

# BRENNAN CENTER FOR JUSTICE

*at New York University School of Law*

## ***Federal Prosecution for the 21st Century: Fiscal Impact Statement***

*By Oliver Roeder, Nicole Fortier*

The Brennan Center’s recent report, [Federal Prosecution for the 21st Century](#), proposes a mission shift for federal prosecution: a reorientation toward the twin goals of reducing crime *and* reducing mass incarceration. It recommends that the Justice Department institutionalize this change by implementing new priorities and success measures.

This analysis presents the estimated budgetary cost savings of a reduction in the federal prison population achieved by implementing this reform. **At best estimate, this reform would result in approximately 100,000 fewer federal prisoners per year, saving the Justice Department over \$1.2 billion annually and \$19 billion over 10 years – without compromising public safety.**<sup>1</sup> As explained below, higher or lower cost savings could result depending on how deeply the reforms are institutionalized within U.S. Attorneys’ Offices.

### **Summary of Report Recommendations**

The Justice Department can implement 21st century federal prosecution by:

- Articulating new priorities for federal prosecution: reducing violent and serious crime, reducing incarceration, and reducing recidivism;
- Evaluating the performance of U.S. Attorneys’ Offices based on “success measures” that track progress toward these priorities;
- Modifying the evaluations of individual prosecutors to include similar success measures;
- Provide additional funding for Offices that successfully reduce the numbers of defendants sent to prison; and
- Encouraging Offices to implement complementary changes in their individual offices.

As Attorney General Eric Holder stated in September, “[These] concrete recommendations – that federal prosecutors should prioritize reducing violence, incarceration, and recidivism – are consistent with the aims of the Smart on Crime initiative. The new metrics [proposed] – such as evaluating progress by assessing changes in local violent crime rates, numbers of federal prisoners initially found in particular districts, and changes in the three-year recidivism rate – lay out a promising roadmap.”

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The Brennan Center’s recommendations would reduce the number of inmates held by the federal Bureau of Prisons (BOP).

### Federal Prison Population Affected

To implement this reform, the Justice Department should start by encouraging U.S. Attorneys to focus on reducing two drivers of the federal prison population: the number of nonviolent offenders sent to prison and the number of pretrial detainees held.

Table 1 shows federal prison admission data for the most recent year available, which is 2010. Of the 146,130 individuals admitted to the BOP, 76,473 were pretrial detainees and 58,461 were convicted of nonviolent crimes. These two categories amount to 92 percent of federal admissions. Research has shown that alternatives to incarceration – such as probation, supervision, or monitoring – could be equally effective for many of these individuals. Many pretrial detainees – by some estimate, up to 80 percent – are at low risk of failing to return to court or of committing a new crime while on release.<sup>2</sup>

**Table 1: Pretrial Detainees and Nonviolent Offenders Sent to Federal Prison (2010)**

Offense	Number Sentenced to Prison	Median Prison Term
Property	7,224	24 months
Drug	23,129	60 months
Public order	3,012	27 months
Immigration <sup>3</sup>	22,251	15 months
Misdemeanor	2,745	3 months
Pretrial	76,473 (52%)	4 months
<b>Total Nonviolent and Pretrial Inmates</b>	<b>134,834 (92%)</b>	—
Total Inmates Admitted	146,130	—

Source: U.S. Department of Justice, Bureau of Justice Statistics.<sup>4</sup>

Using this data, we estimate three different results of this reform – a high estimate, medium estimate, and low estimate – based on how deeply the reform is institutionalized and followed:

- *High Estimate:* In this scenario, federal prosecutors would use their discretion to ensure that 80 percent of eligible prisoners and defendants would not be sent to BOP. Federal prosecutors would still take action to seek and recommend that 20 percent of defendants are detained pretrial and 20 percent of nonviolent offenders are sent to prison, despite Justice Department directives, evaluations, and incentives not to. This could result if all recommendations of the report were institutionalized, implemented, and evaluated at the Justice Department and in most U.S. Attorneys’ Offices.

- *Medium Estimate:* Prosecutors would seek and recommend that 50 percent of defendants are detained pretrial and 50 percent of nonviolent offenders are sentenced to prison. This scenario assumes a meaningful, but not wholesale, shift in practice. Given legitimate public safety reasons to hold some nonviolent and pretrial detainees, the wide discretion afforded prosecutors, and possible challenges of implementation, this scenario may be the most likely.
- *Low Estimate:* In this scenario, prosecutors would seek and recommend that 10 percent of nonviolent and pretrial detainees are sent to BOP. This scenario assumes that prosecutors largely would not follow Department directives, evaluations, and incentives. This could result if the Department does not take steps to institutionalize this change, or if U.S. Attorneys' Offices do not implement complementary changes.

Table 2 estimates the total number inmates not sent to prison under each scenario, taking into account typical lengths of stay.<sup>5</sup>

**Table 2: Project Number of Inmates Diverted, by Scenario**

	<b>High Estimate</b>	<b>Medium Estimate</b>	<b>Low Estimate</b>
Property	11,558	7,224	1,445
Drug	92,516	57,823	11,565
Public order	5,422	3,389	678
Immigration	22,251	13,907	2,781
Misdemeanor	549	343	69
Pretrial	20,281	12,676	2,535
<b>Total</b>	<b>152,577</b>	<b>95,361</b>	<b>19,072</b>

### Cost Savings

Nearly one-quarter of the Justice Department's budget (\$6.9 billion) is absorbed by the Bureau of Prisons.<sup>6</sup> The marginal cost of incarcerating a federal prisoner is estimated at \$12,900 annually.<sup>7</sup>

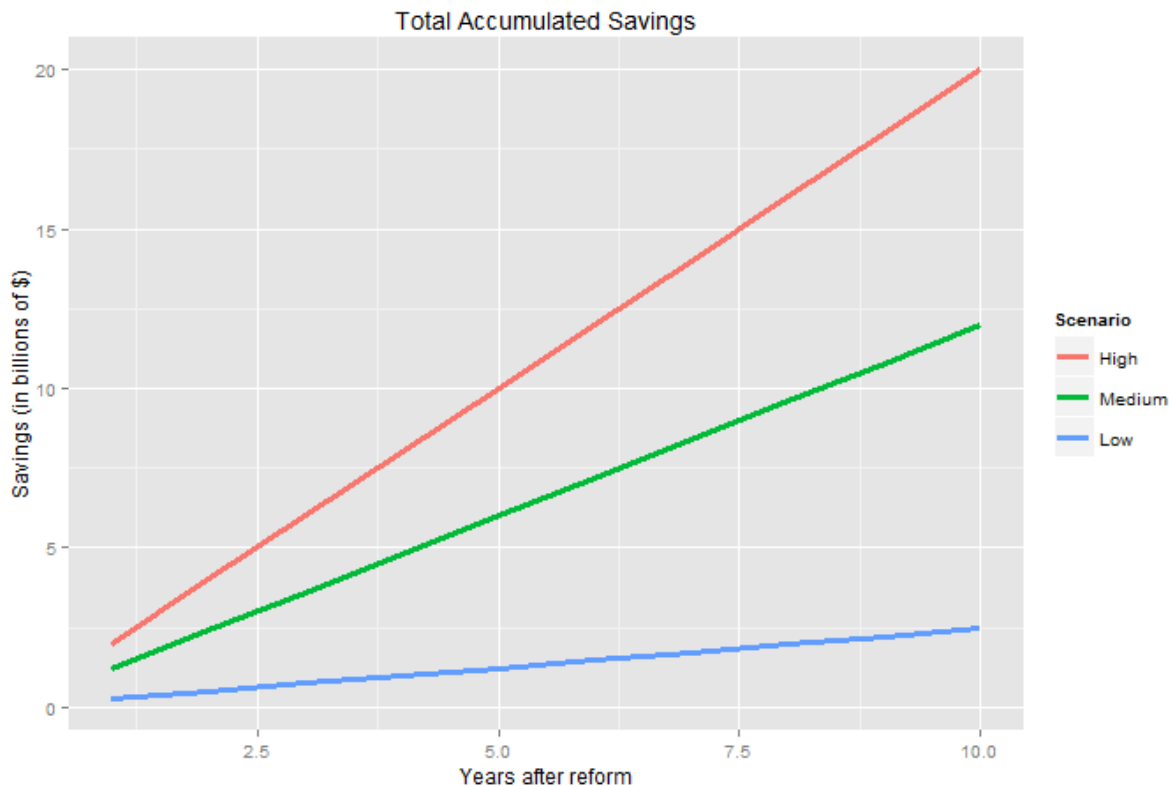
Table 3 depicts the annual amount the federal government would save by enacting each scenario.<sup>8</sup>

**Table 3: Annual Marginal Costs Savings**

<b>High Estimate</b>	<b>Medium Estimate</b>	<b>Low Estimate</b>
\$2.0 billion	\$1.2 billion	\$246 million

Figure 1 depicts the federal government’s total expected accrued savings over time, assuming the characteristics of federal defendants entering the prosecution system hold steady over time.

**Figure 1: Ten-Year Estimated Savings**



1. High Estimate: The federal government would save nearly **\$20 billion over 10 years**.
2. Medium Estimate: The federal government would save nearly **\$12 billion over 10 years**.
3. Low Estimate: The federal government would save **\$2.5 billion over 10 years**.

Notably, as the reform takes effect year after year, these practices would become more ingrained and solidified within U.S. Attorneys’ Offices. We would therefore expect to see more prisoners and defendants diverted from prison, and more cost savings than the estimates above. Additionally, these savings are based on *marginal* estimates not total cost savings, meaning they do not include cost savings if prison were to be closed.

### **Conclusion**

The time is ripe to ensure federal criminal justice practices align with today’s challenges and spend taxpayer dollars wisely. This reform is practical, can be implemented swiftly, and would save billions while continuing to protect public safety.

## ENDNOTES

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<sup>1</sup> This analysis does not include the administrative or other costs of implementing these reforms. Nor does it include the cost of any additional public benefits drawn by released prisoners. Additional cost savings would also result from a savings in prosecutorial resources. This analysis only calculates the estimated cost savings of a reduction in the prison population.

<sup>2</sup> See, e.g., *Leading in National Standards*, PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, [http://www.psa.gov/?q=leading\\_national\\_standards](http://www.psa.gov/?q=leading_national_standards) (stating that “on average in the District of Columbia, 80% of persons arrested and charged with a crime are released to the community, either on personal recognizance or with supervised release conditions”).

<sup>3</sup> For the purposes of this estimation, immigration qualifies as a nonviolent offense. However, if immigration is removed from the analysis, the projected savings remain fairly consistent: Over 1 year, the federal government could still be expected to accrue nearly \$1.7 billion under the high estimate, over \$1 billion under the medium estimate, and \$210 million under the low estimate. Over 10 years, the federal government could be expected to accrue nearly \$17 billion under the high estimate, \$10.5 billion under the medium estimate, and \$2 billion under the low estimate.

<sup>4</sup> MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2010 22 & tbl.13 (2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf> (providing the number of sentenced federal offenders sentenced to prison by offense in 2010); see also *id.* at 2 (finding the number of inmates in 2010 who were detained pretrial as compared to the general BOP population); see also THOMAS COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995-2010 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf> (providing number of pretrial detainees in 2010); see also THOMAS COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008-2010 8 (2012) available at <http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf> (providing average length of stay for pretrial detainees in 2010).

<sup>5</sup> For more on how prosecutors can exercise discretion to achieve these changes, see pages 43 to 52 of report.

<sup>6</sup> U.S. DEP’T OF JUSTICE, FY 2014 BUDGET SUMMARY 3, 11 (2013), available at <http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/11/fy14-bud-sum.pdf>.

<sup>7</sup> Generally speaking, marginal costs should be used in a cost-savings calculation because average costs are likely much higher than marginal costs. The Vera Institute of Justice has estimated marginal costs as on the order of half average prisoner costs. See generally CHRISTIAN HENRICHSON & SARAH GALGANO, VERA INST. OF JUSTICE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS (2013), available at <http://www.vera.org/sites/default/files/resources/downloads/marginal-costs-guide.pdf>. The annual cost of federal prisoners (\$25,800) was estimated by averaging the reported annual costs of minimum (\$21,006), low (\$25,378), medium (\$26,247), and high security prisoners (33,930). See NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012), available at <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.

<sup>8</sup> These estimated savings include savings in the current year, as well as *savings expected to accrue* in the future from avoiding long prison sentences.