, namely

- using a validated risk assessment tool to sort parolees into high- and low-risk groups;
- ensuring that parolees with a demonstrated need for rehabilitative programming have access to evidence-based, appropriately delivered programs;

[46] Federal inmates who are eligible for parole (i.e., inmates sentenced before November 1, 1987) can be released after serving one-third of their sentences (if sentenced to a term of incarceration greater than one year) or after 10 years if sentenced to life or a term of incarceration over 30 years. However, the sentencing court could designate a minimum term of imprisonment the defendant would have to serve before being eligible for parole. The minimum term of imprisonment designated by the court could be less, but not more, than one-third of the sentence imposed. The sentencing court could also fix the maximum sentence to be served, at which point the inmate could be released on parole. 18 U.S.C. §§4205(a) and 4205(b), as it was in effect before being repealed by §218(a) of P.L. 98-473.

[47] Matthew R. Durose, Alexia D. Cooper, and Howard N. Snyder, United States Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, NCJ 244205, April 2014. For a summary of this study and other studies on recidivism, see CRS Report RL34287, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, by Nathan James.

[48] *What Works in Corrections*, p. 310.

[49] Ibid.

- requiring parolees who violate their conditions of release to serve intermediate sanctions rather than returning them to prison; and
- allowing parolees who strictly adhere to the conditions of their parole to be released early.

Also, like probationers, data indicate that parolees are at the highest risk for recidivism during their first year of parole.[50] This suggests that in order to decrease the risk of recidivism services should be more intensive during the parolee's first year on release. Some research suggests that intensive supervision programs can reduce recidivism when they are combined with treatment and rehabilitative programming.[51]

Expanding Good Time Credits

Another potential policy option Congress could consider as a means to slow the growth of, or possibly reduce, the federal prison population is to expand BOP's authority to grant good time credit to inmates. Congress abolished parole for federal inmates in the 1980s, which means that inmates cannot be released before serving their entire sentence, minus any good time credit, even if the inmate's risk of recidivism is low. Under current law, BOP can grant up to 54 days of good time credit per year to inmates serving a sentence of more than one year, assuming the inmate has demonstrated "exemplary compliance with institutional disciplinary regulations" and is making satisfactory progress on completing a GED (assuming the inmate does not have a GED or a high school diploma).[52]

In addition to the amount of good time credit an inmate can earn, BOP is allowed to reduce a non-violent inmate's sentence by up to one year if the inmate participates in residential substance abuse treatment.[53] It has been argued that teaming good time credit with a program that places inmates with objectively assessed needs and risks in evidence-based programs to address those needs and risks can reduce recidivism and cut prison costs.[54] Congress could consider allowing BOP to award good time credit for inmates who have a need for and successfully complete rehabilitative programs other than residential drug abuse treatment. However, expanding good time credit for participation in rehabilitative programming would likely require Congress, at least in the short term, to expand funding for rehabilitative programs and inmate skills and needs assessments.

While expanding current good time credit policies might help reduce prison overcrowding, there might be some concern that BOP would effectively be reducing inmates' sentences without the sentencing court's approval. Additional good time credit would also allow inmates to be released before serving a significant (85%) portion of their sentence, a key rationale for why parole was eliminated in the first place. In addition, some may feel that regardless of an inmate's efforts to rehabilitate himself or herself or the risk he or she would pose to society when released, the inmate was sent to prison as a punishment for a crime, hence the inmate should serve his or her full sentence.

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[50] Community Corrections: Probation, Parole, and Prisoner Reentry, p. 524.

[51] *What Works in Corrections*, p. 318.

[52] 18 U.S.C. §3624(b)(1).

[53] 18 U.S.C. §3621(e)(2)(B).

[54] Dora Schriro, "Is Good Time a Good Idea? A Practitioner's Perspective," *The Federal Sentencing Reporter*, vol. 21, no. 3 (February 2009), p. 181.

Sentence Reduction

In addition to allowing BOP to grant more good time credit to inmates, Congress could also consider whether to amend the conditions under which courts can reduce an inmate's sentence. Under current law (18 U.S.C. §3582(c)(1)(A)), BOP can petition the court to reduce an inmate's sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction"; or the inmate is at least 70 years of age, has served at least 30 years of his or her sentence, and a determination has been made by the Director of BOP that the inmate is not a danger to the safety of any other person or the community. Congress required the USSC, when issuing a policy statement regarding sentence modification under 18 U.S.C. Section 3582(c)(1)(A), to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."[55] Under Section 1B1.13 of the U.S. Sentencing Guidelines, the USSC deemed the following circumstances to be "extraordinary and compelling reasons" for a sentence reduction:

- The inmate is suffering from a terminal illness.
- The inmate is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.
- The death or incapacitation of the inmate's only family member capable of caring for the inmate's minor child or minor children.
- As determined by the Director of BOP, there exists in the inmate's case an extraordinary and compelling reason other than, or in combination with, the reasons described above.

Pursuant to 28 U.S.C. Section 944(t), rehabilitation of an inmate is not, by itself, an extraordinary and compelling reason for granting a sentence reduction. If the court grants a sentence reduction under 18 U.S.C. Section 3582(c)(1)(A), the court is also allowed to impose a term of probation or supervised release, with or without conditions, for a period up to the amount of time that was remaining on the inmate's sentence.

One of the critiques of this program is that it relies on BOP to petition the court for a review of an inmate's sentence. One commentator argues that BOP narrowly interprets when inmates should be allowed to apply for a sentence reduction, effectively limiting applications to cases where the inmate is terminally ill and near death.[56] The policy statement governing the program states that consideration for a sentence reduction under 18 U.S.C. Section 3582(c)(1)(A) is limited to "particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing."[57] In August 2013, BOP revised its compassionate release policy statement to broaden the circumstances under which it will consider a sentence reduction request to include the following:[58]

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[55] 28 U.S.C. §994(t).

[56] Stephen R. Sady, "Second Look Resentencing under 18 U.S.C. §3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration," *Federal Sentencing Reporter*, vol. 21, no. 3 (February 2009), p. 167.

[57] U.S. Department of Justice, Bureau of Prisons, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g)*, Program Statement 5050.49, p. 1.

[58] BOP made changes to its compassionate release policy as a part of DOJ's "Smart on Crime" initiative. Changes to the compassionate release policy were also made in response to an Office of the Inspector General's report that

- terminal and non-terminal (e.g., the inmate has a serious physical or mental impairment) medical circumstances;
- circumstances for elderly inmates;
- circumstances in which there has been the death or incapacitation of the family member caregiver of an inmate's child; and
- circumstances in which the spouse or registered partner of an inmate has become incapacitated.[59]

Before submitting a compassionate release request to the court, BOP will consider whether an inmate's release would pose a danger to the safety of anyone in the community.[60]

Notwithstanding the changes BOP recently made to its compassionate release policy, Congress could consider modifications to the requirements for sentence reduction under 18 U.S.C. Section 3582(c)(1)(A) to allow more inmates to have their sentences reduced. For example, Congress could debate allowing courts to consider rehabilitation—either as an extraordinary and compelling reason on its own, or in consort with other reasons—when making determinations about sentence reductions. Expanding the authority of courts to grant a sentence reduction could allow inmates deemed to be a low threat to public safety to be placed in the community earlier, thereby freeing up bedspace in federal prisons.

An inmate granted a sentence reduction could still be required to serve a term of supervised release, which would allow federal probation officers to monitor the inmate after he or she is released, a possible advantage over allowing inmates to be released early by increasing good conduct time. However, it is likely that the judicial branch would require additional resources in order to process more applications for sentence reductions under the program and properly monitor inmates whose sentences were reduced but who were placed on supervised release. Also, there might be a question as to whether this would turn the courts into de facto parole boards. Congress eliminated parole in the federal system, in part, over concerns that inmates were incarcerated for less than an appropriate amount of time and disparities in decisions over who received parole. Under this possible system, inmates could be released before serving a majority of their sentences, but Congress could address this concern by not allowing inmates to be eligible for a sentence reduction until they have served a certain portion of their entire sentence.

A potentially more difficult issue for Congress to address is how judges would make decisions if granted broader authority to reduce sentences under the program. It is possible that an inmate's opportunity to receive a sentence reduction would depend on which judge ruled on the inmate's petition. This concern mirrors some of the concerns that existed about how much sway parole boards held over who was granted parole.

Congress could also consider amending the requirements under 18 U.S.C. Section 3582(c)(1)(A) so that inmates could be released before turning 70. Research indicates that most offenders "age-

uncovered problems with how BOP administered the program and critiques from external advocacy groups. DOJ's "Smart on Crime" initiative is a "comprehensive review of the criminal justice system aimed at ensuring federal laws are enforced more fairly, and federal resources are used more efficiently, by focusing on top law enforcement priorities." Rafael Lemaitre, *Real #DrugPolicyReform: DOJ's New Criteria on Compassionate Release Requests*, Executive Office of the President, Office of National Drug Control Policy, August 12, 2013 (document on file with the author).

[59] Ibid.

[60] Ibid.

out" of crime; that is, the older offenders get, the less likely they are to commit new crimes.[61] It appears likely that more elderly inmates could safely be released from confinement and placed on home confinement for the remainder of their sentences.[62] However, while elderly inmates might pose a reduced threat to public safety, there is likely to be some sentiment that any offender, regardless of age and safety risk, should serve his or her entire sentence.

Modifying the "Safety Valve" Provision

There are other amendments to the criminal code Congress could consider if policymakers wanted to potentially reduce the size of the federal prison population. For example, Congress could consider expanding the "safety valve" provision under 18 U.S.C. Section 3553(f). The safety valve provision allows judges to impose a sentence without regard to the mandatory minimum sentences for certain drug offenses[63] if the following conditions are met:

- The defendant does not have more than one criminal history point, as determined under the sentencing guidelines.
- The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.
- The offense did not result in death or serious bodily injury to any person.
- The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined by the sentencing guidelines, and was not engaged in a continuing criminal enterprise.
- No later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has

[61] Lindsey Devers, *Desistance and Developmental Life Course Theories: Research Summary*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, Washington, DC, November 9, 2011, p. 7.

[62] Under §231(g) of the Second Chance Act of 2007 (P.L. 110-199), BOP was directed to conduct a pilot program in FY2009 and FY2010 whereby eligible inmates would be placed on home confinement for the remainder of their sentences. Inmates eligible to participate in the pilot program were 65 or older; non-violent or non-sex offenders; not serving a life sentence; severed the greater of 10 years or 75% of their sentences; did not have a history of escape or escape attempts; and were determined to not be at risk for recidivism. The Government Accountability Office (GAO) reported that of the 855 inmates who applied for the pilot program, 71 (8.3%) were determined by BOP to have met the criteria for the program and were eventually placed on home confinement. The GAO noted that as of June 2012, none of the inmates placed on home confinement had recidivated or violated the terms of release. However, BOP reported that it did not save any money by placing elderly inmates on home confinement; in fact, BOP reported that it cost approximately $540,000 more to place the inmates on home confinement. The GAO contends that BOP's conclusions might not be a reliable indicator of the potential cost of the program should it be continued or expanded. First, while BOP knows what it paid RRCs to monitor inmates placed on home confinement, BOP does not know the exact cost of home confinement. BOP negotiates with RRCs to provide supervision of inmates placed on home confinement. RRCs are paid a per diem rate to house an inmate and they are paid 50% of the per diem rate to supervise an inmate placed on home confinement. However, BOP does not require RRC contractors to separate the cost of home confinement services and RRCs bedspace, so BOP does not actually know the cost of home confinement. Second, some of the costs of the pilot program would have been incurred regardless because BOP is currently authorized to place all of the inmates in the program on home confinement for up to six months. Government Accountability Office, *Federal Bureau of Prisons: Methods for Estimating Incarceration and Community Corrections Costs and Results of the Elderly Offender Pilot*, GAO-12-807R, Washington, DC, July 27, 2012.

[63] These offenses are trafficking in various controlled substances (21 U.S.C. §841), possession of certain controlled substances (21 U.S.C. §844), attempt or conspiracy to violate controlled substance provisions carrying mandatory minimum sentences (21 U.S.C. §846), smuggling controlled substances in violation of 21 U.S.C. §§952, 953, 955, 957, or 959 (21 U.S.C. §960), and attempt or conspiracy to violate the controlled substance import/export provisions (21 U.S.C. §963).

> concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful or other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has not complied with the requirements of the provision.

Currently, the safety valve provision cannot be applied to defendants facing a mandatory minimum sentence for an offense that is not drug-related. The safety valve provision was enacted after Congress became concerned that the mandatory minimum sentencing provisions could result in equally severe penalties for both the more and the less culpable offenders.[64] Congress could consider expanding the provision so that it would apply to defendants facing mandatory minimum sentences for offenses other than drug crimes. This option would allow Congress to retain mandatory minimum penalties that can still be applied to more serious offenders while allowing judges to sentence less serious offenders to shorter periods of incarceration.

One idea put forth is to amend current law so that judges could apply the safety valve in instances where the recommended sentencing guideline range is below the mandatory minimum penalty and where the defendant's offense did not result in death or serious bodily injury to anyone and the defendant has provided the government with all information and evidence available to the defendant.[65] Under the proposal, the defendant could not be sentenced to less than the minimum of the sentencing range calculated under the sentencing guidelines. Many of the conditions placed on the current safety valve provision would remain (e.g., not using violence or possessing a weapon and not being an organizer or leader in the offense), but rather than being a bar from being eligible for the safety valve, they would be factors for the court to consider when deciding whether to sentence a defendant below the mandatory minimum penalty. Judges would be required to state for the record why they chose to impose a sentence below the mandatory minimum penalty, and those decisions would be subject to appellate review. However, as noted, the USSC has incorporated many mandatory minimum sentences into the sentencing guidelines. Therefore, in some instances the guideline sentence might be equal to or exceed the mandatory minimum penalty, which would render the proposed safety valve provision moot. One possible solution to this conundrum would be to allow the USSC to give consideration to mandatory minimum penalties when formulating the sentencing guidelines, but not requiring the USSC to make the guidelines consistent with mandatory minimum penalties.[66]

Repealing Federal Criminal Statutes for Some Offenses

One of the highlighted reasons for the growth in the federal prison population was the "federalization" of offenses that were traditionally under the sole jurisdiction of state authorities. Policymakers could consider revising the U.S. Code so that federal law enforcement focuses on crimes where states do not have jurisdiction over the offenses or where the federal government is best suited to investigate and prosecute the offenders (e.g., the offense involves multiple individuals acting together to commit crimes across several states). Some crimes will remain federal offenses. For example, the federal government is responsible for prosecuting individuals who commit immigration-related offenses because immigration laws are solely the jurisdiction of

[64] CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by Charles Doyle. See also U.S. Congress, House Committee on the Judiciary, *Mandatory Minimum Sentencing Reform Act of 1994*, to accompany H.R. 3979, 103rd Cong., 2nd sess., March 24, 1994, H.Rept. 103-460 (Washington: GPO, 1994), p. 2.

[65] Paul G. Cassell and Erik Luna, "Sense and Sensibility in Mandatory Minimum Sentencing," *Federal Sentencing Reporter*, vol. 23, no. 3 (February 2011), p. 222.

[66] Ibid., p. 225.

the federal government. However, over the years the federal government has become more involved in investigating, prosecuting, and incarcerating people who commit drug offenses and offenses where a convicted felon is found to be in possession of a firearm. In many instances, states have criminal penalties for individuals who commit these types of crimes. For example, in his testimony before the House Subcommittee on Crime, Terrorism, and Homeland Security at a hearing on the unintended consequences of mandatory minimum penalties, one expert argued

> [f]ederal drug cases should focus exclusively on the international organizations that use their profits from the manufacture and distribution of cocaine, opium and heroin, methamphetamine, and cannabis to finance assassinations, terrorism, wholesale corruption and bribery, organized crime generally, and the destabilization of our allies…Every state in the U.S. has a great capacity to investigate, prosecute and punish the high-level local drug traffickers that operate within their jurisdiction. State and local police and prosecutors outnumber federal agents and prosecutors. State prisons far exceed the capacity of federal prisons…Almost none of the crack [cocaine] dealers that proliferate in countless U.S. neighborhoods warrant federal prosecution. There are neighborhood criminals and their crimes are state crimes. If a state's law does not adequately punish a crack [cocaine] dealer, *that is the state's problem. Inadequate state laws do not warrant wasting very scarce, powerful federal resources even on serious neighborhood criminals* [emphasis original].[67]

Scaling back the scope of the federal criminal code could help reduce the size of the federal prison population in the future by reducing the number of people prosecuted and sentenced to incarceration in federal courts. However, this policy option could increase the burden on state criminal justice systems since they would be responsible for prosecuting and incarcerating offenders who are no longer tried in federal courts. By year-end 2014, according to the BJS, 19 state correctional systems were at or above their highest capacity, and another 18 state correctional systems were between 90% and 99% of their highest capacity.[68] Since nearly three-quarters of states have prison systems that are operating at 90% of capacity or higher, it would appear that if the federal government chooses not to prosecute some offenses, thereby leaving states with the responsibility to do so, it would require states to either expand their prison capacities or possibly decline to prosecute some offenses. Also, it is possible that an expansion of state correctional systems could have a significant effect on state finances. The Vera Institute of Justice reported that state correctional spending has nearly quadrupled over the past two decades, which makes it the fasting-growing budget item after Medicaid.[69] Since states typically cannot run a budget deficit, any expansion in correctional expenditures would have to be paid for with cuts to other state services, increased taxes, or issuing bonds.

[67] Statement of Eric E. Sterling, President of the Criminal Justice Policy Foundation, U.S. Congress, House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, *Mandatory Minimums and Unintended Consequences*, Hearing on H.R. 2934, H.R. 834 and H.R. 1466, 111th Cong., 1st sess., July 14, 2009, H.Hrg. 111-48 (Washington: GPO, 2010), pp. 114-115.

[68] E. Ann Carson, *Prisoners in 2014*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 248955, Washington, DC, September 2015, p. 12.

[69] Christian Henrichson and Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, Vera Institute of Justice, New York, NT, January 2012, p. 2.

Appendix. Select BOP Data

Table A-1. Number of Inmates Under BOP's Jurisdiction and the Number and Capacity of and Overcrowding in BOP Facilities

Appropriations amounts are in thousands of dollars

	Appropriations			Prison Population			Prison Facilities		
Fiscal Year	Salaries and Expenses	Buildings and Facilities	Total	Institution	Contract	Total	Number	Capacity	Over-crowding
1980	$323,884	$5,960	$329,844	24,268	372	24,640	41	—	—
1981	351,759	10,020	361,779	26,195	118	26,313	43	23,648[a]	11%[a]
1982	378,016	56,481	434,497	28,133	2,398	30,531	43	24,072[a]	17%[a]
1983	412,133	66,667	478,800	30,214	3,002	33,216	43	23,936[a]	26%[a]
1984	464,850	47,711	512,561	32,317	3,478	35,795	43	24,874[a]	30%[a]
1985	536,932	86,043	622,975	36,001	4,329	40,330	46	25,532[a]	41%[a]
1986	561,480	44,082	605,562	41,506	4,549	46,055	47	27,785[a]	49%[a]
1987	656,941	219,249	876,190	44,194	5,184	49,378	47	27,854[a]	59%[a]
1988	772,013	297,076	1,069,089	44,142	6,371	50,513	52	28,143[a]	57%[a]
1989	962,016	612,914	1,574,930	51,153	6,609	57,762	58	31,727[a]	61%[a]
1990	1,138,778	1,511,953	2,650,731	58,021	6,915	64,936	64	34,239[a]	69%[a]
1991	1,363,645	374,358	1,738,003	64,131	7,377	71,508	68	42,531	51%
1992	1,649,121	462,090	2,111,211	70,670	9,008	79,678	69	48,527	46%
1993	1,793,470	339,225	2,132,695	79,799	8,766	88,565	72	57,610	39%
1994	1,962,605	269,543	2,232,148	85,850	9,312	95,162	75	64,751	33%
1995	2,319,722	276,301	2,596,023	90,159	10,799	100,958	83	72,039	25%
1996	2,546,893[b]	334,728	2,881,621	94,695	10,748	105,443	86	76,442	24%
1997	2,748,427[c]	435,200	3,183,627	101,091	11,198	112,289	91	83,022	22%
1998	2,847,777[d]	255,133	3,102,910	108,207	14,109	122,316	92	86,051	26%
1999	2,888,853[e]	410,997	3,299,850	117,295	16,394	133,689	94	89,581	31%
2000	3,111,073[f]	556,780	3,667,853	125,560	19,565	145,125	97	94,927	32%
2001	3,469,739	833,822	4,303,561	130,327	26,245	156,572	100	98,425	32%
2002	3,805,118	807,808	4,612,926	137,527	25,909	163,436	102	103,262	33%
2003	4,044,788	396,632	4,441,420	146,212	26,287	172,499	103	105,193	39%
2004	4,414,313	393,515	4,807,828	152,518	27,377	179,895	109	108,537	41%
2005	4,571,385	205,076	4,776,461	159,501	27,893	187,394	116	118,652	34%
2006	4,830,160	99,961	4,930,121	162,514	30,070	192,584	114[g]	119,510	36%
2007	5,012,433	432,425	5,444,858	167,323	32,697	200,020	114	122,189	37%
2008	5,346,740	372,720	5,719,460	165,964	35,704	201,668	114	122,366	36%
2009	5,600,792	575,807	6,176,599	172,423	36,336	208,759	115	125,778	37%
2010	6,106,231	99,155	6,205,386	173,289	36,938	210,227	116	126,713	37%
2011	6,282,410	98,957	6,381,367	177,934	39,834	217,768	117	127,795	39%
2012	6,551,281	90,000	6,641,281	177,556	41,131	218,687	118	128,359	38%
2013	6,349,248	95,356	6,444,604	176,849	42,449	219,298	119	129,726	36%

	Appropriations			Prison Population			Prison Facilities		
Fiscal Year	Salaries and Expenses	Buildings and Facilities	Total	Institution	Contract	Total	Number	Capacity	Over-crowding
2014	6,769,000	90,000	6,859,000	172,242	41,907	214,149	121	132,803	30%
2015	6,815,000	106,000	6,921,000	165,134	40,589	205,723	122	134,470	23%
2016	6,948,500	530,000	7,478,500	—	—	—	—	—	—

Source: U.S. Department of Justice, Bureau of Prisons.

Notes: BOP did not provide capacity and overcrowding data for FY1980. Appropriation amounts in **Table A-1** include all supplemental and reprogrammed appropriations and any rescissions of enacted budget authority, but they *do not* include rescissions of *unobligated balances*. From FY1980 to FY1995, funding for the National Institute of Corrections (NIC) was included in a separate account. Since FY1996, funding for the NIC has been included in the S&E account. Funding for the NIC for FY1980-FY1995 was added to the S&E account to make funding for the S&E account comparable across fiscal years. The FY2013 enacted amount includes the amount sequestered per the Budget Control Act of 2011 (P.L. 112-25).

a. Capacity and overcrowding were calculated based on single cell occupancy
b. Includes $13.5 million appropriated from the Violent Crime Reduction Trust Fund.
c. Includes $25.2 million appropriated from the Violent Crime Reduction Trust Fund.
d. Includes $26.1 million appropriated from the Violent Crime Reduction Trust Fund.
e. Includes $26.5 million appropriated from the Violent Crime Reduction Trust Fund.
f. Includes $22.5 million appropriated from the Violent Crime Reduction Trust Fund.
g. In FY2006, BOP closed four stand-alone prison camps and activated two new prisons.

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