Testimony of Brett Tolman
Former U.S. Attorney for the District of Utah
Regarding S. 2123, the Sentencing Reform and Corrections Act of 2015
Senate Judiciary Committee, October 19, 2015

Chairman Grassley, Ranking Member Leahy, and members of the Committee:

Thank you for the opportunity to testify today.

My name is Brett Tolman, and I am a Shareholder and Chair of the White Collar, Corporate Compliance and Government Investigations Section of the law firm of Ray Quinney & Nebeker, PC based in Salt Lake City, Utah. I am the former United States Attorney for the District of Utah – a position I held for nearly 4 years from 2006 to 2009. Before that, I was an Assistant United States Attorney and prosecuted hundreds of federal felonies. As U.S. Attorney I made it a priority to decrease violent crime, protect children, aggressively prosecute mortgage fraud, preserve American Indian heritage, and stem the abuse of illicit and prescription drugs. Prior to serving as U.S. Attorney, I was Chief Counsel for Crime and Terrorism for the United States Senate Judiciary Committee under Chairman Specter and before him Chairman Hatch.

As an Assistant United States Attorney for the District of Utah, I prosecuted mostly violent felonies, but I also participated in the prosecution of white-collar criminals, drug traffickers, human traffickers, illegal immigrants, and others. Indeed, in my nearly a decade with the Department of Justice I was responsible for the prosecution of individuals currently serving long prison sentences—some as long as 35 years in federal prison.

As I have said to this Committee in previous testimony, my experience, while at times rewarding, revealed the need for federal criminal justice reforms that are not only meaningful, but the result of thoughtful analysis of deficiencies in the administration of justice in the federal system—and there *are* some deficiencies.

I have read the recent public statements of some of my fellow witnesses who apparently do not recognize or acknowledge any significant problems with the current system and urge Congress to resist meaningful reform. Such a position is not only surprising, but raises questions of credibility and whether such a position is truly in touch with the experiences of those who have labored in the criminal justice system. Nearly all of the changes contained in the bill before this Committee are the result of former U.S. Attorneys and Assistant U.S. Attorneys identifying issues with the federal criminal justice system which are in need of immediate attention.

Nearly universally it is acknowledged that recent trends in prosecution reveal that rather than focusing valuable resources on the highest levels of criminal conduct, the reality is that today's federal system is all too often mired in the pursuit of low-level offenders who are too often over-punished by the federal government and who, a growing number believe, should otherwise be prosecuted by the states. More and more individuals, on both sides of the political aisle, are recognizing that many of these low-level offenders are being given extremely long sentences in federal prisons—sentences that too often do not match the gravity of the crimes committed.

Take drug offenses as an example. The Department of Justice is expected to use the hammer of mandatory minimum sentences to identify and take down "kingpins" and high-level

traffickers. But the reality on the ground is that most prosecutions, despite resulting in significant prison sentences designed for high-level traffickers, are netting lower-level offenders. In a report to Congress in October 2011[1], the U.S. Sentencing Commission reported the following statistics:

- The highest-level traffickers—those defined as "high-level supplier or importer"—made up just 11 percent of drug offenders sentenced in federal courts.
- Another 7.1 percent of drug offenders were organizers, leaders, growers or manufacturers.
- Meanwhile, 58.6 percent were street-level dealers or below.
- The lowest-level traffickers—those defined as "courier" or "mule"—made up 27.8 percent of drug offenders.
- Another 10.5 percent played "secondary" or "miscellaneous" roles, such as lookout, pilot or bodyguard.

Over-punishment of lower-level offenders is certainly not confined to the drug arena. As I have previously informed this Committee, in the white collar world for example, long sentences are too easily the product of manipulating the "dollar-loss figure"—resulting in baffling and unfortunate prosecutions such as Sholom Rubashkin, a 56-year old Jewish rabbi with no criminal history who is serving 27 years for financial fraud despite there being no actual victim of fraud.

Furthermore, my experience has been that the federal system all too often incentivizes overly aggressive mandatory minimum stacking charges under section 924(c) of Title 18 of the

[1] http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system

U.S. Code. As perhaps the most egregious example of this problem, look at the case of Weldon Angelos, who was convicted of selling marijuana to a police informant several times while having a firearm. Mr. Angelos had very little if any criminal history, and he never used or even brandished the firearm during the undercover buys. The law enforcement officials in the case allowed Mr. Angelos to commit multiple offenses, knowing that the 924(c) mandatory minimum sentences could be unreasonably stacked on top of each other by the prosecutor. As a result, Mr. Angelos received a mandatory minimum sentence of 55 years in prison—a sentence that far outweighs the minimum sentence for hijacking, kidnapping, or rape. The federal judge who was forced to impose this sentence, Judge Paul Cassell, described it as "unjust, disproportionate to his offense, demeaning to victims of actual criminal violence… [and] one of those rare cases where the system has malfunctioned."

Finally, recidivism is endemic. According to an April 2014 Bureau of Justice Statistics study of patterns from 2005 to 2010[2], which tracked 404,638 released prisoners in thirty states:

- 67.8 percent of prisoners were rearrested within three years of release.
- 76.6 percent were rearrested within five years of release.
- The study also found that property and drug offenders were the most likely to be rearrested—82.1 percent and 76.9 percent, respectively.

In the federal system, the vast majority of prisoners are not being rehabilitated during their terms of incarceration.

[2] http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf

The result of these very real deficiencies, ironically, is a burgeoning prison population that, with its rising costs, is becoming a real and immediate threat to public safety. Department heads and congressional leaders have become painfully aware that the growing prison budget is consuming an ever-increasing percentage of the Department of Justice's budget. Over the last 15 years, the enacted BOP budget has increased from 15% to more than 25% of the Department of Justice budget, and I have seen projections it will exceed 30% by the end of this decade. This means we are facing significant reductions in law enforcement budgets, which will become increasingly dangerous to public safety.

During my tenure as U.S. Attorney, which included roughly a year as a member of the Attorney General's Advisory Committee, I became aware of growing budgetary issues as many U.S. Attorneys' offices were informed that they could no longer hire additional prosecutors—in many instances unable to fill existing vacancies, let alone secure much needed additional FTEs. And as I informed this Committee, I observed the budget become the absolute center of focus of the Department of Justice and its U.S. Attorneys. More significantly, in individual U.S. Attorney's offices across the country, lack of funding is increasingly the reason behind failed or abandoned law enforcement obligations and partnerships.

Some of my fellow witnesses on this panel might not recognize these problems as deficiencies, but I firmly believe they reveal the need for federal criminal justice reforms that are not only meaningful, but based on proven reforms carried out in states across the country. Such an approach is not a signal of weakness or "going soft on crime." Instead, it is an acknowledgement that we can be smarter and accomplish the interests of the criminal justice

system more efficiently and enlightened by those who have struggled with, and overcome, the same issues and concerns.

This is why I am here to congratulate this Committee on the incredible bipartisan negotiations which have resulted in a thoughtful bill aimed at making some of the most needed changes to the front *and* back ends of the federal criminal justice system. I certainly hope to convey today that while there are additional issues that still need to be addressed over the next several Congresses in this area, I am pleased to express my wholehearted endorsement of S. 2123, the Sentencing Reform and Corrections Act of 2015.[3]

I am not alone in this position. Several of my former colleagues have joined me in signing a "Policy Statement of Former Federal Prosecutors and Other Government Officials—signed by former U.S. Attorneys, federal judges, and senior Department of Justice officials, including the Honorable Larry Thompson, former Deputy Attorney General, and others—that describes the need for meaningful federal criminal justice reform and formally endorses S. 2123. I ask that it be submitted into the record of this hearing.

Many of us who signed this Statement are noted conservatives who were some of the most aggressive appointees when it came to pursuing the prosecution of federal crime. Because of our backgrounds as former prosecutors, judges, and other law enforcement officials, whose service to this country focused on law and order, we have come to realize that the federal criminal justice system must be capable of reform.

[3] While endorsing the bill, I urge the Committee to make certain adjustments to more effectively tie the Corrections Act exclusions to higher-level fraud offenders; to give lower-risk offenders the opportunity to earn more time in home confinement under the supervision of probation officers; and to speed up the implementation of these back-end reforms.

A few of us have been serving as resources to members of this Committee for the last few years—highlighting areas of concern and lending our voices based upon our individual experiences to the debates and efforts to accomplish appropriate, meaningful reforms—so we can help ensure fairness in the administration of justice.

Based on my several years of discussions with members and staff of this Committee, I know what a herculean effort it took to reach this bipartisan compromise to address the unsustainable prison growth that has become a looming threat to public safety. I also know that the reforms contained in S. 2123 are the result of a deep and thoughtful analysis of actual deficiencies in the administration of justice in the federal system, and disrupt the one-size-fits-all status quo.

I commend Senators Cornyn, Whitehouse and Hatch for taking the lead on prison reform and reentry; Senators Lee, Durbin and Leahy for taking the lead on sentencing reform; Senators Graham and Schumer for their valuable contributions on these issues; and Chairman Grassley for his remarkable leadership in bringing each of these groups together and successfully negotiating this consensus legislation. This is a truly historic moment.

Focusing my remarks on these specific reforms, I can quickly identify what I view to be the most important and impactful provisions.

On the front end, S. 2123:

- Preserves the 5 and 10-year mandatory minimum sentences but broadens the existing safety valve to cover individuals with minimal non-felony criminal histories that may trigger mandatory minimum sentences under current law;

- Creates a second safety valve that more effectively targets the 10-year mandatory minimum sentence to higher-level drug offenders who performed enhanced roles or otherwise served as importers, exporters, high-level distributors or suppliers, wholesalers or manufacturers;
- Clarifies and reduces the enhanced mandatory minimum sentence for certain firearms offenses but expands its application to include similar prior state-level convictions in which the offender carried, brandished, or used a firearm;
- Raises the statutory maximum for unlawful possession of a firearm and creates an overlapping range by reducing the enhanced mandatory minimum for armed career criminals; and
- Applies the Fair Sentencing Act and certain sentencing reforms retroactively.

These sentencing reforms are important because they refocus mandatory minimum sentences and limited federal resources on higher-level offenders, and provide additional new tools to help law enforcement target violent criminals with enhanced penalties.

They provide a more accurate focus on the role of the offender instead of drug quantity alone, and increase, incrementally, a judge's ability to utilize limited discretion when determining appropriate sentences. This is the only way to more effectively tie the longer mandatory minimum sentences to the higher-level drug offenders and violent criminals—which is who they were designed to punish.

Further, they fix the Weldon Angelos type "outlier" problems associated with the recent trend towards unnecessary count stacking and maximizing every prison sentence, which endangers the integrity of the criminal justice system.

I should note that applying these reforms retroactively will not eliminate the initial mandatory minimum sentences, nor does it eliminate the additional time for the underlying offense. And I understand the Department of Justice is committed to a case-by-case review to ensure that resentencing, if necessary, is done carefully and with transparency.

But I want to make it very clear that it is not enough to focus on sentencing reforms. By themselves, sentencing reforms do nothing to rehabilitate offenders and thereby reduce recidivism rates. So it is of vital importance that we also invest in rehabilitation programs and address the issues associated with risk and recidivism reduction in order to more quickly offset the out-of-control incarceration costs plaguing the federal system.

Consequently, the most important back-end changes of S. 2123:

- Require the Attorney General to develop a risk and needs assessment system that will determine the recidivism risk level of all federal prisoners, classify them as having a low, moderate or high risk of recidivism, and identify their programmatic needs and appropriate recidivism reduction programming to reduce their risk;
- Require the Bureau of Prisons to make statistically validated recidivism reduction programming available to all eligible prisoners;

- Incentivize eligible prisoners to complete these programs by allowing them to earn time credits of up to 5-10 days for each period of 30 days of programming they successfully complete;
- Provide that the risk and needs assessment system must periodically reassess, look for and measure indicators of change such that higher-risk prisoners have a meaningful opportunity to progress to lower risk levels and classifications through changes in dynamic risk factors; and
- Allow eligible lower-risk prisoners to serve an amount of time equal to the credits they have earned in prerelease custody and community supervision.

These prison reforms are important because they put a new focus on rehabilitation and correction, and establish risk and needs assessment as the cornerstone of more effective recidivism reduction programming, and a more efficient federal prison system. We will be able to assess prisoners as they enter the prisons, and then periodically reassess them over time as they complete the number, types and intensity of programs they need, and work in real jobs rather than sitting idle as most do today. This reassessment is vital, as it goes to the heart of the legislation. It is true that risk of recidivism will go down with good programming, but we need to identify dynamic risk factors and indicators of real change (in thinking and behavior), make prisoners demonstrate this change, and reassess them with a standard, objective instrument to measure it over time as they complete their programs. This will be a major advancement for the federal system. In fact, it will establish a new standard for corrections in this country.

They will also incentivize prisoners to not only participate in programs and jobs, but to actually reduce their risk of recidivism. Higher risk prisoners will have to demonstrate substantial risk reduction—in the reassessments—but they will be provided with the opportunity to progress down into lower risk categories, become eligible to utilize their earned time credits and transfer into prerelease custody.

Lower risk prisoners will be eligible to spend up to 25% of their sentences in home confinement and community supervision, which will produce significant savings. This is remarkable as the most current cost of post-conviction supervision is $3,909 per year, as opposed to $30,621 per year for imprisonment, and $28,999 for residential reentry centers. This is a much more cost-effective way to supervise low-risk offenders.

These reforms will effectively shift the current federal system from risk management to risk reduction. As those states which have applied a similar regime have found, this will increase public safety while saving taxpayers money.

Congress must act on this legislation. With these thoughtful and deliberate reforms, you prudently decide where the lines should be drawn as to who does and does not deserves relief from mandatory minimum sentences, and who does and does not deserves to earn time in service of their sentences in home confinement and community supervision.

If Congress fails to act on this legislation at this historic moment, you will continue to allow the terms to be dictated by the executive and judicial branches. California serves as a great example and warning of what the future could hold if Congress does not pass reforms on its own terms.

In 2009, the three-judge panel of the Ninth Circuit found that California's prison population violated prisoners' constitutional rights and ordered California to submit a plan within 45 days that would, in no more than two years, reduce the California's prison population to no more than 137.5% percent of its adult institutions' design capacity. To meet that goal, California would have to release a staggering 46,000 of its 156,000 prisoners.

By February of 2014, California had released around 25,000 prisoners. Despite this, California was ordered by the courts to immediately implement expanded parole programs and early release credits, including allowing non-violent second strike offenders to have their sentences reduced by up to one-third and to be eligible for parole when they had served half their sentences. If California were to miss any of the benchmarks on the way to its final February 2016 goal, a court-appointed officer was given the power to release as many inmates as needed to bring the state into compliance.

Rather than addressing its prison issues through careful and deliberate means, as the committee has done with S. 2123, California spent years in court battling efforts to reduce its prison population. The time, effort, and money spent on these court battles would have undoubtedly been better spent reducing its prison population in a safe, deliberate manner, as other states have done. When it finally started to release prisoners, it had to do it in a haphazard way, putting the public at risk and doing nothing to reduce the risk of recidivism of those it was releasing. Without effective rehabilitation programs to better prepare inmates to return to life outside of prisons, California lacked the ability to make the released prisoners less likely to reoffend—and in turn keep the public safe.

In contrast, several states, many of which are among the most conservative in the nation, have moved in recent years to implement similar legislation. The underlying, evidence-based reform practices have already been proven successful in states such as Texas, Rhode Island, Ohio, Georgia, and North and South Carolina. In Texas, for example, a series of similar reforms led to the closure of a prison for the first time in the state's history in 2011, and two more since then. To date, the state has saved taxpayers at least $3 billion—but up to $10 billion—and Texas has its lowest crime rates since 1968.

The U.S. federal justice system locks up far too many people for far too long. In designing our criminal justice system we must balance the interests of justice, economy, and safety. Prosecuting and imprisoning the relatively less-dangerous is extremely expensive. We should not lock them up for any longer than is necessary, and once imprisoned our goal should be to make them productive members of society and reintegrate them into society as quickly and as safely as possible. Spending the vast amount of our finite time and resources on these lower-level offenders only serves to make our communities less safe as there is less time and money to pursue the worst offenders.

As a former federal law enforcement official, I know first-hand that our current system is far too costly, does not focus limited resources on the most crucial areas of enforcement, and does not prepare inmates to return to life outside of prison. These problems can be addressed by this legislation.

The reforms contained in S. 2123 have proven successful in a number of states across the country. They have proven to increase public safety while reducing costs. And they should be

implemented as soon as possible. With broad, bipartisan support, these reforms are no longer the political third-rails they once were.

I urge members of the Judiciary Committee to act quickly, before the problem becomes an emergency that must be addressed by drastic, emergency measures instead of deliberate, careful measures designed to protect the public.

Thank you, Chairman Grassley, Ranking Member Leahy, and members of the Committee.