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TITLE VI

PUBLIC EDUCATION AND PRIVATE SECTOR INITIATIVES

A BILL

To encourage and enhance the use of private sector initiatives in a concerted campaign of public education on the dangers of illegal drug use.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 601. This Act may be cited as the "Public Education and Private Sector Initiatives Act of 1986."

SEC. 602. (a) Notwithstanding any other provision of law, an agency may contract for property or services designed primarily to warn of the dangers of illegal drug use without complying with any requirement for competition in federal procurement, so long as at least 50% of the actual, reasonable costs of providing the property or service are being donated to the government.

(b) The provisions of this section shall take effect upon enactment and remain in effect for a period of one year thereafter.

Sec. 603. (a) Section 1461 of title 22 is amended to

insert, after the word "office" in the parenthetical, the following:

"or any information warning of the hazards of illegal drug use"

(b) The provisions of this section shall take effect upon enactment.

PUBLIC EDUCATION AND PRIVATE SECTOR INITIATIVES

SECTION BY SECTION ANALYSIS

This title makes two changes to remove statutory impediments to ongoing efforts to recruit private sector groups for volunteer programs to educate the public about the dangers of drug use. Both changes are limited in scope and do not reflect any fundamental criticism of the statutes being amended. Instead, they merely seek to change anomalies in the law, which we do not believe Congress ever intended, to ensure that they do not interfere with efforts to establish a public sector-private sector partnership to aid in the war on illegal drugs.

The Competition in Contracting Act, § 2711 of the Deficit Reduction Act of 1984, amending 41 U.S.C. 253, requires that wherever possible, competitive procedures be used in all federal procurement. This Act and other similar statutes embody a salutatory principle, but have had the unfortunate (and probably unforeseen) effect of making it more difficult to obtain volunteer services, particularly in producing public service announcements on the dangers of illegal drug use for television and radio.

In many instances, noted producers and directors have offered to prepare such public service announcements if the government will agree to pay their out of pocket expenses. However this limited expenditure of money by the government has the effect of bringing the transaction under the federal procurement statutes, triggering substantial red tape, including the requirement that the proposal be published in the Commerce Business Daily to solicit other proposals. Frequently, such publication means that the director or producer who developed the concept for the television or radio spot finds that other less talented individuals can take advantage of his original idea, and offer to produce it with lower out of pocket expenses (albeit at an equivalent decline in quality). Thus an Oscar-winning film producer may not be the "low bidder" on the contract, even though the government would get appreciably more for its money were he selected. We believe that in this limited circumstance, agencies should be authorized to accept such offers without going through normal procedures.

To resolve this problem, section 601 of title VI of the administration bill would create a narrow, one year exemption from the federal statutes mandating competition in procurement for services donated to the government to aid in the campaign against drug use--but only where at least 50% of the actual reasonable costs of providing the property and services have been donated. This exemption is limited in scope and duration because we do not want to imply that we are seeking to dispense with the salutatory principle of competition in government procurement in all cases. Instead, this limited exemption could be reviewed and extended by the Congress next year if it proves to be effective.

Another statutory barrier to efforts to educate the public on the dangers of illegal drug use is contained in section 1461 of title 22, the general authorization of the United States Information Agency (USIA). This statute bars USIA from releasing any film, radio spot, or book to domestic audiences if it was prepared for a foreign audience. While such a prohibition on the domestic display of "political propaganda" might make sense as a general matter, there have been several occasions in which outstanding USIA films on the dangers of drug use could not be shown to domestic audiences for this reason. This is a particularly acute problem where there is a need for a film in a language other than english, since the USIA product may be the only one available. Hence, section 602 of this title would create a narrow exception from this prohibition for USIA film and other material warning against the dangers of illegal drug use.

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Executive Order No. _____ of September __, 1986

Drug Free Federal Workplace

WHEREAS drug use is having alarming and tragic effects upon a significant proportion of the national workforce and results in billions of dollars of lost productivity each year;

WHEREAS the Federal Government, as an employer, is concerned with the well being of its employees, the successful accomplishment of agency missions and the need to maintain employee productivity;

WHEREAS the Federal Government as the largest employer in the nation can, and should show the way towards achieving drug free workplaces through a program designed to offer drug users a helping hand and, at the same time, getting the message to drug users and potential drug users that drug use will not be tolerated in the federal workplace;

WHEREAS the use of illegal drugs, on or off duty, by federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust given to such employees as servants of the public;

WHEREAS federal employees who use illegal drugs, on or off duty, are less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

WHEREAS the use of illegal drugs, on or off duty, by federal employees impairs the efficiency of federal departments and agencies by undermining public confidence in them, and thereby making it more difficult for other employees who do not use illegal drugs to perform their jobs effectively;

WHEREAS the use of illegal drugs, on or off duty, by federal employees can pose a serious health or safety threat to members of the public and to other federal employees;

WHEREAS the use of illegal drugs, on or off duty, by federal employees creates suspicion and distrust within an agency or department that disrupts its smooth and efficient functioning;

WHEREAS the use of illegal drugs, on or off duty, by federal employees in certain positions evidences an unreliability, an instability, and a lack of judgment that is inconsistent with access to sensitive information, and renders such employees susceptible to coercion, influence, and irresponsible action under pressure so as to pose a serious risk to national security, the public safety, and the effective enforcement of the law;

WHEREAS federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves, and will only take such steps if made accountable for their unsuitable and illegal use of drugs; and

WHEREAS standards and procedures should be put in place to ensure fairness in achieving a drug-free federal workplace, to allow an appropriate response to be made to the use of illegal drugs by a federal employee, and to protect the privacy of federal employees:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including Section 3301(2) of Title 5 of the United States Code; Section 7301 of Title 5 of the United States Code, Section 290ee-1 of Title 42 United States Code; and as President of the United States, and deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the federal service, it is hereby ordered as follows:

Section 1: *Drug Free Workplace*

- (a) Federal employees are required to refrain from the use of illegal drugs.
- (b) The use of illegal drugs by federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
- (c) Persons who use illegal drugs are not suitable for federal employment.

Section 2: *Agency Responsibilities*

- (a) The head of each agency shall develop a plan for achieving the objectives herein which addresses the problem of drug abuse in the workplace forthrightly and decisively in a fair and equitable manner with due consideration of the rights of the Government, the employee and the general public.
- (b) The plan shall include:

- (i) a strong statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;
- (ii) employee assistance programs emphasizing high level direction, education, counseling, referral to rehabilitation and coordination with available community resources;
- (iii) supervisory training to assist in identifying and addressing drug abuse in the workplace;
- (iv) provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues;
- (v) provision for identifying users in the workplace, including testing on a controlled and carefully monitored basis in accordance with this order.

Section 3: *Drug Testing Programs*

- (a) The head of each agency shall establish and conduct a program to test for illegal drug use under the following circumstances:
 - (i) When there is a reasonable suspicion that any employee uses illegal drugs;
 - (ii) In an examination authorized by the agency regarding an accident or unsafe practice; or
 - (iii) After an employee seeks counseling or rehabilitation for illegal drug use through an Employee Assistance Program.
- (b) The head of each agency shall establish a program for voluntary employee drug testing.
- (c) The head of each agency may establish a drug testing program to identify any applicant who uses illegal drugs.
- (d) The head of each agency is authorized to test any current employee in a sensitive position for the use of illegal drugs. The extent and criteria for such testing shall be determined by the agency head, based

upon the degree of sensitivity of the agency's mission and its employees' duties and the available resources for a testing program.

Section 4: Drug Testing Procedures

- (a) Agencies shall notify employees 60 days prior to the implementation of a drug testing program pursuant to this order that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and the procedures for obtaining such assistance. Drug testing programs already ongoing in agencies are exempted from the 60 day notice requirement. Agencies may take action under Section 3(a) of this order without reference to the 60 day notice period.
- (b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.
- (c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records.
- (d) Drug testing programs shall be conducted in accordance with scientific and technical guidelines promulgated by the Secretary of Health and Human Services after consultation with the Director of the National Institute on Drug Abuse.

Section 5. Personnel Actions

- (a) Agencies shall refer all employees who are found to use illegal drugs to their Employee Assistance Program for assessment, counseling, and referral for treatment or rehabilitation as appropriate.
- (b) Agencies shall initiate action to discipline or remove from the service any employee who is found to use illegal drugs, *provided that* such action is not required for an employee who:
 - (i) voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this

Order prior to being identified through other means;

- (ii) obtains counseling or rehabilitation through an Employee Assistance Program; and
 - (iii) thereafter refrains from using illegal drugs.
- (c) Agencies must not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to obtaining counseling or rehabilitation through an Employee Assistance Program. Agencies shall initiate action to remove from the service or transfer to a non-sensitive position any employee in a sensitive position who is found to use illegal drugs and:
- (i) refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or
 - (ii) does not thereafter refrain from using illegal drugs.
- (d) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing the adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.
- (e) The determination of an agency that an employee uses illegal drugs can be made on the basis of any appropriate evidence, including direct observation, conviction of a criminal offense, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.
- (f) Any action to remove or discipline an employee who is using illegal drugs shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.
- (g) Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of title 21, United States Code, received as a result of the operation of drug testing programs established pursuant to this order.

Section 6: Coordination of Agency Programs

- (a) The Director of the Office of Personnel Management shall:
- (i) Issue government-wide guidance to agencies on the implementation of the terms of this order.
 - (ii) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program.
 - (iii) Develop a model Employee Assistance Program for Federal agencies and assist them in putting strong programs in place.
 - (iv) In consultation with the Secretary of Health and Human Services develop and improve training programs for Federal supervisors and managers on illegal drug use.
 - (v) In cooperation with the Secretary of Health and Human Services and agency heads, mount an intensive drug awareness campaign throughout the Federal workforce.
- (b) The Attorney General shall render legal advice regarding the implementation of this order and must approve all guidelines, regulations and policies adopted pursuant to this order.

Section 7: Definitions

- (a) This order applies to all agencies of the Executive Branch.
- (b) For the purposes of this order, the term "agency" means an Executive agency, as defined in 5 U.S.C. § 105; the Uniformed Services as defined in 5 U.S.C. § 2101(3); the United States Postal Service; or any employing unit or authority of the Federal government, other than those of the judicial and legislative branches.
- (c) For the purpose of this order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21, United States Code, the possession of which is unlawful under chapter 13 of title 21, United States Code. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

- (d) For the purpose of this order, the term "employee in a sensitive position" refers to:
- (i) an employee in a position which an agency has designated Special Sensitive, Critical-Sensitive or Noncritical-sensitive under Chapter 731 of the Federal Personnel Manual or an employee in a position which an agency head has designated or in the future designates as sensitive in accordance with Executive Order 10450 of April 27, 1953 as amended;
 - (ii) an employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order 12356 of April 2, 1982;
 - (iii) individuals serving under Presidential appointments;
 - (iv) members of the Senior Executive Service as defined in Subchapter II of Chapter 31 of Title 5, United States Code;
 - (v) law enforcement officers as defined in 5 U.S.C. § 8331(20);
 - (vi) individuals employed under Schedule C in the excepted service under the authority of section 213.3301 of Title 5, Code of Federal Regulations and Executive Order 10577;
 - (vii) members of the uniformed services as defined in 5 U.S.C. § 2101(3);
 - (viii) air traffic controllers as defined in 5 U.S.C. § 2109; and
 - (ix) other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.
- (e) For the purpose of this order the term "employee" means all persons described in 5 U.S.C. § 2105. Additionally, employees of the United States Postal

Service and the Postal Rate Commission are employees for the purpose of this order.

- (f) For the purposes of this order, the term "Employee Assistance Program" means agency-based counseling programs which offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs which affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employees' progress while in treatment.

Section 8: *Effective Date*

This Order shall become effective on the date of its issuance.

RONALD REAGAN

THE WHITE HOUSE

September __, 1986

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ISSUES

1. Pre-employment testing and hiring standards.
 - a. Should pre-employment testing be required for all sensitive jobs or authorized and left to agency discretion? (OPM).
 - b. Should pre-employment testing for nonsensitive jobs be authorized and left to agency discretion or prohibited? (DOL).
 - c. Should agencies be prohibited from hiring current drug users in nonsensitive jobs for which they are otherwise qualified? (DOL).

2. Employees in sensitive positions.
 - a. Should these be categorically defined in the Executive Order or left to agency discretion?
 - b. Should employees with access to "Secret" information be included?
 - c. Should Presidential appointees, SES and Schedule C employees be included?
 - d. Should agencies be permitted to retain current drug users on-duty in sensitive positions? (DOL).
 - e. Should agencies be precluded from disciplining or removing sensitive employees who voluntarily identify themselves as drug users? (DOL, HHS).
 - f. Should agencies be precluded from removing sensitive employees who are willing to undergo rehabilitation? (HHS).
 - g. Should agencies be required to restore sensitive employees to their former positions if they successfully undergo rehabilitation? (HHS).
 - h. Should agencies be required to remove or transfer sensitive employees who fail their first attempt at rehabilitation?

3. Nonsensitive employees
 - a. Should testing be permitted when there is reasonable suspicion of drug use on or off duty, or must the agency have probable cause to believe there is drug use that adversely affects job performance? (DOL).

- b. Should agencies be precluded from disciplining or removing nonsensitive employees who voluntarily identify themselves as drug users? (DOL, HHS).
- c. Should agencies be precluded from removing nonsensitive employees who are willing to undergo rehabilitation? (HHS).
- d. Should agencies be permitted to discipline or remove nonsensitive employees for non-job-related drug use? (DOL).
- e. Should agencies be required to give a second chance at rehabilitation to nonsensitive employees who voluntarily identify themselves as drug users? (HHS).

Job Category	APPLICANTS		CURRENT EMPLOYEES			
	Sensitive	Non sensitive	Sensitive		Non sensitive	
Basis for testing or identification	DOJ: Pre-employment tests for all OPM: Pre-employment tests at agency discretion	DOJ: Pre-employment tests at agency discretion DOL: No pre-employment tests	Voluntary	Involuntary 1) Random or uniform 2) Reasonable suspicion of drug use on or off duty 3) Accident investigation 4) Rehabilitation followup	Voluntary	Involuntary 1)DOJ: Reasonable suspicion of drug use on or off duty DOL: probable cause for job-related drug use 2)Accident investigation 3)Rehabilitation followup
Agency action upon identification as drug user	Must not hire	DOJ:Must not hire DOL:Must hire if otherwise qualified	1)DOJ:Must reassign to nonsensitive position or nonduty status DOL:May reassign to nonsensitive position or nonduty status	2)DOJ:May discipline or remove HHS&DOL:Must not discipline or remove	DOJ:May discipline or remove HHS&DOL:Must not discipline or remove	DOJ:Must discipline; may remove HHS:Must discipline; must not remove DOL:May discipline or remove if job-related
Agency action after successful rehabilitation	May hire	Must hire (by statute)	DOJ:Any discipline stands; otherwise at agency discretion HHS:May cancel any discipline; must return to prior sensitive position; must not take further adverse action		DOJ:Any discipline stands; otherwise at agency discretion HHS:May cancel any discipline; must not take further adverse action	
Agency action after unsuccessful rehabilitation	Must not hire	DOJ:Must not hire DOL:Must hire if otherwise qualified	DOJ:Must remove or transfer to nonsensitive position HHS:May remove or discipline; may offer second chance at rehabilitation		DOJ:Must discipline; may remove DOL:May discipline or remove if job-related HHS:Must not discipline or remove until given a second chance at rehabilitation	DOJ:Must discipline; may remove DOL:May discipline or remove if job-related

REPORT
OF THE
NATIONAL DRUG POLICY BOARD SUBCOMMITTEE
ON
PRE-TRIAL DETENTION,
IMMIGRATION DETENTION, AND PRISON SPACE

September 1, 1987

REPORT OF THE NATIONAL DRUG POLICY BOARD SUBCOMMITTEE
ON
PRE-TRIAL DETENTION, IMMIGRATION DETENTION, AND PRISON SPACE

Table of Contents

Executive Summary i

I. Jail/Prison Space Issues 1

II. The Federal Prison Space Problem 7

 Prison Space Shortfall 9

 Options 11

 1. Emergency Building Program 11

 2. Cap the Federal Inmate Population 15

 3. Private Sector Detention 16

 4. Military Facilities 17

 5. Higher Prison Overcrowding 19

III. The Federal Detention Space Problem 22

 Current Detention Programs 27

 Cooperative Agreement Program (CAP) 29

 Federal Detention Centers 30

 Options 31

 1. Expand Federal Detention Capacity 31

 2. Private Sector Detention Services 33

 3. Intergovernmental Cooperative Ventures 34

IV. Alien Detention Space 35

V. Conclusions and Recommendations 42

Appendices

EXECUTIVE SUMMARY

This report to the National Drug Policy Board from its Subcommittee on Prison/Detention Issues deals with the problems facing the United States Government regarding the adequacy of incarceration and detention space for Federal prisoners and detainees. It covers prison space for the Bureau of Prisons, pre-trial detention space for the United States Marshals Service, and illegal alien detention space for the Immigration and Naturalization Service.

SCOPE OF THE PROBLEM

Prisons

The Federal Prison System is severely overcrowded, and inmate population is rising at an average rate of 15% a year. Unalleviated, this overcrowding may cause a "gridlock" in the Federal criminal justice system, necessitating significant departures from current enforcement, prosecution, sentencing, and incarceration policies.

- There are almost 44,000 prisoners in the Federal Prison System (August 1987), with a rated capacity to incarcerate only 27,750. This has resulted in a current overcrowding rate of 58% system-wide.
- The Department of Justice estimates that, given current capacity and with only the additions envisioned in the Administration's current plan, overcrowding will increase to at least 72% by 1997.
- The United States Sentencing Commission has postulated even greater increases in inmate population (only 10% of which relate to the proposed sentencing guidelines themselves), which may yield as much as 183% overcrowding, based upon its highest population projection of 125,000 inmates by 1997.

Population projections produced by various sources point to a single conclusion: the demand for prison space will rise well beyond that previously estimated. Only the magnitude is as yet unknown.

Detention

The United States Marshals Service, which detains persons awaiting trial and sentencing, has 800 contracts in force with local jails to provide space for Federal detainees. However,

local jail overcrowding has discouraged local officials from making such space available in many instances, reduced availability in others, and caused space to be unavailable at any price in some cities--all requiring the Marshals Service to transport prisoners over long distances to outlying jails, increasing the possibility of escape, accident, and incident.

- The Marshals Service, in a recent study, found 21 cities facing an "emergency" jail status, meaning that there is no Federal jail space available where such space is required. Less severe but worsening shortages were identified in many other cities. The emergency jail status is projected to more than treble to 72 urban areas by 1992.
- The Marshals Service estimates that the average daily population requiring pre-trial detention will rise from 7,328 in 1986 to 15,300 in 1992. This represents a 115% increase in the number of detainees to be held every day.
- The approximate 8,600 bed shortfall by 1992 in the availability of pre-trial detention space for Federal detainees can be alleviated only by a mix of programs to augment capacity, including Federal construction and Federal support to local jail expansion.

The Marshals Service, in conjunction with the Office of Management and Budget and BoP, is now seeking to determine the most effective mix of Federal construction and local leasing to alleviate the detention problems in the cities with the gravest problems.

Illegal Alien Detention

Because of the fluctuations in the rate of illegal alien apprehensions, the Immigration and Naturalization Service recommends deferring decisions on detention requirements for "administrative" detainees and Mariel Cubans for one year.

The future rate of aliens illegally entering the United States is unclear. Consequently, the number of aliens to be charged by the INS with entry without inspection--and concomitant detention requirements for such illegal entrants--cannot be predicted with confidence at this time. While 1,767,400 illegal aliens were apprehended in FY 1986, the FY 1987 level is expected to be 1.1 million. The INS states that the Immigration Reform and Control Act of 1986, with its sanctions against employers who hire illegal aliens, contributed significantly to the drop in

apprehensions following its enactment. However, apprehensions returned to the historical rate in the summer of 1987. Additionally, INS notes for future planning that because only 7.8% of apprehended aliens are held in detention (one fourth of the percentage of 10 years ago), a greater detention rate may be advisable to buttress the border enforcement program.

A year from now the illegal entrant picture should be clear enough to permit a more informed judgment of their detention needs.

INS likewise recommends deferring decisions on detention requirements for Mariel Cuban criminal aliens. Some 3,600 are in custody now, with increases expected as Mariel Cuban aliens convicted of State and local felonies are returned to Federal custody. However, the panel review process, reinstated to identify those now in Federal custody who may be released, has just begun. Until that process is completed in a year, detention needs should not be decided.

Beyond the Mariel Cuban detainee population, convicted alien felons taken into INS custody also require more than simple detention; most require confinement in facilities with greater security and control than is afforded in minimum security INS facilities (Service Processing Centers). Some are held in local jails under contract with INS, but the overall shortage of local detention facilities available for Federal detention adds to INS' current detention availability problem. Hence, the majority are held in INS facilities and it is likely that this percentage will have to increase.

At this time, INS cites a need for 6,100 additional medium security detention spaces for the criminal aliens expected to be held in Federally operated detention by 1993. However, the supporting data are not adequately reliable: prior criminal, alien detention populations and future projections are based on percentage estimates, not on actual statistics¹.

¹ In FY 1985, 42,277 convicted alien felons were referred to INS; and 22,316 were taken into custody. In FY 1986, 26,723 criminal aliens were taken into custody from all referrals. The INS has no precise figures on criminal alien detainees prior to FY 1987 but estimates that 73% of other-than-Mexican detainees were criminal aliens in FY 1985 and 66% were criminal aliens in FY 1986. Therefore, INS calculates that 16,290 were held by INS in FY 1985 and an estimated 17,637 were detained in INS-operated facilities in FY 1986. In FY 1987, 30,000 will be taken into custody by INS; in FY 1988, 54,000 are expected to be taken into custody; in FY 1989, 80,000; and, by FY 1991, 114,000 are expected. Unclear are the assumptions underlying the

Owing to the criminality of a portion of the illegal and legal alien population, and to the new provisions of the Immigration Reform and Control Act of 1986, detention requirements for criminal aliens should be expected to increase. The IRCA may well affect the number of aliens illegally entering and staying in the United States, but it will do little to mitigate legal and illegal aliens' criminal behavior. The interrelationship of these factors will dictate the INS custody requirements, but the ultimate projections and best mix of methods to handle criminal aliens require refinement. Given the need for more precise data and more thorough planning, the Subcommittee considers the INS detention figure as a preliminary figure which may be reiterated or refined a year from now. Critical in the short term is the FY 1989 activation of the Oakdale II and Terminal Island detention facilities to provide an additional 800 bed spaces. These should be sufficient while the INS five year detention plan is being finalized.

Therefore, the Subcommittee recommends deferring decisions on criminal alien detention for the same one year period.

Aggravating Circumstances

Factors creating the prison and detention crises are not likely to diminish. These include the following:

- Federal investigative and prosecution resources have steadily increased since 1982. The total investigative and prosecution budget for drug law enforcement, as an example, increased from \$220 million in 1981 to \$625 million in 1986. There are 5,554 agents and 1,191 prosecutors focusing their efforts in the drug area alone. They have produced record arrests and prosecutions, and are expected to continue to do so.
- More Federal criminal prosecutions, particularly for drug violations, are being brought and will continue to be brought. The United States courts reported a 115% increase in the number of drug cases handled and a 94% increase in the number of defendants tried from 1985 to 1986.

¹(...continued)
anticipated criminal alien referral population and uncertain are the projected number to be detained in INS facilities for FY 1987 onward.

The Anti-Drug Abuse Act of 1986 created mandatory minimum prison sentences ranging from five years to life imprisonment for various classes of drug offenders. These so-called "mandatory minimums" will greatly expand the number of prisoners coming into the system, and they will remain incarcerated for longer periods of time.

The Immigration Reform and Control Act of 1986 and subsequent appropriations acts are expected to increase the Border Patrol by 50% by 1990 and augment criminal investigators, placing new emphasis on enforcement activities, including the employer sanctions for hiring illegal aliens. While these provisions are intended to discourage illegal aliens from entering and staying in the United States, it is unclear how they will ultimately affect Federal prison and detention.

ISSUES

The critical issues which this Administration must confront are what levels of detention and prison space are necessary to prevent the criminal justice system from breaking down, i.e., losing the discretion to follow current enforcement, detention, sentencing, and incarceration policies?

OPTIONS

Summarized below are a variety of options for decisions concerning Federal prisons and detention.

Federal Prison System

The Subcommittee recommends adopting a policy to seek a 20-30% overcrowding rate by 1993 to ensure the safety of inmates and staff in the future, to provide prison facilities which can be managed without the disturbances, violence and psychological damage experienced by severe overcrowding, and to provide for and permit population adjustments which are responsive, in a timely manner, with changes in current enforcement, prosecution, sentencing, and incarceration practices. The most critical issue facing Federal policy makers will be setting the overcrowding target rate for five-year planning and budgetary purposes.

Flowing from a policy decision on the appropriate target level for Federal prison overcrowding will be actions to either

increase prison space availability or constrain the number of inmates incarcerated:

1. Expand Federal prison space.

- The Department of Justice advocates 20% overcrowding as the maximum excess population manageable over a long period. Providing sufficient bed spaces based on the Bureau of Prisons' conservative population projection for this target will cost \$1.9 billion for construction and activation for 1989-1992.
- Obviously, financial costs are among those which vary for different maximum levels of acceptable overcrowding.

The table on the following page depicts the different annual funding requirements of the Federal Prison System for various levels of overcrowding in terms of rated capacity levels. These range from the lowest (0%) where the Federal prisons would comply in full with space standards established by the American Corrections Association (often relied upon by the courts in rendering decisions capping inmate populations in State prison and local jail systems) to 50% (almost as high as the 58% overcrowding level in August 1987 and twice that as would be provided in the President's FY 1988 budget):

Table 1. PRISON CONSTRUCTION COSTS AND ANNUAL OPERATING COSTS FOR SEVERAL OVERCROWDING AND POPULATION PROJECTION SCENARIOS

Dollars in Millions

Assuming 76,000 inmates in FY 1997 (BoP estimate and Sentencing Commission low estimate):

Overcrowding Rate.....	0X	20X	30X	40X	50X
Construction Cost.....	\$2,332	\$1,654	\$1,208	\$ 940	\$ 708
Activation Cost.....	211	222	171	133	100
Total One Time Costs.....	2,663	1,889	1,379	1,073	808
Annual Operating Cost.....	1,017	706	587	484	395

Assuming 100,000 inmates in FY 1997 (an average of the Sentencing Commission's high and low estimates):

Overcrowding Rate.....	0X	20X	30X	40X	50X
Construction Cost.....	\$4,228	\$3,100	\$2,666	\$2,294	\$1,971
Activation Cost.....	600	440	378	325	280
Total One Time Costs.....	4,828	3,540	3,044	2,619	2,251
Annual Operating Cost.....	1,871	1,439	1,273	1,131	1,008

Assuming 125,000 inmates in FY 1997 (Sentencing Commission high estimate):

Overcrowding Rate.....	0X	20X	30X	40X	50X
Construction Cost.....	\$5,921	\$4,510	\$3,968	\$3,503	\$3,100
Activation Cost.....	840	640	563	497	440
Total One Time Costs.....	6,761	5,150	4,531	4,000	3,540
Annual Operating Cost.....	2,634	2,094	1,886	1,709	1,554

Other options are:

2. Cap the Federal prison population at an appropriate overcrowding rate by:

- Setting lower prosecution declination standards. In this way, the Federal Government would refuse to prosecute many of the types of cases that are normally prosecuted

today, thereby lowering the number of individuals incarcerated.

- Releasing those convicted earlier than is current practice to alternative confinement (halfway houses) and supervised parole prior to completing their terms of imprisonment, lowering prison overcrowding somewhat. Many non-violent inmates now serve the last two to three months of their sentences in halfway houses. Cost avoidances would accrue by increasing the amount of time an inmate spends in a halfway house in lieu of prison. In addition, the BoP could save some funds by requiring that halfway house inmates reimburse the government for room and board and moving some half-way house residents into forms of intensive probation.
- Considering legislation which would recommend alternative forms of punishment for first-time, non-violent, less serious offenders.

United States Marshals Service

The Administration faces four options in obtaining needed jail space: (1) lease space from local governments; (2) build jails together with local governments; (3) contract private sector firms to operate jails; and (4) as a last resort, build Federal jails where no other option is feasible. BoP and the Marshals Service are working together to develop the best combination of these options for several court cities in which space is already critically needed. The estimated overall cost for pre-trial detention space for the next five years is \$534 million.

Immigration and Naturalization Service

INS proposes to wait at least one year to assess the detention needs for illegal entrants and Mariel Cuban criminals. While the need for increased detention for other criminal aliens appears to exist, its dimensions

are not clear². To permit INS to better quantify its need and justify a five year plan, the Subcommittee recommends that INS further study its criminal alien detention program, develop a population projection methodology founded upon hard statistics, and present a comprehensive detention plan a year from now.

FUNDING REQUIREMENTS

The table on the following page summarizes the funding requirements for the prison and pre-trial detention plans. It begins with OMB's most recent "outyear" funding estimates, as contained in the FY 1988 allowance to the Justice Department. Traditionally, these serve as the foundation for any subsequent incremental funding. Funding requirements, dictated by current and anticipated circumstances, follow for the BoP and USMS. Adding the needed \$3.3 billion in enhancements to the "outyear" estimates provides the total costs, per fiscal year, for the plans.

It is important to remember that the prison population projections made by the U.S. Sentencing Commission are for eight years. Moreover, the inmate population trend lines are not simple linear projections. For comparative purposes, BoP has extended its inmate population projections in this report to cover the same eight years.

However, the funding estimates presented in this report cover only the next five fiscal years. Therefore, for prisons, consider the funding plans as an expression of what is required to be in place for the first five years of the eight year time period covered by the population projections. The Bureau of Prisons funding requirements are spread over the five year period, indicating the staggered construction and phased activation of facilities.

The Marshals Service funding requirements are shown in the 1989-1991 period, indicating the fiscal years in which budget

² To handle deportable alien felons, INS is expected to consider: (1) BoP constructing facilities to provide additional bed spaces in facilities with a medium security level, for operation by the BoP with INS support staff to assist in the transport and deportation hearing process; (2) increasing the minimum level security of some units within INS Service Processing Centers to handle additional criminal aliens, to the exclusion of a like number of illegal entrants; (3) and, increasing the number of immigration law judges to permit the conduct of more deportation hearings while criminal aliens are serving their sentences in non-Federal custody.

appropriations will be needed for Federal and CAP construction to commence so as to have detention bed spaces in place for the anticipated detainee population.

Table 2: FIVE YEAR FUNDING REQUIREMENTS

Budget Authority in Millions

	<u>Fiscal Years</u>				
	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
PRESIDENT'S 1988 BUDGET (1)...	\$1,045	\$1,072	\$1,169	\$1,097	\$1,122
BUREAU OF PRISONS					
FIVE YEAR PLAN (2)...	613	463	450	742	503
U.S. MARSHALS					
FIVE YEAR PLAN (3)...	73	230	231	0	0
TOTAL, BOP & USMS	\$1,731	\$1,765	\$1,050	\$1,839	\$1,625

(1) Includes the Buildings and Facilities and the Salaries and Expenses accounts of the Bureau of Prisons and the Support of U.S. Prisoners appropriation account of the U.S. Marshals Service.

(2) Incremental funding based on BOP population projections as of August 1987 for 72,000 inmates with a 20% overcrowding target; includes cost of constructing, activating, and operating the new prison facilities.

(3) Assumes acquisition of 3,140 bed spaces through the CAP program and 5,486 bed spaces through the construction of Federal jails; includes the cost of constructing and activating these jails.

Federal budget constraints are severe. They are likely to remain so. Any increased resources for prison and detention space will be difficult to obtain in this fiscal environment and sufficient resources may not be available to meet all needs².

The Subcommittee suggests that serious consideration be given to proposing legislative amendments to the Justice Assets Forfeiture Fund and the Treasury Assets Forfeiture Fund which

² The Office of Management and Budget members of the Subcommittee wish to note that while they participated as members, their participation does not imply any acceptance or concurrence on the part of their agency to the funding requirements endorsed by the Subcommittee.

would permit a portion of the "carryover" fund balances to be provided to Federal prison and detention programs. "Carryover" funds are defined as those in excess of requirements to operate the program, including all asset management expenses, program-related costs, and equitable sharing disbursements made to State and local law enforcement agencies. By directing only excess funds to Federal prison and detention programs, no diminution of effort in the seizure/forfeiture area would take place yet the proceeds of crime could help underwrite the detention and incarceration of Federal criminals.

RECOMMENDATIONS

To meet successfully the crises in prison and detention space and to provide for future management of the increasing populations and other exigencies, this report suggests several steps which can be implemented immediately:

1. Commit to a comprehensive, integrated, five year plan for the Bureau of Prisons and the U.S. Marshals Service.
2. Determine the prison overcrowding target rate so that the facilities and budget planners can devise annual plans against a policy which permits them to address the inmate population as it grows.
3. Amend the Assets Forfeiture Fund legislation to allow carry-over income--in excess of the requirements for the custody and maintenance of seized assets pending forfeiture, and other statutorily permitted, program-related expenses--to be transferred for prison and detention programs.
4. Establish a standing task force under the Department of Justice to continually monitor prison and detention space requirements and offer related action plans.

REPORT OF THE NATIONAL DRUG POLICY BOARD SUBCOMMITTEE

ON

PRE-TRIAL DETENTION, IMMIGRATION DETENTION, AND PRISON SPACE

I. The Jail/Prison Space Issue

The Federal criminal justice system is approaching a potential "gridlock." Unless avoided, this "gridlock" might undermine, if not cripple, the criminal justice process in the United States, necessitating significant departures from current enforcement, detention, prosecution and incarceration policies.

The causes of this impending "gridlock" are four-fold: the rapid disappearance of Federal detention space; a serious shortfall in space to incarcerate sentenced Federal prisoners; the impact of new legislation on enforcement programs, prosecution practices and prison sentences; and, the anticipated effects of the proposed guidelines of the U.S. Sentencing Commission. The specific factors contributing to the crisis include:

- increased government emphasis on the enforcement of laws against violent crime, white collar crime and, particularly, drug offenses;
- the increased number of Federal law enforcement agents, prosecutors, and judges in the criminal justice system (more were added within the last seven years than in any previous seven year period);
- a decreased number of State and local detention spaces available for Federal use due to population restrictions imposed by

Federal and State courts, State jail standards, and increased enforcement of State and local criminal laws;

- a marked increase in criminal cases in the Federal system;³
- a continued, high overall conviction rate (85%);
- an increase of 20% annually in the imposition of prison sentences; and,
- an increase in the number of Mariel Cubans and convicted alien felons coming from State penal systems.

Adding to the resource enhancements provided to Federal law enforcement, the Congress overhauled Federal criminal sanctions with the enactment of the Comprehensive Crime Control Act of 1984. And, last October, the Congress passed the Anti-Drug Abuse Act of 1986 which further increased penalty provisions in the criminal area, particularly those dealing with drug violations.⁴

³ The Bureau of Justice Statistics of the Department of Justice reported in a recent study that during the period June 1985 to June 1986, Federal Courts sentenced 40,740 defendants, imposing incarceration on 20,777 individuals. The average prison sentence for all offenders was 5 1/2 years, 32% longer than in 1979. The study identified a 38% increase in the length of sentences for drug crimes and a 43% increase for fraud crimes. The study also revealed that Federal parole revocations for major new crimes increased from 6.8% in 1979 to 15.4% in 1986.

⁴ Major penalty enhancements are embodied in both the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of 1986. As an example, the latter statute at Title 1, Subtitles A and G, prescribes that mandatory minimum terms of imprisonment be imposed based upon factors such as weight of drugs involved, prior convictions and whether death or serious bodily injury occurred coincident to the illicit drug transactions. Enhanced sentences range from a mandatory five year term to a mandatory life term, depending on the factors applicable in the case. Moreover the sentencing courts' options

Recently, the United States Sentencing Commission proposed a major revision of judicial sentencing by articulating guidelines which, when adopted, would mandate ranges of sentences for all Federal crimes. The impact of the Sentencing Commission's recommendations has been projected by a multi-faceted computer model; two inmate population projections are made, founded on separate sets of assumptions regarding judges' adherence to the proposed sentencing guidelines. However both projections foretell a significant increase in prison population as a result of the combined effects of the new statutes, primarily, and the sentencing guidelines, secondarily.⁵

The Sentencing Commission calculates that 90% of the projected increase in inmate population relates to the newly

⁴(...continued)
are constrained as incarceration under these mandatory sentences may not be mitigated by parole or suspension, except on the motion of the Government citing the defendant's cooperation with law enforcement.

⁵ The inmate population prediction model used by the United States Sentencing Commission was developed jointly by the Bureau of Prisons and the United States Sentencing Commission. It is a very complex model employing over 100 data elements from a sample of 10,500 defendants. The model can be characterized as a discrete event simulation model, wherein each sampled defendant's offense and criminal history characteristics are examined by the model. These characteristics determine the appropriate path the individual will follow through the criminal justice process. The model then applies the appropriate sentencing guidelines to each sampled offender and determines the individual's resultant sentence. The model then aggregates the 10,500 individuals' data and projects future inmate population upon them.

enacted statutes, with only an additional 10% expected as judges implement the guidelines, if enacted as proposed.

Additional external problems are now exacerbating and will continue to exacerbate the pre-trial detention space problem. The majority of State criminal justice systems are extremely overcrowded. Indeed, thirty-eight (38) Federal and State court orders have been entered against State correctional systems requiring the alleviation of a variety of conditions, most of which stem from overcrowding.⁶ A number of States, including California, Michigan, and New York, are presently embarking on large prison construction projects. Officials of all three States indicate, however, that these expansion programs will only

⁶ The New York Times noted on August 17, 1987, in an article entitled "Texas Prison System Closes" that the Texas prison system, the nation's third largest state system, was closed to new inmates 19 times in 1987 for exceeding court imposed population ceilings. The Texas Department of Corrections reported no additional prisoners eligible for early release and, as sentenced prisoners are backed up in local jails, the number of Federal detainees accepted is reduced in those local jails.

In another example, Mid South magazine reported in its August 16, 1987, feature article on the Shelby County (Memphis, Tennessee) jail. It noted that 1,660 prisoners were packed into the new 1,165-bed facility. Although commonly called the "Glamour Slammer", most inmates are fearful for their lives and their safety in the jammed cellblocks. Because over 400 convicted felons are awaiting transfer to the overcrowded state prison, the availability of space in this jail to accommodate Federal detainees has declined significantly.

In a third example, the Bureau of Prisons was forced in July 1987, to accept 150 sentenced prisoners from the seriously overcrowded Commonwealth of Puerto Rico prison system in exchange for Puerto Rico agreeing to hold 150 Federal detainees awaiting trial in San Juan. Unfortunately, the jail spaces were exhausted almost instantly, as the Federal detainee level reached 191 during the first week of August.

meet their needs and the Federal Government will not be able to secure space in their institutions. In the short term, no help can be anticipated from State correctional systems in taking any overflow of Federal pre-trial detainees from local jails. In fact, a diminishing capacity to detain Federal defendants in other State and local facilities is anticipated in the foreseeable future, particularly in the local jails of major metropolitan areas. Some States, including the District of Columbia, have requested and received temporary Federal assistance with their overcrowded prisons in the form of their inmates being housed in Federal prisons. In the District of Columbia, a Federal judge has ordered that the Federal Prison System incarcerate local prisoners due to overcrowding at the Lorton correctional facilities and the "special relationship" between the District and the Federal government.

Illegal aliens present detention problems in several ways. Illegal entrants, by and large, require only minimum security detention, when detention is required, and for only short periods of time before deportation is effected. Criminal aliens, irrespective of legal or illegal entry, are convicted felons referred for INS deportation following their State or local incarceration. These illegal aliens present more difficult handling and detention problems. Their number is increasing and the INS has not the resources to accommodate them. The shortage of local jail spaces means that INS is experiencing greater difficulties in having these aliens detained on a contract basis.

Finally, Mariel Cuban criminals are the most difficult to detain. They may be excluded from the United States, but, now that they are here, cannot be deported, owing to Cuba's renegeing on its agreement to accept their return. This particular class of criminal aliens requires high security level detention. Their numbers are growing as those who complete State prison and local jail sentences are brought into Federal custody.

In the Southwest United States, Operation Alliance⁷ has doubled the number of Federal criminal arrests, thereby using State and local detention space that might be available for the Immigration and Naturalization Service or routine United States Marshals Service cases.

The Bureau of Prisons, United States Marshals Service, and the Immigration and Naturalization Service have done virtually all that they can possibly do for one another, within current resource levels, to manage detainee/prisoner overcrowding with available Federal resources. Such cooperative ventures will continue and, indeed, new resources, if provided, will be employed in many instances in joint projects.

⁷ Operation Alliance has added approximately 1,200 new permanent investigators and 60 Federal prosecutors to the five judicial districts along the Southern Border.

II. The Federal Prison Space Problem

The Federal Bureau of Prisons is responsible for the housing and care of all prisoners convicted of Federal crimes and, in certain metropolitan areas, for detaining some individuals charged with Federal violations. Presently, there are almost 44,000 inmates housed in prison facilities having a total "rated capacity" of 27,750. This means that the Federal Prison System is already overcrowded by a sizable 58%, and some individual institutions, owing to their low and medium security levels and the greater influx of prisoners classified at those security levels, are overcrowded by more than 100%. Prison overcrowding is commonly related to increases in inmate idleness, violence, and litigation. Overcrowding has been judged as a major contributing factor to the worst disturbances experienced in State institutions. In fortunate contrast, to date the rate of assaults and other measurable incidents have not risen apace with Federal prison overcrowding.

The current level of Federal prison overcrowding coupled with substantial growth in future prison population can create a crisis of major proportions in the criminal justice system. The Attorney General has advised the President that insufficient prison space constitutes a "material weakness" in the Department's system of internal controls. The Attorney General has set companion objectives to (a) expand the capacity of the Federal Prison System to keep pace with projected increases in inmate population, and (b) simultaneously reduce overcrowding to 20% by

FY 1995.⁸ The Prison/Detention Issues Subcommittee has determined that, based upon currently funded construction and projected increases in the prison population through 1997, reaching this goal will be impossible without a substantial resource increase to the Bureau of Prison's facilities expansion program.

Since 1981, the Federal Prison System's capacity has been increased by approximately 4,500 beds through the construction of new housing units at existing prisons, the acquisition and conversion of existing properties to correctional facilities, and the construction and activation of new prisons. In addition to these projects, Congress has appropriated funds to build seven new prisons and several additions to existing facilities which will house almost 7,000 additional inmates. Construction has already begun on five of these prisons and sites have been selected for the remaining two. The President's FY 1988 budget request now before Congress requests construction funds for two major prisons and expansion projects to house an additional 2,400 inmates.

⁸ "Rated capacity" represents the number of inmates that an institution should house based on contemporary correctional standards, particularly those established by the Joint Commission on Accreditation for Corrections. While the ideal goal is to eliminate overcrowding, the Attorney General has established a level of 20% overcrowding as acceptable. The 20% goal recognizes the pressures of the current fiscal climate as well as the expertise of the Federal Bureau of Prisons in managing overcrowded institutions. Nevertheless, it should be noted that the Federal Bureau of Prisons has handled 55% overcrowding to date without major incident. This has been accomplished by maintaining high level security prisons at rated capacity and overcrowding the lower level security institutions as much as 100%.

Prison Space Shortfall

While the expansion program of the Federal Prison System has been substantial, it will not meet both the future population increases and the critical goal of reducing overcrowding. The Bureau of Prisons projects that, under current trends, the Federal prison inmate population will increase to 71,892 inmates by FY 1995. For comparability to the Sentencing Commission's 1997 projections, this BoP estimate is extrapolated to yield 76,000 inmates in 1997. The BoP projections which consider increased law enforcement efforts and newly enacted enforcement and penalty statutes but do not include the Sentencing Commission guidelines, as they are not now in effect and, if implemented, may differ from their present content.

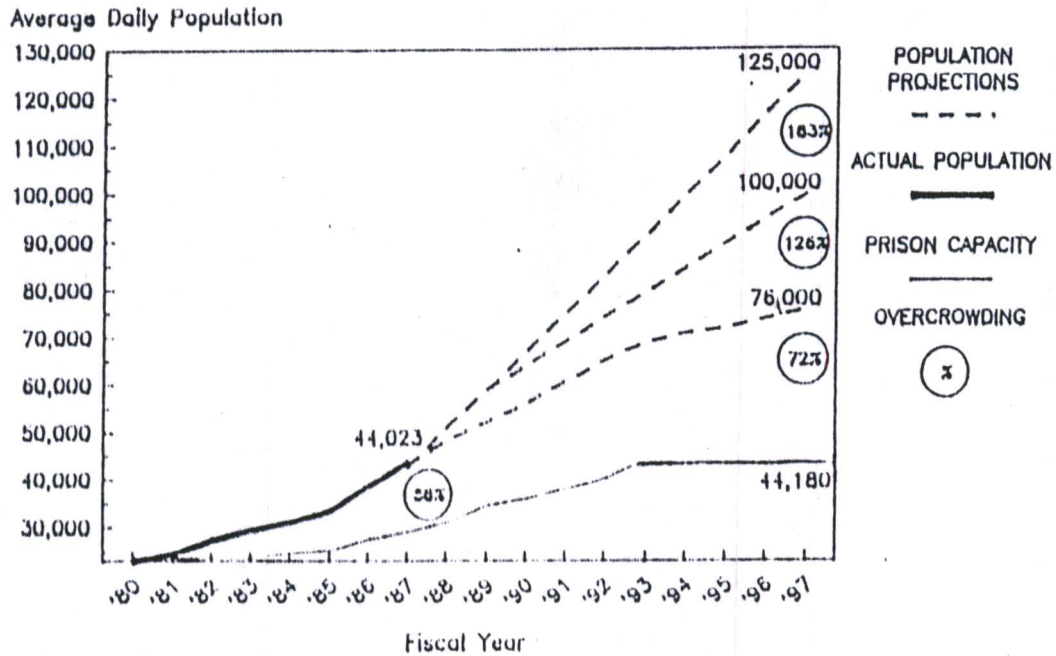
The United States Sentencing Commission's recently completed impact analysis projects even higher future Federal inmate populations. The Commission's analysis includes varying policy assumptions which yield inmate population projections from 78,000 to 125,000 inmates by FY 1997. The "low-growth" projection incorporates the effects of enacted statutes and the currently proposed guidelines; it assumes that judges will depart frequently from the guidelines. The Sentencing Commission's "high-growth" projection is based upon greater rates of prosecution, conviction and plea bargains, and assumes close adherence by sentencing judges to the proposed sentencing guidelines. (The "mid-range" projections used in this report are

presented to ease discussion of Sentencing Commission estimates. This level averages the high and low estimates.)

In any scenario, it appears that a tidal wave of inmates will hit the Federal Prison System between 1990 and 1995. The only question is whether it will hit at high or low tide.

For purposes of illustration, let us review the impact of three potential population scenarios for FY 1997. The graph below shows that if the Administration were to request and receive funding for only its current FY 1989-92 "outyear" estimates for new prison construction, overcrowding would increase from the current level of 58% to 72% (low estimate), 126% (mid-range estimate) and 183% (high estimate) respectively. These scenarios obviously fail to meet the Attorney General's priority objective of keeping pace with projected increases in the inmate population while simultaneously reducing current overcrowding to 20%. It is the strong belief of the Department of Justice, based on its expertise regarding "conditions of confinement" litigation, that continued and increasing overcrowding of the Federal Prison System will invite Federal court intervention. The distinct possibility exists that "population caps" may be established by the courts which would place the Federal criminal justice system into a "gridlock," requiring significant loss of operating discretion and necessitating departures from current enforcement, prosecution, sentencing, and incarceration policies.

**COMPARISON OF PROJECTED FEDERAL PRISON
POPULATION LEVELS WITH PRISON SYSTEM
CAPACITY FUNDED AND PLANNED THROUGH FY 1997**



Options

Five options are presented below. They are not mutually exclusive; a mix of them in varying degrees may be used.

1. Emergency Building Program

To reduce prison overcrowding to the Attorney General's goal of 20% by 1997, it will be necessary to add at least 24,400 beds to the Federal Prison System over and above those now under construction or requested in the President's FY 1988 budget. This is assuming, however, that the low Bureau of Prisons projection of 76,000 inmates is correct. The mid-range Sentencing Commission projection would result in a 45,000 bed shortfall. If accurate, a high-range Sentencing Commission projection of 125,000 would result in a 70,000 bed shortfall.

To meet a 20% overcrowding goal based upon the lowest estimate of 72,000 inmates by 1992 will require the construction of:

- twenty-two (22) new medium security Federal corrections institutions with maximum security camps;
- five (5) minimum security Federal prison camps;
- two (2) maximum security United States Penitentiaries, with satellite camps;
- two (2) Metropolitan Detention Centers; and,
- ten (10) expansion projects at existing prisons.

Because of the lead time required for site acquisition, construction, and activation, funds for these facilities must be requested over the four year period, commencing in FY 1989 and continuing through FY 1992.

Appended at Appendix A to this report is a set of five regional maps which show the location of existing prison facilities; sites approved for facilities' construction; active construction site prospects; and, potential secondary sites. The maps also provide the years in which the new Bureau of Prison facilities are needed for activation, through 1995.

In contrast, the current President's budget "outyear" allowances for FY 1989-92 plan for approximately \$400 million in construction funds for an addition of about 7,200 beds, far short of the 24,400 required to meet a 20% overcrowding target for

72,000 prisoners in 1992 and to prepare for the expected 76,000 inmates in 1997. It should be noted that the rationale for the President's 1988 budget allowance was based upon a plan which did not include the inmate population impact of the recently enacted Anti-Drug Abuse Act of 1986, not to mention the sentencing guidelines. Simply stated, the factors which will drive the inmate population far beyond previous estimates have changed radically.

Cumulative funding requirements for new prison construction and activation to meet the 20% target over the FY 1989-92 period is approximately \$1.9 billion. Annual operating costs and other uncontrollable increases will further increase resource requirements. It is clear that the aggregate resource levels substantially exceed those currently contained in OMB's current planning estimates. The total cumulative difference between OMB's current planning estimates and the Bureau of Prisons' minimum requirements is approximately \$2.3 billion.

The following table shows funding for overcrowding rates ranging from 0% (compliance with American Corrections Association standards), through the Attorney General's 20% overcrowding target, to a 50% overcrowding rate for FY 1997, the year in which the last of the proposed construction would be activated and operational. Each overcrowding rate is depicted for the low population projection made by BoP (76,000), the "mid-range" average of Sentencing Commission estimates (100,000) and the Sentencing Commission's high estimate (125,000).

Table 1. PRISON CONSTRUCTION COSTS AND ANNUAL OPERATING COSTS FOR SEVERAL OVERCROWDING AND POPULATION PROJECTION SCENARIOS

Dollars in Millions

Assuming 76,000 inmates in FY 1997 (BoP estimate and Sentencing Commission low estimate):

Overcrowding Rate.....	<u>0%</u>	<u>20%</u>	<u>30%</u>	<u>40%</u>	<u>50%</u>
Construction Cost.....	\$2,332	\$1,654	\$1,208	\$1,940	\$1,708
Activation Cost.....	321	232	171	133	100
Total One Time Costs.....	2,663	1,889	1,379	1,073	808
Annual Operating Cost.....	1,017	706	587	484	395

Assuming 100,000 inmates in FY 1997 (an average of the Sentencing Commission's high and low estimates):

Overcrowding Rate.....	<u>0%</u>	<u>20%</u>	<u>30%</u>	<u>40%</u>	<u>50%</u>
Construction Cost.....	\$4,228	\$3,100	\$2,666	\$2,294	\$1,971
Activation Cost.....	600	440	378	325	280
Total One Time Costs.....	4,828	3,540	3,044	2,619	2,251
Annual Operating Cost.....	1,871	1,439	1,273	1,131	1,008

Assuming 125,000 inmates in FY 1997 (Sentencing Commission high estimate):

Overcrowding Rate.....	<u>0%</u>	<u>20%</u>	<u>30%</u>	<u>40%</u>	<u>50%</u>
Construction Cost.....	\$5,921	\$4,510	\$3,968	\$3,503	\$3,100
Activation Cost.....	840	640	563	497	440
Total One Time Costs.....	6,761	5,150	4,531	4,000	3,540
Annual Operating Cost.....	2,634	2,094	1,886	1,709	1,554

It should be noted that no specific percentage overcrowding target is guaranteed to ensure safety and control in prisons or, conversely, trigger violent incidents when exceeded. Staffing levels, prison design, conditions of facilities (construction, sanitation, state of repair), staff training, and prison

management influence the situation as do the characteristics of the inmates themselves. A high or low overcrowding rate will yield uncertain results. There is, therefore, no "magic" to an overcrowding target rate--other than the great usefulness it has for financial planning and facilities acquisition to achieve a policy goal measurable in terms of inmate population. The Attorney General advocates a 20% overcrowding goal, based on his acceptance of the advice of experienced corrections officials in the Bureau of Prisons. OMB budget officials state that while overcrowding should be reduced from the current 58%, the selection of any single overcrowding target is unnecessary. (However, for the FY 1988 President's budget, OMB supported funding requests and approved Congressional budget testimony seeking resources which would have permitted the Federal Prison System to achieve a 26% overcrowding rate).

2. Cap the Federal Inmate Population

An alternative to a massive construction/activation program is to drastically limit new prisoner intake and/or reduce current prisoners' incarceration periods. A policy decision could be made to house only certain numbers of inmates in the next five years. This self-imposed "cap" on prison population would be achieved in two ways:

First, by declining to prosecute certain types of cases or raising the declination threshold levels of cases that are currently prosecuted Federally; and,

Second, by releasing certain classes of lower risk individuals earlier than normal.

This option, however, would not yield a pro rata cost avoidance; it would require additional monies to fund more half way houses as well as to expand probation services to monitor those released.⁹ The option presents particular dangers owing to the types of prisoners that are in the Federal system. Most inmates "graduate" to the Federal system, i.e., they have criminal histories which include their having been previously incarcerated in State prisons and local jails. Not incarcerating some of these and/or releasing the requisite number of others earlier than is the current practice, even with proper supervision, could have dramatic deleterious political and legal consequences for the Government.

3. Private Sector Detention

The Bureau of Prisons currently uses private sector facilities to house short-term sentenced aliens. The Prison/Detention Issues Subcommittee examined the greater use of private sector detention firms as a partial solution to the impending crisis.

At this time, it does not appear that this option would significantly reduce the cost of incarceration. Private sector

⁹ The Administrative Office of the United States Courts reported that 63,092 persons were under the supervision of the Federal Probation System as of June 30, 1984, including approximately 6,000 under parole supervision.

claims of meaningfully reduced costs have not been validated; in fact, the costs of the Federal Bureau of Prisons are comparable to those of private firms. Also, there are unresolved legal and policy questions that increase the difficulty of any significant transfer of the Federal Government's imprisonment responsibilities to the private sector.

One area of private sector involvement that does warrant further analysis are private financing mechanisms for new prison construction. Under this approach, the Federal Bureau of Prisons would enter into lease/purchase arrangements for new facilities, thereby spreading over a longer period of time the initial high Federal capital expenditures required.

4. Military Facilities

The Department of Defense was an active and welcome participant in this prison and detention study. Facilities requirements for prisons and jail facilities were examined in the context of existing Department of Defense detention facilities, with an eye toward identifying low use military facilities with the requisite capacity, security, and sites for transfer to civilian use. The Department of Defense anticipates that all their existing, relatively modern, confinement facilities, including the new facilities being constructed by the Department of the Navy, will be required for military prisoners and mobilization contingencies for the foreseeable future. While the transfer of such properties will be further examined, even if the Department of Defense

were to identify excess confinement facilities or other suitable properties, the number of bed spaces provided would satisfy only a small portion of the civilian needs. The Department of Defense reaction to a joint Bureau of Prisons/ U.S. Marshals Service letter request for facilities is expected in six months.

In certain instances, the acquisition and conversion of suitable existing property and structures can be less expensive than new construction. In addition, such facilities can be brought on-line in a much shorter period of time. The BoP continually reviews Federal surplus and other properties for possible acquisition and conversion to correctional facilities. The Bureau of Prisons has had excellent success in the conversion of surplus Air Force Bases to minimum security Federal Prison Camps such as those which now exist at Big Spring, Texas, and Boron, California. Also acquired and activated within a five month period as a Federal Prison Camp was a surplus Air Force facility in Duluth, Minnesota. In similar actions involving non-military facilities, a former State mental hospital in Rochester, Minnesota, was converted to a 500-bed facility for inmates requiring general medical/surgical and psychiatric treatment, and a former seminary in Loretto, Pennsylvania, was converted to a 500-bed prison institution. Just recently, an agreement was reached to house minimum security inmates in a renovated barracks at Tyndall Air Force Base in Florida. Currently, the Bureau of Prisons is reviewing several surplus and other existing proper-