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CRIMINAL JUSTICE IN
PRESIDENT TRUMP'S
FIRST 100 DAYS

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EXECUTIVE SUMMARY

In his Inaugural Address, President Donald Trump pledged to address the rising specter of “American carnage” — “the crime and gangs and drugs that have stolen too many lives and robbed our country of so much unrealized potential.”¹ The last time a president addressed rising crime in his inaugural address was 1997. Then, with crime near historic peaks (at 4,891 offenses per 100,000 people),² President Bill Clinton spoke of the need to “help reclaim our streets from drugs and gangs and crime” so that “our streets will echo again with the laughter of our children, because no one will try to shoot them or sell them drugs anymore.”³

Trump’s dark portrait of America, however, comes at a time when the national crime rate is near historic lows — 42 percent below what it was in 1997.⁴ As his first 100 days near an end, what has the president done to address crime and criminal justice? And what can the country expect in the weeks and months ahead?

So far, many of the administration’s actions are symbolic. But they evidence a clear return to the discredited “tough on crime” rhetoric of the 1990s, and suggest a significant departure from the Obama administration’s approach to criminal justice. Trump’s turn also directly contradicts the emerging consensus among conservatives, progressives, law enforcement, and researchers that the country’s incarceration rate is too high, and that our over-reliance on prison is not the best way to address crime. As crime remains near historic lows — despite local, isolated increases — these proposed changes are, ultimately, solutions in search of a problem.⁵ Taken to an extreme, they would set back the national trans-partisan movement to end mass incarceration.

This analysis documents the following key shifts in federal policy since January 20th:

- **Misguided Fears of a New Crime Wave.** President Trump has repeatedly cited misleading statistics to push a false narrative about rising crime and call for urgent, drastic action.⁶ This focus on fear over fact, unprecedented for a modern president, helps justify the administration’s most controversial policies. Trump and his new attorney general, Jeff Sessions, insist that they must “Make America Safe Again,” citing outside forces that have brought in drugs and violence — justifying a travel ban, a border wall with Mexico, and mass deportations.⁷ The administration has also issued several executive orders focused on combatting this phantom crime wave, without offering solutions to solve the real and serious localized problems of violence in Chicago and Baltimore. The taskforces created by these orders may recommend new federal criminal laws or new mandatory minimums, especially for crimes against police officers and drug offenses. This new tone from Washington also risks derailing a decade-long bipartisan effort to reduce prison populations in states. If the public incorrectly believes that crime is rising, there may be less support for state and local reform.
- **A New War on Drugs?** President Obama and Attorney General Eric Holder took several steps to reduce the federal imprisonment rate, which dropped by 9.5 percent since 2007.⁸ In 2013, the Justice Department deprioritized prosecuting nonviolent marijuana cases, providing more

latitude to states, and issued a directive to federal prosecutors to reduce charges in lower-level nonviolent drug cases.⁹ Now, Sessions is poised to reverse those reforms. He has been one of the most vocal opponents of bipartisan criminal justice reform. He derailed a Republican-led, modest sentencing reform bill last year, and opposed many of Holder’s initiatives.¹⁰ Since taking office, Sessions has given several speeches calling for a return to harsher federal charging policies, and issued memoranda directing U.S. Attorneys to stand by for such major policy shifts.¹¹ Sessions could revoke key Holder-era initiatives, directing federal prosecutors to pursue maximum penalties in drug cases even in states where marijuana is legal. Notably, the administration has shown interest in expanding treatment options for opioid addiction, which disproportionately affects white, rural communities, while increased marijuana prosecutions would more affect communities of color.

- **Increased Immigration Enforcement and Detention.** Shortly after the election, Trump pledged to deport as many as 3 million undocumented immigrants.¹² He has since issued several executive orders directing the Justice Department to more vigorously enforce immigration law.¹³ Sessions responded by fast-tracking the hiring of new immigration agents, ordering all U.S. Attorneys to prioritize immigration cases, and threatening to strip funding from cities that do not cooperate with federal immigration authorities (i.e. “sanctuary cities”). The Department of Homeland Security is also expanding its detention capacity.¹⁴
- **Decreased Oversight of Local Police.** Historically, the Justice Department has played a key role overseeing and regulating civil rights violations committed by local police departments.¹⁵ Under Obama, the Justice Department opened more than 20 investigations into police misconduct and enforced more than a dozen “consent decrees” with local police departments.¹⁶ These settlements, overseen by a federal court, require officers to work with communities and improve policing practices.¹⁷ Sessions outright rejects this role for the federal government, labeling it as part of a broader “war on police.” He has directed a review of all existing consent decrees and attempted to stall pending agreements.¹⁸ This trend will likely continue, potentially emboldening police departments to become more aggressive.
- **Increased Use of Private Prisons.** Sessions recently revoked an Obama-era memorandum that directed a wind-down of federal use of “private prisons” — correctional facilities operated by private corporations on behalf of the Bureau of Prisons.¹⁹ Now, BOP is free to continue and expand the use of private prisons, a signal that Sessions expects the federal prison population to grow.
- **Possible Federal Sentencing or Reentry Legislation.** Last year, Republicans, including Sens. Chuck Grassley (R-Iowa) and John Cornyn (R-Texas), and House Speaker Paul Ryan (R-Wisc.) led a bipartisan effort to pass the Sentencing Reform and Corrections Act (SRCA). The bill would have reduced mandatory minimums for some nonviolent and drug crimes.²⁰ Then-Senator Sessions led an effort to defeat the bill, labeling it a “criminal leniency bill.” In response, Senate Majority Leader Mitch McConnell declined to bring the bill to a floor vote despite overwhelming

support for the initiative, fearing a split within his own party.²¹ In January 2017, Grassley and Ryan committed to reintroducing some version of the law, yet are rumored to be waiting for the administration to announce its position before moving forward.²² In March, Trump dispatched senior advisor and son-in-law Jared Kushner to meet with Grassley and Sen. Dick Durbin (D-Ill.) to discuss sentencing and reentry legislation. Kushner, whose father spent two years in prison for white-collar offenses, supports criminal justice reform.²³ Notably, Trump's personal positions on such bills are unknown. It remains to be seen whether any advice from Kushner and backing by conservative reform advocates will influence the President. Some conservatives support expanding reentry services, and modest sentencing reductions for low-level offenders. The Trump Administration could take a similar stance, backing modest prison reform in Congress while continuing to pursue aggressive new prosecution strategies.

I. CRIME RHETORIC AND POLICY

Trump ran on a platform of “law-and-order,”²⁴ claiming that crime was rising²⁵ and there was a “war on our police.”²⁶ This rhetoric has continued through his first 100 days, and has animated key policies.

A False Narrative of “American Carnage”

In his Inaugural Address, Trump stated, “This American carnage stops right here and stops right now.” He added that “the crime and gangs and drugs that have stolen too many lives and robbed our country of so much unrealized potential” must be put to an end.²⁷

President Trump paints an inaccurate, dark picture of the country, comparing cities to “war zones”²⁸ and misappropriating or misquoting crime data to prop up his narrative. On Twitter, he has referred to “the burning and crime infested inner-cities of the U.S.”²⁹ Less than three weeks after taking office, Trump told a meeting of sheriffs at the White House that “the murder rate in our country is the highest it’s been in 47 years.”³⁰ Later, at a gathering of police chiefs, Trump cited Chicago’s rising murder rate as proof that violent crime rose “in many of our big cities.”³¹ Expanding on this theme, Sessions has also claimed that recent small increases in crime in some cities represent the start of a crime wave. “My best judgment,” he said immediately after being sworn in as attorney general, “having been involved in criminal law enforcement for many years, is that this is a dangerous permanent trend that places the health and safety of the American people at risk.” He warned: “we have a crime problem.”³² In mid-April, he claimed in a *USA Today* op-ed that “Violent crime is surging in American cities.”³³

These statements are misleading at best, and some are patent falsehoods. Today, national crime and murder rates are half of what they were at their peak in 1991.³⁴ Crime overall continued to plummet last year. In 2015 and 2016, the murder rate in the 30 largest cities rose by 13.2 and 14 percent, respectively, but these increases were highly concentrated. In 2015, Baltimore, Chicago, and Washington, D.C. were responsible for more than half the increase in urban murders. In 2016, almost half of all new murders in major cities occurred in Chicago.³⁵ Yet Trump and Sessions specifically point to these outlier cities as evidence of a crime wave.³⁶

Notably, Chicago Police Superintendent Eddie Johnson reported in February that he had “made requests to the White House and Justice Department for them to support our work — from increasing federal gun prosecution to more funding for mentoring, job training, and more” — but had yet to hear back on these requests.³⁷ In March, Sessions met with Johnson and reportedly agreed to support Johnson’s work in Chicago.³⁸

A Misleading Connection Between Immigration and Crime

What is causing this phantom crime wave? According to Trump, the answer is simple: immigration. “By finally enforcing our immigration laws,” Trump told a joint session of Congress in February, “we will . . . make our communities safer for everyone.”³⁹ Trump has repeatedly claimed that undocumented immigrants commit more crimes than American citizens.⁴⁰ Sessions shares this belief. “Transnational gangs and international cartels,” he said at an April address in Nogales, Ariz., “flood our country with drugs and leave death and violence in their wake.”⁴¹

However, research shows that immigrants commit fewer crimes than native-born citizens. According to one representative study, “foreign-born individuals exhibit remarkably low levels of involvement in crime across their life course. Moreover, it appears that by the second generation, immigrants have simply caught up to their native-born counterparts in respect to their offending.”⁴² Focusing on immigration could risk distracting the public from real problems with our justice system.

But Trump’s rhetoric about a national crime wave has a clear purpose: to undergird the administration’s most controversial immigration policies, such as the travel ban,⁴³ Mexican border wall,⁴⁴ and a plan to detain and deport as many as three million immigrants (explained in Section II).⁴⁵ A distortion of the truth is necessary to justify these actions.

Executive Orders Targeting Crime

The president issued three executive orders in February to “reduce crime and restore public safety.”⁴⁶ Though none make concrete policy changes, they lay the foundation for the Justice Department to take action to combat the perceived threat.

- The first order directs the attorney general to create a “Task Force on Crime Reduction and Public Safety” to identify “deficiencies in existing laws,” and recommend new federal legislation on illegal immigration, drug trafficking, and violent crime as necessary.⁴⁷

Sessions has since issued a memorandum stating that task force members will include the heads of the FBI, U.S. Marshals Service, Drug Enforcement Agency, and Bureau of Alcohol, Tobacco, Firearms and Explosives,⁴⁸ and the task force will also review “charging, sentencing, and marijuana.”⁴⁹ Notably, the task force does not include police chiefs or criminologists, but Sessions has called for a summit of local leaders to discuss how the Department can “best support and replicate successful local violent crime reduction efforts.”⁵⁰ According to some sources, the task force will be headed by Steven Cook, a career prosecutor on detail to the Deputy Attorney General’s office⁵¹ who has a history of opposing criminal justice reform (explained further in Section II).

Notably, Trump’s 100 day plan from October 2016 includes a proposal for a “Restoring Community Safety Act,” which would “reduce surging crime” by creating a task force to address violent crime and “increasing funding for programs that train and assist local police; increas[ing]

resources for federal law enforcement agencies and federal prosecutors to dismantle criminal gangs and put violent offenders behind bars.”⁵² The task force created by the executive order is similar to this proposal.

- The second order, “Preventing Violence Against Federal, State, Tribal, and Local Law Enforcement Officers,” directs the attorney general to develop strategies and legislative proposals, such as establishing new crimes and mandatory minimums, to combat crimes against law enforcement officers. It also directs the attorney general to evaluate and propose changes to the Justice Department’s grant funding program to better support law enforcement.⁵³ As a companion measure, Trump’s budget outline issued in March (called his “skinny budget”) includes a clause about “safeguarding” grants and programs “aimed at protecting the life and safety of state and local law enforcement personnel.”⁵⁴
- The third, “Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking,” directs all relevant federal agencies to share information on the transnational drug trade, and encourages more cooperation with international agencies, with the goal of dismantling gangs.⁵⁵ By pointing to increased international drug trafficking as a source of increasing domestic crime, this order clearly ties the administration’s anti-immigration agenda to its anti-crime agenda.

What to Expect

- **Continued Warnings About a Nonexistent Crime Wave.** Trump and Sessions have spoken about the imminent danger posed by rising crime in nearly every major speech.⁵⁶ This is unlikely to change, and this steady drumbeat of fear could chill bipartisan attempts to reduce unnecessary incarceration at the federal, state, and local levels. This new message from Washington calls into question the trans-partisan nature of this decades-long effort.
- **Recommendations for New Criminal Legislation.** Trump’s executive orders on crime are vague and do not implement any immediate change, leading some to say they are merely symbolic.⁵⁷ But these orders entrust the attorney general with charting a new course for criminal justice. As Sessions shares the president’s belief in a mounting crime wave, “war on police,”⁵⁸ and a more aggressive immigration stance, the results of these orders are likely to be recommendations for more punitive immigration, drug, and policing actions. By directing a wholesale “review of existing policies” on charging and drug policy, the first order helps lay the foundation for changes to how law enforcement operates across the country.⁵⁹ Recommendations for those changes should come by July 27, when the Crime Task Force delivers its first report.⁶⁰

What could the task force recommend, and how could the administration follow through? For one, the task force could recommend a rescission of Obama-era memos on prosecutorial discretion, which helped decrease the federal prison population, and diverted low-level drug offenders away from incarceration. It could also recommend that the administration work with

Congress to pass new criminal laws on drugs, immigration, and acts against police officers, and suggest new mandatory minimums for these crimes. These could be highlights of the president's "Restoring Community Safety Act" proposal or other signature crime bill.

- **Potential Changes to Police Funding.** To implement the order to protect police officers, the Justice Department could redirect grant streams to more directly fund local law enforcement activities. Some of these changes could be made without congressional approval. The attorney general can recalibrate grants to incentivize changes in state criminal justice policy,⁶¹ and previous leaders of the Justice Department have done just that.⁶² Other changes could be accomplished in the budgeting process, for example, by increasing funds to help departments buy military surplus equipment.⁶³

II. FEDERAL PROSECUTION AND DRUG POLICY

Over the last decade, lawmakers, researchers, and law enforcement have increasingly come to agree on the need to confront drug crimes with treatment rather than prison.⁶⁴ President Obama brought this perspective to the White House. He signed the Fair Sentencing Act, which reduced the sentencing disparity between crack and powder cocaine,⁶⁵ commuted hundreds of prison sentences imposed under outdated drug laws,⁶⁶ and spoke about the need to end mass incarceration. Attorney General Holder implemented the “Smart on Crime” initiative in 2013, which directed federal prosecutors to prioritize serious and violent crime, and refrain from charging stiff “mandatory minimum” penalties in some lower-level drug cases.⁶⁷ He also gave states some freedom to set marijuana policy.⁶⁸

As a result, the imprisonment rate has fallen by 9.5 percent since 2007.⁶⁹ Meanwhile, cooperation and guilty plea rates remained stable — a sign that drug enforcement can succeed without over-incarceration.⁷⁰ The Trump administration appears to be rethinking this approach, especially in drug cases, and returning to the discredited, overly-punitive strategies pursued by past presidents.⁷¹ While Sessions has yet to take concrete steps in this direction, his staff hires and past record indicate that the Justice Department could be preparing to wage a new “war on drugs.”

New Justice Department Officials

- Handing control of the Justice Department to Sessions remains one of President Trump’s most consequential decisions on criminal justice. Sessions opposed nearly all of President Obama’s criminal justice reform efforts — including Smart on Crime,⁷² his use of the pardon power,⁷³ and his sentencing reform initiatives (explained further in Section V).⁷⁴ As the nation’s chief law enforcement officer, Sessions controls national federal prosecution policy and has great influence over the president’s stance on criminal justice policy broadly.
- In January, Trump nominated Rod Rosenstein, U.S. Attorney for the District of Maryland, to serve as Deputy Attorney General,⁷⁵ and the Senate Judiciary Committee voted to advance his nomination in early April.⁷⁶ Rosenstein praised mandatory minimums at his committee hearing, saying “it’s critically important that we have those penalties available to us in appropriate cases.” But he acknowledged that there are cases where using them “would be excessive.”⁷⁷ As U.S. Attorney, Rosenstein’s jurisdiction includes the city of Baltimore, and he has declined to comment on Sessions’ approach to police reform there.⁷⁸ The Deputy Attorney General is the second-in-command of the Justice Department, and oversees the entire agency,⁷⁹ along with all U.S. Attorneys.⁸⁰
- In April, Sessions asked President Trump to nominate Eric S. Dreiband to lead the Justice Department’s Civil Rights Division.⁸¹ Dreiband opposes “ban the box” reforms, which prevent employers from asking about a criminal record during the initial application process. In a 2013 op-ed in *Forbes*, Dreiband wrote that “if the government is entitled to have law-abiding workers, then surely private employers are as well.”⁸² As head of the Civil Rights Division, Dreiband

has complete authority over opening investigations into police departments, closing them, and negotiating or reopening consent decrees.

- In an April 5 memorandum, Sessions wrote that Assistant U.S. Attorney Steven H. Cook of the Eastern District of Tennessee had been detailed to the Office of the Deputy Attorney General,⁸³ where he will craft Department policy on violent crime. As mentioned above, he may also be leading Sessions' Crime Task Force. Cook has referred to "Smart on Crime" as "Soft on Crime," and called criminal justice reform groups "anti-law enforcement."⁸⁴ As president of the National Association of Assistant U.S. Attorneys, Cook worked with Sessions to vigorously oppose the Sentencing Reform and Corrections Act. Testifying in opposition to the bill in Congress, he said: "The laws that Congress passed worked – they reduced crime. They also, of course, increased the prison population." He added: "States have also instituted sentencing 'reform' programs that have resulted in many more thousands of criminals being returned to the streets."⁸⁵ These statements contradict research demonstrating the diminishing returns to excessive incarceration. Decreased incarceration had a limited effect on the dramatic crime decline since the 1990s,⁸⁶ and 27 states cut crime and incarceration together over the last decade.⁸⁷ Cook has since appeared alongside Sessions at several speeches and meetings, and is now poised to play a forceful role in Department criminal justice policy.
- In March, Trump appointed Richard Baum to serve as the acting head of the White House Office of National Drug Control Policy (the "Drug Czar"). Baum defended the drug war in a 2001 speech, saying "there are not problems with the drug war. There may be mistakes with the plan but there are no problems."⁸⁸ Trump is expected to name Congressman Tom Marino (R-Pa.) to be the permanent head of the agency.⁸⁹ Marino has, at times, expressed support for treatment programs: in 2015 he co-sponsored the "Comprehensive Addiction and Recovery Act,"⁹⁰ which authorized \$181 million in annual federal funding for a coordinated response to addiction that encompassed the areas of prevention, treatment, recovery, and law enforcement, and was signed into law by Obama in 2016.⁹¹ However, in a 2016 hearing before the House Committee on Ways and Means, he suggested that "nondealer, nonviolent drug abusers" should be secured in a "hospital-slash-prison, if you want to call it that."⁹² Marino also voted against an amendment that prohibited the Justice Department from spending money to interfere with legal state marijuana regimes.⁹³ As the new Drug Czar, Marino would set the national drug policy and serve as an influential advisor to the President on the topic.⁹⁴
- Trump has yet to nominate a new head of the Criminal Division, the Justice Department arm that prosecutes all criminal cases and "formulates and implements criminal enforcement policy."⁹⁵ However, in March, Trump ordered nearly 50 U.S. Attorneys appointed by President Obama to resign.⁹⁶ Past administrations have issued similar orders. But this signals that Sessions is bringing a new vision of federal prosecution to the department by appointing like-minded prosecutors who share his priorities.

Harsher Federal Prosecutions for Violent and Nonviolent Crimes

As a senator, Sessions openly criticized “Smart on Crime,” which guided federal prosecutors to avoid seeking the longest sentence possible in some low-level cases.⁹⁷ Sessions called the initiative a “dramatic event too little appreciated” that amounted to “direct[ing] prosecutors not to follow the law”⁹⁸ — essentially, he views statutory penalties as a floor, not a ceiling. In a May 2016 press conference he also claimed that Holder’s guidance led to a decrease in federal drug prosecutions.⁹⁹

Sessions has hinted that he will use the Justice Department’s considerable discretion to unwind “Smart on Crime” and pursue longer, tougher sentences. In a March 8 memo, Sessions directed federal prosecutors to “partner with federal, state, local, and tribal law enforcement to specifically identify the criminals responsible for significant violent crimes in their districts” and prosecute them using “the many tools at a prosecutor’s disposal.” These partnerships, Sessions added, should include deciding whether to prosecute defendants in state or federal court.¹⁰⁰

Sessions expanded on this goal in an address the following week in Richmond, Va. There he praised “Project Exile,” a program that funneled state firearm cases to federal court, where offenders would receive longer sentences, to be served in prisons far from home.¹⁰¹ “This Department of Justice will encourage more efforts like Project Exile in cities across America,” Sessions said, suggesting he plans to similarly use federal resources to prosecute state-level crimes: “Coordinated strategies that bring together all levels of law enforcement to reduce gun crime and make our cities safer.”¹⁰²

Sessions’ March 8 memo also instructed prosecutors to expect an “updated memorandum on charging for all criminal cases.”¹⁰³ In an April 5 memorandum, Sessions announced that the Task Force on Crime Reduction and Public Safety created by President Trump’s executive order would “undertake a review of existing policies in the areas of charging, sentencing, and marijuana enforcement” to “ensure consistency with the Department’s overall strategy on reducing violent crime and with administration goals and priorities.”¹⁰⁴

Increased Drug Enforcement

Sessions views the drug trade as the key driver of violent crime in the United States. At a 2016 hearing on the Drug Enforcement Agency, Sessions argued that “drug trafficking is by nature a violent crime.”¹⁰⁵ In a March 2017 speech in St. Louis, Mo., Sessions linked the “scourge” of heroin and opioid abuse to a “rising tide of violent crime.”¹⁰⁶

This includes marijuana. In a Senate hearing in April 2016 he said “good people don’t smoke marijuana,” and warned of the “very real danger” the drug poses. It is “not the kind of thing that ought to be legalized,” he concluded.¹⁰⁷ In his Richmond speech, Sessions also rejected the notion of legalizing marijuana. “I am astonished to hear people suggest that we can solve our heroin crisis by legalizing marijuana,” he said, “so people can trade one life-wrecking dependency for another that’s only slightly less awful.”¹⁰⁸

Similarly, at a February 23 press conference, Press Secretary Sean Spicer warned of “greater enforcement” of federal marijuana laws. Spicer appeared to acknowledge a place for legal medical marijuana, but said that “recreational marijuana” is a “very, very different subject.”¹⁰⁹

If Sessions wishes to more broadly prosecute marijuana crimes, even in states where the drug is legal, there is little stopping him. Federal law classifies marijuana as a Schedule I drug, implying that it has “no currently accepted medical use” and is more dangerous than cocaine.¹¹⁰ As a result, possessing even small amounts violates federal law.¹¹¹ It is true that 29 states and Washington, D.C., now allow marijuana to be used medically, and eight states plus Washington, D.C., allow recreational use.¹¹² But previous attorneys general have refrained from targeting marijuana only in the exercise of prosecutorial discretion. That policy, memorialized in a 2013 guidance memo by then-Deputy Attorney General James M. Cole (the “Cole Memo”), permitted federal prosecutors to overlook the use and cultivation of marijuana so long as it complied with a state regulatory regime, and did not involve violence or fund the trade of more serious drugs.¹¹³

In remarks to reporters after his Richmond speech, Sessions suggested that he might be willing to depart from this regime. “Much of” the Cole Memo “is valid,” he said, but he “may have some different ideas [himself], in addition to that.” He reaffirmed that: “federal law on marijuana is in effect in every state.”¹¹⁴ But while Sessions’ approach to marijuana leans toward the punitive, it is unclear where the president himself stands on the issue. Asked in a 2015 appearance on MSNBC’s *Morning Joe* if people should be imprisoned for marijuana crimes, Trump responded “I don’t really think so.”¹¹⁵ In a 1990 speech in Miami, Trump actually supported drug legalization: “We’re losing badly the war on drugs,” he said. “You have to legalize drugs to win that war.”¹¹⁶ He has since backtracked, saying legalization was just “something that should be studied and maybe should continue to be studied.”¹¹⁷ On the campaign trail Trump also acknowledged a need for drug treatment programs — “We have to do clinics, we have to do something to help [addicts].”¹¹⁸

Other administration officials have their own views, too. In an April appearance on *Meet the Press*, Department of Homeland Security (DHS) Secretary John Kelly said “marijuana is not a factor in the drug war.” He added that: “the solution is not arresting a lot of users,” saying instead “the solution is a comprehensive drug demand reduction program in the United States that involves every man and woman of goodwill. And then rehabilitation. And then law enforcement.”¹¹⁹ These statements diverge from Sessions’ belief about marijuana’s role in the drug war, but are unlikely to impede Sessions’ drug enforcement plans.

What about “harder” drugs? At a March 7 speech in Manchester, New Hampshire, Sessions called for a three-pronged approach for tackling opioid abuse: “prevention, criminal enforcement, and treatment.” But Sessions is skeptical of treatment, saying it “often comes too late,” and he believes prevention efforts should be minimal, and focused on public education. After 1980s-era prevention campaigns, Sessions claimed, “drug users were not cool. Crime fell dramatically, and addiction fell too.”¹²⁰ When speaking in Richmond, he also asserted that we have “too much tolerance for drug use,” channeling the 1980s tag line coined by Nancy Reagan: “Just Say No.”¹²¹ This approach seems to leave little room for modern, successful treatment programs, and treats drug use as a criminal issue, rather than a public health matter.

Treatment Options for Opioid Addiction

While Sessions' actions above foreshadow greater criminal enforcement of drug laws, President Trump has encouraged treatment for opioid addiction. On March 29, he tapped New Jersey Gov. Chris Christie to head a new President's Commission on Combatting Drug Addiction and the Opioid Crisis. The executive order establishing the commission refers to opioid abuse as a "public health crisis," and tasks the commission with making recommendations to the president to improve federal support for "drug addiction treatment services and overdose reversal,"¹²² as well as describing current federal funding used to combat drug addiction. At the press conference announcing the commission, Christie explained his treatment-centered approach: "Addiction is a disease," he said, "and it is a disease that can be treated." He added: "No life is irredeemable."¹²³ In April, Christie announced a \$15 million New Jersey ad campaign aimed at educating the public in his state about opioid addiction — the ad ends with Christie saying, "the road to recovery starts now."¹²⁴

Notably, opioid abuse (including heroin) is rising in predominantly white, rural areas, specifically in counties that voted for Trump.¹²⁵ According to one study, "nearly 90 percent of [opioid users] who began use in the last decade were white,"¹²⁶ a trend that, others have found, contributes to rising rural incarceration rates.¹²⁷ The benefits of opioid treatment efforts may inure to white communities,¹²⁸ while communities of color would bear the brunt of rising marijuana prosecutions.¹²⁹

More Aggressive Immigration Enforcement

In a November post-election interview with *60 Minutes*, Trump pledged to deport 2 million to 3 million immigrants with criminal records. "We are getting them out of our country or we are going to incarcerate," he said.¹³⁰

Ordinarily, people detained for deportation are tried in Immigration Court, and held in DHS facilities. Individuals convicted of immigration crimes (such as illegal reentry) are tried in federal court, and held in prisons under the jurisdiction of the Bureau of Prisons (BOP). Trump's plans would require expanding the capabilities of both systems.

The administration has begun taking action to carry out its promise. In January, Trump signed an executive order¹³¹ directing DHS to hire 10,000 new immigration officers, and pursue a broader deportation strategy.¹³² He called for the construction of a southern border wall and instructed Immigration and Customs Enforcement (ICE) to "allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico."¹³³ Trump and Sessions have also directed local authorities to cooperate with immigration officials, and help them apprehend immigrants subject to deportation. (For more see Section III.)

And in an April 11 speech, Sessions announced a comprehensive immigration strategy, designed to combat drug cartels — “international criminal organizations that turn cities and suburbs into warzones, that rape and kill innocent civilians, and who profit by smuggling poison and other human beings across our borders.” He directed U.S. Attorneys to prioritize immigration cases, and directed each U.S. Attorney’s office to assign one prosecutor to oversee immigration cases. He also ordered federal prosecutors to more aggressively pursue illegal reentry cases, by charging them as felonies and liberally applying a two-year mandatory minimum. This announcement reverses previous practice, under which prosecutors generally charged misdemeanor offenses in minor immigration cases.¹³⁴ In that speech, Sessions also announced that “we will now be detaining all adults who are apprehended at the border. To support this mission, we have already surged 25 immigration judges to detention centers along the border.” To process these cases, Sessions committed to hiring more immigration judges over the next two years.¹³⁵

From January to mid-March, immigration arrests rose by 33 percent.¹³⁶ Further, internal DHS memos obtained by reporters show that the administration is already “considering ways to speed up the hiring of hundreds of new Customs and Border Patrol officers” to assist in deportations, and has located 33,000 new immigration detention beds.¹³⁷ Sessions has also taken steps to expand BOP’s ability to house non-citizens convicted of immigration crimes. (For more see Section IV.) These actions all align with Trump’s belief that immigrants increase crime, and his campaign promises.

What to Expect

- **More Aggressive Federal Charging and Repeal of “Smart on Crime.”** In his March memo, Sessions promised an “updated memorandum on charging for all criminal cases.” As a follow up step, it is likely that Sessions will direct federal prosecutors to seek the maximum prison sentences in all cases, especially drug cases.¹³⁸ This would mark a return to the charging policies of President George W. Bush’s attorney general, John Ashcroft, who required U.S. Attorneys to “charge and to pursue the most serious, readily provable offense in all federal prosecutions.”¹³⁹ This would be consistent with Sessions’ criticism of Holder’s policies, his speeches stating a desire to ramp up federal law enforcement, and his staffing decisions.¹⁴⁰ If the Holder charging memo were repealed, prosecution for drug crimes would increase, as would the prison sentences attached to them, potentially reversing recent declines in the federal prison population.¹⁴¹ Even if Sessions does not explicitly reverse the charging memo, federal prosecutors may interpret his rhetoric as a directive to aggressively increase drug and other criminal enforcement and prosecute these crimes to the maximum extent allowable by law. Some federal prosecutors have already increased drug prosecutions since Trump entered office, citing increased opioid use in their districts.¹⁴²
- **Increased Marijuana Prosecutions — Despite State Laws.** Taken together, Sessions’ statements about marijuana use, his views on the Cole Memo, and Spicer’s warnings make it likely the Justice Department will ramp up prosecutions of crimes involving recreational marijuana, including low-level possession and sale.¹⁴³ While users and lower-level sellers and growers of marijuana have

avoided federal prosecution under the Cole Memo, that guidance is little more than a paper shield. A 2005 Supreme Court case, *Gonzales v. Raich*, holds that the federal Controlled Substance Act's ban against marijuana sale and use preempts state law, meaning the attorney general would be within his rights to repeal the Cole Memo and enforce federal marijuana prohibitions without regard to state law.¹⁴⁴ States could argue that the Supreme Court should reevaluate *Gonzales*, since more states have legalized marijuana and built economies around it, but such a challenge would likely fail.

Any change in department policy would likely be partial, focusing on recreational use, or gradual, giving states and businesses a certain period of time to comply before enforcement begins.¹⁴⁵ This could lead to an increase in the number of federal prisoners serving time for marijuana crimes. Such action would also harm the legal marijuana economies in states such as Colorado and California,¹⁴⁶ and the resulting intrusion into state policy could upset some Republicans. For example, Rep. Tom McClintock (R-Calif.) has indicated that he expects Sessions to understand his state's right to determine its own marijuana policy.¹⁴⁷

- **Federal Support for Treatment.** The administration's divergent approach to marijuana and opioids could signify a two-pronged federal strategy: an aggressive enforcement of marijuana and other drug crimes, while preferring treatment for opioid use. This preference could manifest in the form of increased federal grants for treatment for opioid use. It is also possible the administration may increase funding for treatment for all drug use since, as noted above, President Trump has vocally supported substance abuse treatment.
- **More Immigration Enforcement, Detention, and Deportation.** Sessions' enforcement strategy will require a massive expansion of the federal offices tasked with apprehending, prosecuting, detaining, and deporting those who have entered the country illegally. This strategy, as described in Section IV, will likely increasingly rely on private detention facilities.

III. POLICING

In 2015 and 2016, the deaths of Freddie Gray, Michael Brown, and other black men at the hands of police officers sparked nationwide protests about police brutality.¹⁴⁸ Activist groups, such as Black Lives Matter, increased pressure on the Justice Department to investigate police civil rights violations, and prompted a national conversation about the relationship between police officers and communities of color.¹⁴⁹ President Obama significantly expanded police oversight and accountability, using laws passed in the wake of 1990s-era police brutality to investigate and correct “pattern[s] and practice[s]” of police misconduct.¹⁵⁰ As of January 2017, the Justice Department had investigated misconduct by more than 20 police departments across the country, and was overseeing “consent decrees” — negotiated settlements overseen by a federal court — with 15.¹⁵¹

Trump is set to reverse this trend. In fact, Sessions penned an op-ed in *USA Today* on April 18, saying, “We will not sign consent decrees for political expediency that will cost more lives by handcuffing the police instead of the criminals” amidst an alleged “wave of violence.”¹⁵²

Reduced Federal Oversight of Local Police

As a candidate, Trump pledged to end “the war on our police,” and argued that protesters “have fostered [a] dangerous anti-police atmosphere in America.”¹⁵³ As president, he continues to blame a phantom rising crime wave partially on protesters. “Sadly, our police are often prevented from doing their jobs,” he said at a March 2017 meeting of Chicago’s Fraternal Order of Police. As a result, he claimed, “In too many of our communities, violent crime is on the rise.”¹⁵⁴

Sessions shares this perspective. In a 2015 Senate hearing titled “The War on Police: How the Federal Government Undermines State and Local Law Enforcement,” then-Senator Sessions said that police reform movements hamper police work and endanger public safety.¹⁵⁵ Speaking of consent decrees in his January confirmation hearing, Sessions said he “wouldn’t commit that there would never be any changes” to existing agreements.¹⁵⁶ In February, after his confirmation, Sessions dismissed Justice Department investigations of police misconduct as “pretty anecdotal and not so scientifically based.”¹⁵⁷

These comments quickly turned into action. On March 31, Sessions issued a memo titled “Supporting Federal, State, Local and Tribal Law Enforcement,” which called for the review of “all Justice Department activities,” including “existing or contemplated consent decrees.” He wrote: “It is not the responsibility of the federal government to manage non-federal law enforcement agencies,” adding that “local control and local accountability are necessary for effective policing.”¹⁵⁸ Immediately after this memo was issued, federal prosecutors sought to delay a consent decree that had been negotiated but not yet approved in Baltimore. He argued that based on the executive order to reduce violent crime, the department needed more time to assess whether the consent decree advanced that purpose.¹⁵⁹ Four days later, a federal judge denied this request, and approved the agreement. Since “the parties have already agreed to the draft before the court,” the judge held, “it would be extraordinary for the court to permit one side to unilaterally amend an agreement already jointly reached and signed.”¹⁶⁰

Sessions responded almost immediately with a statement claiming that the settlement would “govern every detail of how the Baltimore Police Department functions for the foreseeable future,” “was negotiated during a rushed process,” and would “reduce the lawful powers of the police department and result in a less safe city.”¹⁶¹ Later, a Justice Department spokesperson said that the department would “never negotiate or sign a consent decree that could reduce the lawful powers of the police department and result in a less safe city.”¹⁶²

Local Police as Federal Immigration Enforcers

In a January executive order, Trump directed the DHS Secretary to more aggressively pursue state/federal partnerships to enforce immigration law, called “287(g)” agreements.¹⁶³ Under these initiatives — in which 37 local authorities already participate — local police can perform immigration law functions, helping flag arrestees for deportation.¹⁶⁴ To help jurisdictions comply with this order, Trump’s “skinny budget” would provide \$171 million to cities for space to hold suspects detained on federal charges, such as immigration offenses.¹⁶⁵

On March 27, Sessions expanded on this strategy, announcing that the department would withhold, terminate, and possibly “claw back” federal grants to all “sanctuary cities” — jurisdictions whose law enforcement officers refuse to assist federal immigration officials with detaining undocumented immigrants. This change jeopardizes grants worth \$4.1 billion to these cities,¹⁶⁶ and builds on an earlier, January order declaring “sanctuary jurisdictions” ineligible for federal grants.¹⁶⁷

New York City’s mayor has vowed to fight this initiative,¹⁶⁸ and San Francisco¹⁶⁹ and Seattle have both challenged the underlying order in court.¹⁷⁰ But other jurisdictions, including Miami-Dade County, have formally repealed their “sanctuary” status and vowed to cooperate with immigration authorities.¹⁷¹ The administration had initially planned to publish a list of cities that had failed to comply with its order, but the effort was halted in April, after several cities were listed in error.¹⁷²

An End to the National Commission on Forensic Science

In early April, Sessions announced he would end the National Commission on Forensic Science. Created in 2013, the commission brought together scientists, judges, and other experts to address problems with forensic evidence practices in criminal cases, such as addressing flaws with “bite mark” evidence.¹⁷³ In its place, Sessions will convene an internal Justice Department task force and seek public comment on how it can improve forensic science standards.¹⁷⁴ Sessions believes that bringing the effort in-house is “critical to integrity in law enforcement,”¹⁷⁵ but experts fear that any effort run solely by prosecutors will lack the objectivity and transparency necessary to ensure its effectiveness. “It is unrealistic to expect that truly objective, scientifically sound standards for the use of forensic science . . . can be arrived at by entities centered solely within the Department of Justice,” said U.S. District Judge Jed S. Rakoff, the only federal judge on the commission.¹⁷⁶

What to Expect

- **Fewer Restrictions on Police.** What will Sessions' skepticism of federal police oversight mean for future investigations of police wrongdoing? The Baltimore example suggests that the Justice Department will ask judges to wind down or renegotiate existing consent decrees. It may also pull back from actively enforcing them. Current consent decrees assume that the Justice Department will remain an active participant, and intervene when municipalities fail to live up to their obligations. That is no longer a safe assumption. If the Justice Department fails to zealously enforce these agreements, existing reform plans could suffer.¹⁷⁷ In Ferguson, Mo., for example — where a consent decree has been in place since April 2016 following a Justice Department investigation sparked by the shooting of Michael Brown — local authorities have missed key deadlines.¹⁷⁸

As a result, the job of ensuring that police departments comply with these negotiated settlements will increasingly fall to courts and community members rather than federal regulators. Additionally, the Department will likely reduce the number of new investigations and curtail existing ones. And new investigations will likely be very limited in scope, deferential to local police officers, and play out over a long period of time. This may embolden some police departments to continue or return to over-zealous or unconstitutional practices. Additionally, as a next step to the executive order to protect law enforcement, Sessions could recommend legislation to make crimes against police federal offenses with long mandatory minimums.

- **More Local Police Involvement in Immigration.** Many cities may begin cooperating with federal immigration authorities, leading to more arrests, detentions, and deportations of undocumented immigrants. Some may do so voluntarily, or for more funding. Other cities may abandon their “sanctuary” status so as to not lose existing funding.
- **Potential Lack of Alignment with Police Leaders.** Police unions who support Trump represent rank-and-file officers.¹⁷⁹ However, many in police leadership have spoken out to say that supporting the police does not mean embracing overly punitive arrest and incarceration policies. “We need not use arrest, conviction, and prison as the default response for every broken law,” reads a policy agenda released in February by Law Enforcement Leaders to Reduce Crime and Incarceration, a group of 200 police chiefs and prosecutors led by former Dallas Police Chief David Brown and former New Orleans Police Superintendent Ronal Serpas, the latter an avowed conservative. “Decades of experience have convinced us of a sobering reality: Today’s crime policies, which too often rely only on jail and prison, are simply ineffective in preserving public safety.”¹⁸⁰ Others have argued that a renewed focus on immigration detracts from true priorities: “I would rather have my officers focused on going after violent criminals and people breaking into homes than going after nannies and cooks,” said Art Acevedo, the Chief of the Houston Police Department.¹⁸¹ On policing reform, too, Baltimore police leaders supported the Justice Department consent decree¹⁸² — while front-line officers welcomed Sessions’ request for a delay.¹⁸³

What could this mean for the Trump administration's criminal justice agenda? For one, it suggests that law enforcement officers do not all support his ideas. It's possible the administration may decide to take into consideration police leadership's positions on what they believe will help reduce crime. It could also point to a divergence between state and federal priorities, with state and local officials leading the way on criminal justice reform, pushing a reluctant administration toward action. Significantly, the same election that placed Trump in the White House brought pro-reform district attorneys to power in major cities such as Houston and Chicago.¹⁸⁴

IV. PRIVATE PRISONS

The BOP contracts with private facilities to house approximately 11 percent of federal prisoners.¹⁸⁵ In August 2016, the Justice Department's Inspector General found that private prisons "incurred more safety and security incidents per capita than comparable BOP institutions." Among other deficiencies, the report concluded that these private facilities suffered from a number of problems, including: higher rates of assaults against other inmates and staff; inmates inappropriately housed in solitary confinement units due to overcrowding when those units should have been used for disciplinary or administrative reasons; many more contraband issues; and almost ten times more security lockdowns.¹⁸⁶

In response, then-Deputy Attorney General Sally Yates directed the BOP to phase out its use of private facilities. Declines in the federal prison population, she wrote, allowed the bureau to shift prisoners back into its own safer, more successful facilities.¹⁸⁷ Sessions has reversed this policy.

Reprieve for Private Prisons

On the campaign trail, Trump made few direct statements about prison reform. In one rare discussion, he said, "Our prison system is a disaster. It's a complete disaster all over the country." He proposed one solution: "I do think we can do a lot of privatizations and private prisons. It seems to work a lot better."¹⁸⁸ Given these statements and Trump's law and order rhetoric on the campaign trail, private prison companies seemed likely to benefit from a Trump presidency, and stocks of the nation's two largest private prison companies, GEO Group and CoreCivic, soared by 21 and 43 percent respectively the day after the election.¹⁸⁹

In February, less than three weeks after being confirmed, Sessions issued a memorandum rescinding Yates' directive. He stated the old policy would have "impaired the Bureau's ability to meet the future needs of the federal correctional system."¹⁹⁰ The memo signals that Sessions will likely expand the use of private prisons, and possibly that he expects the federal prison population to grow.

This has implications for both federal prisoners and undocumented immigrants.

What to Expect

- **Increased Use of Private Facilities for Federal Prisoners.** The BOP is understaffed, with one in ten positions vacant due to Trump's recently-concluded hiring freeze.¹⁹¹ And, Trump's budget calls for \$1 billion in savings from halting prison construction, with \$193 million budgeted to repair or modernize existing facilities.¹⁹² If, as a result of Sessions' changes in prosecution policies, the federal prison population grows, the BOP may not be prepared to cope with demand. Without a fully-staffed bureau, privatization could appear even more attractive to the administration.
- **Expanding Incarceration of Non-Citizens.** There are approximately 15,000 inmates in federal prisons for immigration crimes,¹⁹³ mostly in private prisons.¹⁹⁴ Even if Trump's plan to deport

three million immigrants never comes to pass,¹⁹⁵ Sessions' plan to aggressively prosecute illegal entry and reentry (see Section II, above) could translate into more non-citizens incarcerated in BOP's private facilities, and a corresponding expansion of the federal prison population.

- **More Detention in ICE Private Facilities.** While non-citizens convicted of immigration crimes are held in BOP facilities, ICE detains undocumented immigrants awaiting a determination of their immigration status or potential deportation. The federal government relies heavily on private companies to manage these immigration detention centers: Private facilities hold more than 60 percent of immigrant detainees.¹⁹⁶ Any moves to expand immigration enforcement would also require expanding ICE private detention capacity. In fact, this expansion is already underway. According to agency leaks, immigration officials have already located space for 33,000 new detainees.¹⁹⁷ And, GEO Group has begun construction of a new immigrant detention facility in Texas.¹⁹⁸

V. FEDERAL SENTENCING LEGISLATION

In 2015, a bipartisan coalition of senators introduced the Sentencing Reform and Corrections Act (SRCA), which would have reduced prison sentences for some nonviolent crimes, given judges more flexibility in charging drug offenders, and applied the law that reduced the sentencing disparity between crack and powder cocaine to current prisoners.¹⁹⁹ This bill was championed by Republican leaders in the Senate, including Chuck Grassley (R-Iowa) and John Cornyn (R-Tex.). House Speaker Paul Ryan (R-Wisc.) also considered it a priority.²⁰⁰

The bill's most strident critics were Sen. Tom Cotton (R-Ark.) and then-Senator Sessions, who branded the SRCA a "criminal leniency bill."²⁰¹ Sessions gave a lengthy speech on the Senate floor in October 2015, arguing that decreasing prison terms would invite a crime wave. "Now is not the time to move too fast to further reduce penalties without careful thought. Before we rush to judgment about undoing Federal sentencing laws, we must consider the results of what has already happened-how much reduction we have already seen," he said. "We need to study what experts have told us and what history tells us about crime."²⁰² At a November 2015 hearing on the bill, he stated that when "mandatory minimums are either eliminated or reduced substantially, it reduces the ability of law [enforcement] officers to negotiate and protect the public."²⁰³ This effort to defeat the SRCA placed Sessions to the far right of his own party. Rather than risk an election-year party fracture, Senate Major Leader Mitch McConnell (R-Ky.) decided not to bring the bill to a floor vote.²⁰⁴

Sessions' ascension to the head of the Justice Department, as Trump's primary criminal justice advisor, could mean an end to bipartisan momentum for federal sentencing reform. However, there are some encouraging signs, as some of Trump's top advisors, including son-in-law Jared Kushner, support sentencing and reentry reforms.

Support for Federal Sentencing Reform?

Despite last year's setbacks, Grassley announced in early January that he and Sen. Dick Durbin (D-Ill.), two of the SRCA's original sponsors, would reintroduce the bill.²⁰⁵ However, some Senators are rumored to support a more modest version of the bill that would increase reentry programs in prison, but not reduce sentences. Grassley acknowledged in January that the bill would have to "have some changes" before it could pass.²⁰⁶

On March 30, Trump dispatched Jared Kushner to meet with Grassley, Durbin, and Sen. Mike Lee (R-Utah), to discuss the bill and criminal justice reform more broadly.²⁰⁷ Kushner's father, Charles Kushner, spent two years in federal prison for white-collar crimes (prosecuted by then-U.S. Attorney Chris Christie),²⁰⁸ and since his release, he has made a point of hiring and supporting formerly incarcerated people. He also serves on the board of a nonprofit dedicated to mentoring incarcerated youth on Rikers Island.²⁰⁹ Jared is sympathetic to sentencing reform;²¹⁰ however, he has also been tasked with handling a wide variety of issues, including restarting the Middle East peace process.²¹¹

Additionally, Vice President Mike Pence supports conservative criminal justice reform. In his debate with Tim Kaine, the two candidates agreed on only one thing. In Pence's words: "We need criminal justice reform." He continued: "I signed criminal justice reform in the state of Indiana, and we're very proud of it."²¹² In 2013, Pence signed a law that updated the criminal code, making some penalties tougher but lightening sentences in some drug cases. (Pence had expressed concerns that a previous draft of the bill was too lenient.)²¹³ That same year, he also signed House Bill 1482, which gave some offenders the ability to expunge their records.²¹⁴ However, in 2015, Pence proposed a \$51 million prison expansion,²¹⁵ and in March 2016, he signed a law "reinstating a 10-year mandatory minimum prison term for a person convicted of dealing meth or heroin who has a prior [drug] conviction."²¹⁶

Statements made by the president on sentencing reform are sparse. In an August 2015 interview, he left some room for changes to existing law, saying that the criminalization of marijuana was a "very tough subject nowadays," but that "in terms of the violent offenses, we have to get a lot tougher."²¹⁷ However, at a May 2016 National Rifle Association convention, Trump said that while gun rights are being restricted for private citizens, firearm offenders are being "let go" from prison "by the thousands." He went on to criticize "changes to sentencing laws that [would] release thousands of dangerous drug trafficking felons and gang members who prey on civilians."²¹⁸

What to Expect

- **Possible Stiffer Sentencing Laws.** As explained in Section I, the results of Trump's three executive orders on crime could be recommendations for Congress to create new federal crimes or mandatory minimums. Given the substance of the orders, these recommendations would likely focus on violent crimes, immigration, anti-law enforcement violence, and/or drug offenses.
- **A Second Try at Sentencing or Reentry Reform.** With key advisors such as Kushner supporting sentencing reform, and Sessions opposing it, how will the Trump administration resolve these differences?

The most likely outcome is a legislative proposal that includes the reentry reform aspects of the SRCA — such as increased recidivism reduction programs in prison, ability to seal criminal records of juveniles, and "compassionate release" for sick or elderly prisoners²¹⁹ — but without aspects containing sentencing reductions. This result would be far more modest than the SRCA, but would reflect a strong belief among conservatives in favor of reentry reform.²²⁰ It is also rumored that Sessions may support reentry reforms.²²¹

Even this proposal could be jeopardized, though, by a push to add a default criminal intent provision to federal statutes — "*mens rea*" reform. Conservatives strongly support *mens rea* reform as a way to combat perceived regulatory excess and over-criminalization.²²² It would also dovetail with Trump's anti-regulatory agenda. However, adding this provision would jeopardize Democratic support for the bill, as *mens rea* reform would make prosecuting businesses for environmental or securities crimes more difficult. President Obama and Sen. Elizabeth Warren (D-Mass.) have opposed *mens rea* reform on that basis.²²³

It is possible that Congress could pass sentencing reform, but it is a long shot in the current environment. For any efforts to move, the Trump administration would need to take a clear position and prioritize the effort.

CONCLUSION

During his first 100 days, President Trump has begun to outline a criminal justice strategy built to combat a phantom national crime wave, grounded in the outdated, and now discredited, “tough on crime” attitude of the 1990s that helped create mass incarceration. The administration’s few official acts in this area have focused on expanding the federal government’s detention capacity, loosening oversight of local police departments, and signaling a desire to increase enforcement and prosecution for drug and other crimes. This is a remarkable shift from the approach of President Obama’s administration. It is possible, however, that a bipartisan effort in Congress to reduce imprisonment of lower-level offenders could succeed.

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- 221 See Del Quentin Wilber & Lisa Mascaró, *Trump Picks Sen. Jeff Sessions for Attorney General*, L.A. TIMES, Nov. 18, 2016, <http://www.latimes.com/politics/la-na-pol-sessions-attorney-general-20161118-story.html> (quoting Holly Harris, a conservative reform advocate, on Sessions' "friendlier stance toward proposals to ease offenders' reentry into life after prison"); see also AMES GRAWERT, BRENNAN CTR. FOR JUSTICE, ANALYSIS: SEN. JEFF SESSIONS' RECORD ON CRIMINAL JUSTICE 6 (2017), <https://www.brennancenter.org/analysis/analysis-sen-jeff-sessions-record-criminal-justice> (analyzing Sessions' past statements on and support for reentry reform).
- 222 Pat Nolan, *Dear President Trump: Here's How to Get Right on Crime, Part 1*, MARSHALL PROJECT, Jan. 17, 2017, <https://www.themarshallproject.org/2017/01/17/dear-president-trump-here-s-how-to-get-right-on-crime-part-1#.u7KLevo7>.
- 223 See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017) ("Despite broad support, there was vocal opposition from some while others pushed for the reform legislation to be paired with proposals such as mens rea reform that could undermine public safety and harm progressive goals."), available at <http://cdn.harvardlawreview.org/wp-content/uploads/2017/01/811-866-Online-Rev-vf.pdf>; SEN. ELIZABETH WARREN, RIGGED JUSTICE: 2016, HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY 4 (2016), https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf.

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