Statement of

THOMAS M. SUSMAN

on behalf of the

AMERICAN BAR ASSOCIATION

for the record of the hearing on

OVERSIGHT OF THE FEDERAL BUREAU OF PRISONS

before the

Subcommittee on Crime, Terrorism, Homeland Security and Investigations

Committee on the Judiciary

of the

UNITED STATES HOUSE OF REPRESENTATIVES

September 19, 2013
Chairman Sensenbrenner, Ranking Member Scott, and Members of the Subcommittee:

I am Thomas M. Susman, Director of the Governmental Affairs Office of the American Bar Association (ABA), and I am submitting this statement on behalf of the ABA for the Subcommittee’s consideration for its September 19, 2013, hearing on “Oversight of the Federal Bureau of Prisons.”

The ABA commends the Subcommittee for holding this hearing. In the debate over addressing the country’s fiscal challenges, many are rethinking our nation’s approach to criminal justice and corrections spending. A growing number of states have done so on a bipartisan basis, in the name of fiscal responsibility, accountability, and public safety. These state successes offer ideas for what can also be done at the federal level. We believe this hearing can serve as an important step toward generating a higher level of congressional scrutiny of costly, outdated, and, in important respects, ineffective federal corrections spending policies and related sentencing laws.

The ABA believes that the same level of scrutiny that is applied with regard to federal spending in other areas must be applied to spending on prisons, corrections, and criminal justice policies. We must ask whether these crime and corrections policies are cost-effective and evidence-based, and whether they are more or less effective in reducing crime and serving public safety than other alternatives. We look to the continued leadership of the Subcommittee to reconsider overly costly federal corrections policies and to replace them with less costly and more effective alternatives.

In 1980, the federal prison system housed 24,000 people at a cost of $333 million. Since then, the federal prison population has exploded, now housing 217,000 people at an annual cost of over $6 billion – an increase of 760% in population and 1700% in spending. Overcrowding plagues the federal system, operating at almost 40 percent over capacity, but we cannot build ourselves out of this crisis. Disproportionate investment in prison expansion has diminished attention to viable and fiscally sound alternatives to prison and weakened the concept that prison should be the sanction of last resort. It is critical that the crisis of the surging, unsustainable federal prison population be addressed, as it will increasingly engulf federal law enforcement resources.

The most significant source of this exponential growth is the increased incarceration of nonviolent drug offenders. The federal government wastes precious taxpayer dollars when it incarcerates nonviolent offenders whose actions would be better addressed through alternatives that will hold them equally accountable at a substantially lower cost. Being sentenced to prison is always one option, but there should be others. We must expand and make broader use of proven alternatives to prison, especially for low-level and nonviolent offenders. Experience at the state level has demonstrated legislators can make changes that safeguard the public and save money. Examples of successful bipartisan state-level reforms include:

- In Texas, requiring all drug possession offenders with less than a gram of drugs to be sentenced to probation instead of jail time;
- In Oklahoma, expanding eligibility for community sentencing and increasing the use of parole for nonviolent offenders;
- In Kentucky, strengthening parole eligibility for certain low-level felony offenses and making individuals who complete drug treatment or education programs eligible to receive an earned discharge credit of 90 days;
- In Mississippi, reducing time-served for certain categories of nonviolent offenders; and
- In South Carolina, removing mandatory minimums for first-time offenders.
Reforms similar to these are being implemented in a variety of states, and these changes have led to the first overall declines in state prison populations since 1980. These reforms can and should serve as a model for the federal criminal justice system. Alongside many legal, criminal justice, civil rights, and faith-based organizations across the political spectrum, the ABA urges you to press the BOP to fully utilize programs to release eligible prisoners under appropriate supervision into their communities.

The Bureau of Prisons (BOP) should be required to better utilize existing authority to cut costs while protecting safety

- **Residential Drug Abuse Treatment**
  The BOP can and should expand the use of its Residential Drug Abuse Treatment Program (RDAP). Congress mandated that the BOP make available substance abuse treatment for each person in BOP custody with a “treatable condition of substance addiction or abuse” and created an incentive for people convicted of nonviolent offenses to complete the program by authorizing a reduction of incarceration of up to one year. However, the full cost-savings benefits of RDAP are not currently being realized. According to a Government Accountability Office (GAO) report that assessed the program, from 2009 to 2011 only 19% of those who qualified for a 12-month sentence reduction were able to enroll in RDAP and complete it and thereby receive the maximum sentence reduction. We understand that BOP is reconsidering policies that currently result in excluding large numbers of prisoners from participating in the program who Congress has determined are eligible.

- **Compassionate Release**
  As one of few mechanisms available to revisit sentences once imposed in federal cases, Congress authorized the BOP to petition the sentencing court to reduce a sentence for “extraordinary and compelling” reasons that warrant release, commonly referred to as “compassionate release.” For many years, the Bureau limited use of this authority to cases where the prisoner had a terminal illness with a life expectancy of one year or less or had a profoundly debilitating medical condition. However, the U. S. Sentencing Commission promulgated a guideline in 2007 that delineated additional circumstances a court could take into account, including the death or incapacitation of the inmate’s only family member capable of caring for the inmate’s minor child or children or any other reason determined by the BOP Director. This summer, BOP set out additional guidelines expanding eligibility to the parents of minor children contemplated by the Commission and extending eligibility to certain other prisoners, including those who did not commit violent offenses and have served portions of their sentences. We are heartened by the expanded grounds recently announced by the BOP but mindful that it has rarely invoked the sentence reduction authority provided to it by Congress. We urge the Bureau to use the full authority of the new guidelines to identify and bring to the court’s attention all worthy cases that meet the criteria.

- **Community Confinement**
  Congress has directed the BOP to ensure that persons in federal prisons have an opportunity to spend up to 12 months in re-entry facilities, to facilitate successful re-entry into the community after release. This may include a full year in a residential re-entry center (RRC), also known as a halfway house, or in home confinement for up to 6 months of that one-year total. Despite Congress’s direction, the GAO noted that in 2010 that stays in RRCs alone averaged only 95 days and home detention averaged only 4.5 months. Although BOP has begun to give staff more discretion regarding decisions as to when to place persons in halfway houses and in home confinement, much more needs to be done to ensure that persons approaching release from
prison benefit from the full 12-month reentry period Congress authorized. The Subcommittee should inquire and scrutinize BOP’s explanation of its sparing use of this authority to support reentry steps and reduce prison stays and cost.

The Subcommittee should take legislative action to address out-of-control prison costs and respond to the prison crowding crisis.

We believe there is broad and growing consensus among across the political spectrum that the time has come to reduce BOP costs and achieve future savings through legislative reforms.

The ABA commends the Judiciary Committee and its leadership for establishing a Task Force on Over-Criminalization and Over-Federalization of Crime. The ABA is strongly encouraged by the bipartisan process and the clearly positive dialogue regarding issues of agreement in the initial hearings held by the Task Force. As part of the “Over-criminalization Working Group” formed by key criminal justice reform advocacy organizations that has been meeting for several years, the ABA believes that there are key legislative reforms that will find consensus support among the members of the Task Force, leading to action by the Judiciary Committee and the full House in this Congress. We also urge the Subcommittee to consider and act on pending bipartisan legislation that will institute reforms in federal sentencing laws and in-prison programming aimed at reducing recidivism. Both of these proposals would significantly reduce the BOP prison population, cut costs and serve public safety:

- **Expand Recidivism-Reducing Programs in Federal Prisons**
  Representatives Jason Chaffetz (R-UT) and Bobby Scott (D-VA) have introduced the Public Safety Enhancement Act of 2013, legislation to improve the effectiveness and efficiency of BOP administration of the federal prison system with offender risk and needs assessment, individual risk-reduction incentives and rewards, and risk and recidivism reduction. Once implemented, this legislation would provide significant cost savings by BOP through earlier release for a potentially large number of federal prisoners who committed certain nonviolent offenses and have participated in proven, recidivism-reducing programs while in federal prison.

- **Restore Proportionality to Federal Sentencing**
  Representatives Bobby Scott (D-VA) and Tom Massie (R-KY) introduced the Justice Safety Valve Act of 2013, H.R. 1695, legislation to authorize federal courts to impose sentences below statutory mandatory minimums for certain nonviolent offenses. Excessive mandatory minimum sentences associated with a range of nonviolent federal offenses have directly led to the unprecedented growth in the federal prison population. The availability of federal mandatory minimum sentences for nonviolent drug offenses has led to an overrepresentation of low-level and nonviolent drug offenders in the federal criminal justice system, including many whose cases would otherwise have been handled in state systems. Restoring federal judicial discretion in certain low-level, nonviolent drug cases by eliminating mandatory minimum sentences would not ignore culpability, but would ensure that defendants receive punishments that are proportional to the offense they committed and would dis-incentivize states’ shifting of such cases to the federal criminal justice system.

There is a growing recognition that our criminal justice system – like other government systems – must be based on what actually works, meet clear performance measures, and withstand cost-benefit analysis.
Policy makers can replace unnecessary and excessive prison sentences with proven alternatives that hold people accountable while, at the same time, saving taxpayer dollars. The American Bar Association looks forward to working with the Subcommittee to advance these important principles.