


# Letting Punishment Fit The Crime: A Bipartisan Effort to Reduce Prison Occupancy

*by Erich R. Eiselt, Assistant General Counsel*

**Question: What do Attorney General Eric Holder and the Tea Party agree on? The obvious answer would seem to be "Hardly anything." But there are exceptions.**

As the last week of an ineffectual term characterized mainly by acrimony and gridlock came to a close and Senators and Congressman jetted off to summer vacations, a modest bipartisan proposal surfaced on Capitol Hill. The Smarter Sentencing Act of 2013 (S.1410)[1] is intended to revise national drug incarceration polices by giving federal judges more discretion in sentencing those convicted of non-violent drug offenses. Introduced by Assistant Majority Leader Dick Durbin (D-IL) and Senator Mike Lee (R-UT), the SSA is architected to allow shorter prison terms for non-violent offenders, reducing surging prison populations and cutting runaway costs.

Durbin, a consistent advocate of legislation to hold the line on skyrocketing federal incarceration trends, provides the rationale for the SSA: "Mandatory minimum sentences for non-violent drug offenses have played a huge role in the explosion of the U.S. prison population," he says. "Once seen as a strong deterrent, these mandatory sentences have too often been unfair, fiscally irresponsible and a threat to public safety. Given tight budgets and overcrowded prison cells, judges should be given the authority to conduct an individualized review in sentencing certain drug offenders and not be bound to outdated laws that have proven not to work and cost taxpayers billions."[2]

The growth in federal prison populations—and taxpayer-funded expenditures to keep them incarcerated—is documented in a Congressional Research Service publication issued earlier this year.[3] In 1980, there were 25,000 inmates under federal Bureau of Prisons (BOP) jurisdiction. That number increased nearly nine-fold, to 219,000 BOP prisoners, by 2012. Nearly half of them are serving sentences for drug offenses, with the largest percentage growth resulting from lower-level drug charges.

Not surprisingly, costs to house this population have grown even more stunningly. Per-capita expenses grew from $19,500 per prisoner in 2000 to over $30,000 per person today. And overall appropriations for the BOP which were $3.7 billion in 2000 raced upwards to $6.8 billion in 2011, consuming over one-fourth of the entire Justice Department budget.[4]

Mandatory sentencing, once viewed as a prudent measure to ensure punishment, is now seen as part of the problem. Particularly when applied to drug offenses, mandatory sentencing forces a judge to impose a one-size-fits-all sentence without taking into account the details of an individual case. Critics charge that many of these sentences disproportionately affect minority populations and foster distrust of the criminal justice system. In addition, a lack of flexibility for "compassionate release" determinations keeps many aging prisoners behind bars, although they pose greatly reduced recidivism risks and cost significantly more than average, due to increased healthcare needs.[5]

Cost considerations are only one parameter of the problem; safety considerations are another. The ballooning inmate population is straining prison infrastructure and staffing. The BOP is nearly 40 percent over capacity, putting inmates and corrections officers at risk.

The SSA is not radical (and in fact too moderate for some, who want greater remedial action). It applies only to nonviolent drug offenses, and it proposes modest revisions to current drug sentencing policy:

First, it lowers certain drug mandatory minimums – without lowering the maximum sentences for those offenses. This policy would maintain a (lowered) floor for all who commit the same drug-related offense and allow judges more flexibility in assessing individual circumstances.

Second, the SSA allows certain inmates who did not appropriately receive the benefits of the Fair Sentencing Act of 2010 to petition retroactively for sentence reductions consistent with that law. (The bipartisan Fair Sentencing Act of 2010, which was authored by Senator Durbin and unanimously passed the Senate before becoming law, reduced the prior disparity between crack and powder-cocaine offenses. Due to the timing of their sentences, some inmates continue to serve sentences that Congress determined to be unjust and racially disparate. The SSA would allow certain inmates sentenced under the pre-Fair Sentencing Act regime to seek sentence reductions consistent with the Fair Sentencing Act and current law. )

Third, the SSA moderately broadens eligibility criteria for the federal "safety valve" which would allow judges to impose individualized sentences for certain nonviolent drug offenders with minimal criminal history category and who meet the other elements of the safety valve's strict objective test.

Eric Holder has been an increas-

*Continued on page 35*

ed by the National Resources Defense Council – protested the settlement discussed here. These groups filed a separate lawsuit against PPG, which the two sides agreed to settle in 2011. That settlement calls for PPG to reduce chromium levels on its contaminated sites to 5 parts per million – a more stringent standard than the 20 parts per million standard required under both New Jersey law and the settlement the City reached with PPG. However, the 5 ppm standard has no impact on the pragmatic remediation of the PPG sites: Since PPG is removing the contaminated soil on its sites, it effectively eliminating all traces of chromium thereupon. This said, the community groups and NRDC do have the right to review the clean-up of the PPG properties. ML

## Federal *Cont'd from page 18*

ingly outspoken advocate for the type of change proposed in the SSA. As he puts it ""I think there are too many people in jail for too long and for not necessarily good reasons."[6] Looking to Congress, Holder has spoken of a cooperative approach as the Justice Department considers its options: "How we deploy our agents, what we tell our prosecutors to charge, but I think this would be best done if the executive branch and the legislative branch work together to look at this whole issue and come up with changes that are acceptable to both."[7] And in early August he took the initiative, announcing that he was directing his 94 US Attorneys around the nation to stop charging low-level, non-violent drug offenders with offenses requiring lengthy mandatory sentences.[8]

Not surprisingly, the move has been greeted with approval by many in both the Democratic and Republican parties, as well as those with Libertarian leanings. In an unusual conversion of interests between the Executive Branch and the Tea Party, Rand Paul (R-KY) is working for the same result as Eric Holder. Paul has signed on with Senate Judiciary Committee Chairman Patrick Leahy (D-VT) to introduce similar legislation –the Justice Safety Valve Act of 2013—which would give judges more power to impose lower sentences, not only for drug crimes.

To some extent, the changes sought by the Attorney General and the bills now before Congress are already underway at the state level. Although federal prison populations have continued to rise, combined federal and state statistics reveal a slight but statistically significant year-over-year drop in state prison populations during the past 4 years: total federal and state incarcerations dropped from a peak of 1,615,487 in 2009 to 1,571,093 in 2012.[9] (City, county and local jail inmates add another 735,000 to the mix, pushing America's total incarcerated population to nearly 2.3 million persons, with an additional 3.9 million on probation.)[10]

California led the drop, prodded by federal court orders. But Texas, traditionally viewed as hard on crime, reduced its inmate rolls by nearly 5,000, and New York, North Carolina, Virginia and Florida each showed declines of over 1,000 prisoners each.

Clearly, some of the reduction is a function of sagging state budgets. But other factors are also at work, including gradual softening of charges for lesser offenses and public distaste for allocating funds to incarceration when public schools languish. And failure to spend the money needed to provide adequate facilities and oversight has Constitutional dimensions. California is the most notable case in point. In 2009, following a years-long series of challenges by prisoners rights advocates, a three-judge federal panel ordered the state to redress inmate overcrowding in California prisons. The judges determined that California inmates were suffering and dying as a result of inadequate medical and mental health care due to prison overpopulation. The State was directed to cut its prisoner total by nearly 30,000 inmates, which would reduce to 110,000 the number of people behind bars in California (that figure would still result in the State's penal system holding 137.5 percent of capacity, down from 150 percent.) California challenged the order, arguing among other things that it constituted an impermissible intrusion of the federal government into a matter of state law. But in a 5-4 opinion rendered in 2011, the Supreme Court upheld the lower court's order, finding that California prison overcrowding was so bad that conditions violated the Eighth Amendment's prohibition against cruel and unusual punishment.[11]

The immediate financial benefits of reduced prisoner populations seem obvious. Annual budgets for holding inmates behind bars can be stemmed, and the burden of continual building or contracting for new facilities will be deferred or stopped. But the intangible consequences of putting unemployable or potentially dangerous prisoners back on the streets—or mistakenly interpreting juvenile offenders' patterns of increasing criminality as merely innocuous—could have major implications for municipalities. While federal and state penal costs go down, costs for local law enforcement, homeless shelters and social services could see an increase. As the Sutter County (California) District Attorney said after the Supreme Court again refused to intervene in the federally-ordered inmate reduction plan for California's 33 adult prisons in August 2013, "We were hoping for some relief from the recent push to let more criminals loose on the streets, but obviously that relief isn't coming. This makes things much worse."[12]

For now, though, whatever the uncertainties, the momentum for reducing the number of men and women held in America's prisons is undeniable. The Smarter Sentencing Act of 2013 is supported across the political spectrum, with frequent outliers such as Grover Norquist joining a cause endorsed by the ACLU, the NAACP and a wide range of public interest and church groups. The SSA parallels legislation already underway in at least 20 states as they grapple with uncontrolled growth in prison populations and skyrocketing incarceration costs. With such unlikely bedfellows propelling it, the SSA just may become one accomplishment of an otherwise unremarkable Congressional term.

### Notes

1. http://beta.congress.gov/bill/113th-congress/senate-bill/1410 (last accessed August 4, 2013)
2. http://www.durbin.senate.gov/public/index.cfm/

pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736 (last accessed August 6, 2013)
3. http://www.fas.org/sgp/crs/misc/R42937.pdf (last accessed August 6, 2013)
4. *Id.*
5. http://www.usatoday.com/story/news/nation/2013/07/10/cost-care-aging-prisoners/2479285/ (last accessed August 6, 2013)
6. http://www.capradio.org/news/npr/story?storyid=209253516 (last accessed August 7, 2013)
7. *Id.*
8. http://articles.washingtonpost.com/2013-8-12/world/41333369 3 1 prison-population-prison-reform-prison-costs (last accessed August 25, 2013)
9. http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?pagewanted=all (last accessed August 20, 2013)
10. http://www.sentencingproject.org/map/map.cfm (last accessed August 25, 2013)
11. *Brown v. Plata*, 131 S. Ct. 1910 (2010)
12. http://www.appeal-democrat.com/articles/state-126813-prison-inmates.html#ixzz2cXLHPIPi (last accessed August 25, 2013)

## Ordinances *Cont'd from page 27*

sures" limiting who can own guns and where they can be used.

In response to Christian's assertion that "strict scrutiny" review should apply to the Ordinance (requiring the showing of a "compelling state interest" and "narrowly tailored" statutes), the Oregon court countered that the majority of federal courts have applied an "intermediate scrutiny" standard in the wake of *Heller*. This required the showing of "an important governmental objective" and means "substantially related" to that objective. Because the Ordinance did not seek to ban all public carry of loaded firearms, strict scrutiny was inapposite, and "intermediate" review was proper. On that basis, the Ordinance passed Constitutional muster: "Applying the standard of intermediate scrutiny, we conclude that the city has demonstrated that it is important to protect the public from the many risks associated with the presence of loaded firearms in public places. We also conclude that enforcement of the ordinance, as carefully drawn, is substantially related to that objective and advances that objective."

*State v. Christian*, No. S060407 (OR Aug. 15, 2013) http://www.publications.ojd.state.or.us/docs/S060407.pdf (last accessed August 20, 2013)

**NOTE:** IMLA thanks Larry Rosenthal of Chapman University for writing our brief with Paul C. Elsner, Beery, Elsner & Hammond, LLP, Portland, Chad A. Jacobs, Portland, and John Daniel Reaves, Washington DC. IMLA was joined on its amicus brief by the U.S. Conference of Mayors and the Major Cities Chiefs Association and IMLA thanks them for their support. Thanks too, to Jerry Lidz, Eugene City Attorney's Office, who filed the brief for *amicus curiae* League of Oregon Cities. With him on the brief was Sean E. O'Day, League of Oregon Cities. Finally, IMLA salutes Harry Auerbach, who argued the case for the City of Portland.

## Code Enforcement *Cont'd from page 19*

video gaming. The administration felt that we should enact local regulations in order to provide the ability for local enforcement to ensure compliance. The ordinance which was drafted was patterned after the state regulations and also authorized a fee for local licensing of video gaming machines and locations. When the ordinance was presented to the City Council, several aldermen questioned why the City would need to act at all in the face of the state regulations. They felt that the state would provide adequate enforcement. The Mayor and I both indicated during the discussion that we felt it important to have local regulation in order to provide a much more immediate mechanism for enforcement of violations. At the end of the discussion, the City Council enacted the ordinance, but removed the provisions concerning local fees for issuance of the licenses.

While my code book is thick with regulations that mirror state statutes such as traffic regulations, I am not an advocate for enacting local regulations to cover everything possible. However, I do advocate working on an issue and enacting local regulation to provide local enforcement if state regulations and enforcement are not adequate to address a problem that needs resolution. I would encourage those municipalities which have home rule authority to keep an eye on local regulation and enforcement as the potential primary option to address local issues.

