

ANALYSIS

CRIMINAL JUSTICE ONE YEAR INTO THE TRUMP ADMINISTRATION

Introduction

In his Inaugural Address on Jan. 20, 2017, President Donald Trump pledged to stem the tide of what he called “American carnage.”¹ The administration carried out that plan with sweeping changes to long-standing Justice Department policies, covering everything from marijuana to private prisons. Some of those changes were explored in a previous Brennan Center report, *Criminal Justice in President Trump’s First 100 Days*.²

Now, at the end of the president’s first year in office, this analysis examines the administration’s actions to date and their consequences. It first documents significant changes in federal criminal justice policy implemented over the last year. It then describes what impact can be seen to date. Finally, it indicates what to expect moving forward.

All told, President Trump and Attorney General Jeff Sessions have already left a significant mark on the Justice Department. They have used short memoranda or subtle changes in enforcement strategy to quietly undo much of President Barack Obama’s criminal justice reform legacy. In its place, they have built a more draconian vision of law enforcement, centered around

immigration. While many of these changes occurred without drawing public scrutiny, consequences have already begun to materialize in areas such as immigration enforcement.

Over the next three years, these shifts could cause the federal prison population to begin increasing again, reversing what small progress had been made to reduce federal over-incarceration. Further, the administration’s words and deeds on criminal justice could disrupt bipartisan efforts to build a fairer, more effective justice system at the state and local levels.

I. MAJOR POLICY CHANGES

1. Sounded a False Alarm About a Crime Wave.

President Trump changed the way federal officials speak about crime.³ He kicked off his domestic agenda with three executive orders in February 2017 directed at confronting the specter of rising crime.⁴ The orders created a cross-departmental task force on violent crime, an initiative to combat crimes against law enforcement, and an interagency collaboration to combat the drug trade. The violent crime task force led to several key policy changes detailed below.

To justify this focus, President Trump

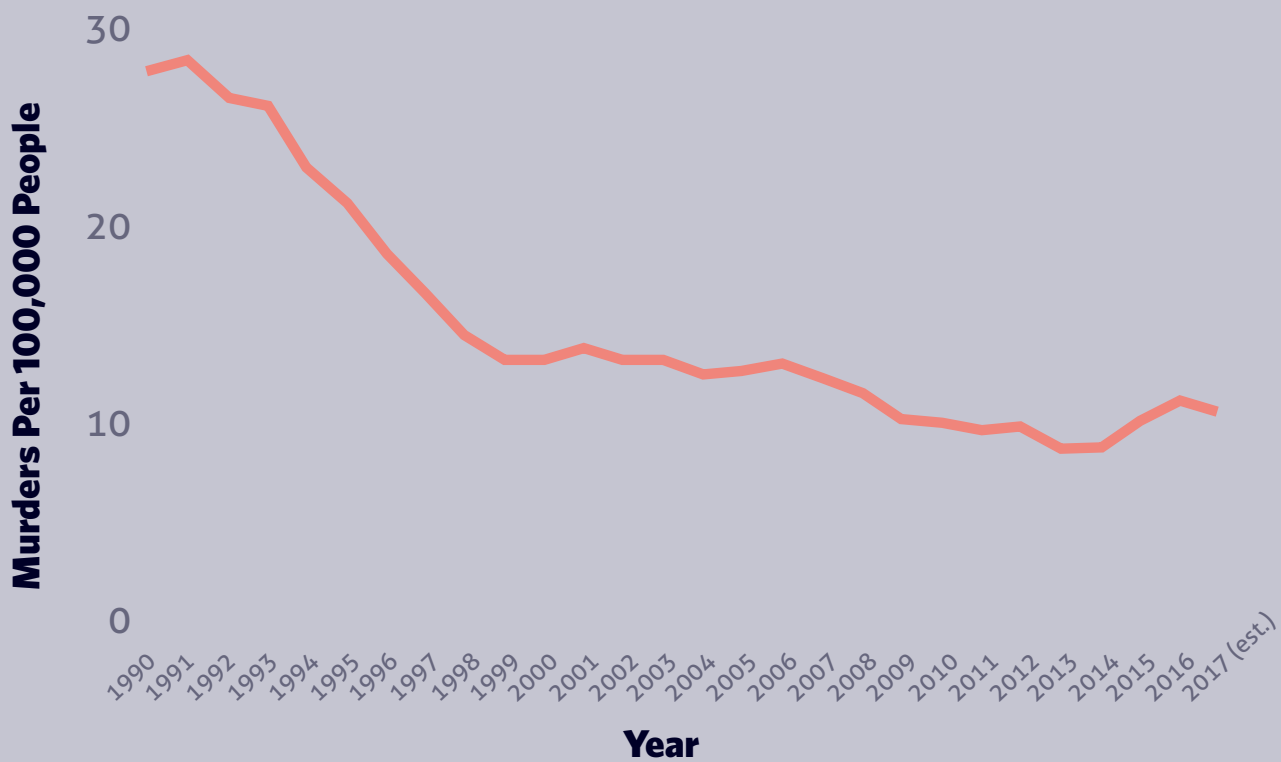
repeatedly claimed that violent crime was rising to dangerous levels. In February, he said that “the murder rate in our country is the highest it’s been in 47 years.”⁵ Sessions has also publicly echoed those concerns. “My fear,” he said in March, “is that this surge in violent crime . . . is not a ‘blip,’ but the start of a dangerous new trend.”⁶

This is misleading at best, and dishonest at worst. While violent crime and murder did increase in 2015 and 2016 — concerning trends that merit further investigation⁷ — new data from the Brennan Center and the FBI show crime and violence declining again in major cities in 2017.⁸ The murder rate in major American cities remains well below its 1991 peak.

2. Falsely Linked Immigration and Crime.

The Trump Administration has drawn a direct line from crime, to drugs (including opioids), to the need for a crackdown on immigration. In October, Trump claimed: “An astonishing 90 percent of the heroin in America comes from south of the border, where we will be building a wall which will greatly help in this problem.”¹⁰ Sessions developed the same theme in an August speech. “A Southern border that is more secure and more lawful will make it harder to bring deadly drugs into this country,” he said. “That would protect children from the effects of this [opioid] epidemic.”¹¹ But research rebuts those claims.¹² Indeed, a new academic analysis released in January analyzed all past research on the topic and found a “negative — but very

Figure 1- Murder Rate in the 30 Largest American Cities



Source: Federal Bureau of Investigation, Uniform Crime Reports; Brennan Center Analysis.⁹

weak” connection between immigration and crime.¹³

Nonetheless, responding to the perceived threat, President Trump signed two executive orders related to immigration five days after his inauguration: one calling for broader enforcement in the interior,¹⁴ and the other calling for immigration judges to be allocated to detention facilities at the Mexican border.¹⁵ Other priorities for the administration — its plans to build a “wall” on the southern border, and renew the Deferred Action for Childhood Arrivals program only through legislation — remain in flux, dependent on congressional negotiations.

3. Directed More Aggressive Federal Prosecutions.

Based on the president’s January executive order, Sessions convened a task force on violent crime in February to recommend changes to Justice Department policy.¹⁶ The task force did not publicly release its recommendations, but Sessions has stated that it informed many of his key changes.¹⁷

- In a March 2017 memorandum, Sessions directed federal prosecutors to “partner with federal, state, local, and tribal law enforcement to specifically identify the criminals responsible for significant violent crimes in their districts” and prosecute them using “the many tools at a prosecutor’s disposal.” The initiative singled out firearm offenses as a key target of this new strategy.¹⁸
- In May 2017, Sessions issued a memorandum directing federal prosecutors to “charge and pursue the most serious, readily provable offense” in every criminal case. It overruled a 2013 policy statement issued by then-Attorney General Eric Holder as part of his Smart on Crime initiative.¹⁹ Holder’s now-

superseded directive had given prosecutors the discretion to, in some lower-level drug cases, bring lesser charges to avoid triggering mandatory minimum sentences. In Holder’s words, the policy was intended to “ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers.”²⁰

In a June 2017 op-ed, Sessions wrote that an increase in the use of mandatory minimums was necessary to address rising violent crime.²¹ However, research shows that overly punitive sentences have done little to reduce crime.²²

- In January 2018, Sessions rescinded a series of memos that guided Justice Department policy on marijuana. Possessing marijuana is a federal crime,²³ but in 2013, then-Deputy Attorney General James Cole issued a directive (called “the Cole Memo”) stating that federal prosecutors may decide not to prosecute marijuana offenses if such actions comply with state law, do not involve violence, do not fund the trade of more serious drugs, and do not otherwise implicate federal priorities.²⁴ Federal prosecutors have been guided by this policy when enforcing drug law in the 30 states and District of Columbia that have legalized or decriminalized the drug in some form.²⁵ Sessions’ directive repealed the Cole Memo, allowing U.S. Attorneys to prosecute marijuana even when in conflict with state law.²⁶ The Justice Department maintains the memo returns to the “rule of law” and restores federal supremacy in drug policy.²⁷ However, Sessions has repeatedly expressed his opinion that marijuana should not be legal. In a March 2017 speech in Richmond, Va., he called the drug “only slightly less awful” than heroin.²⁸

4. Appointed Like-Minded U.S. Attorneys.

United States Attorneys are the chief federal law enforcement officers serving in states across the country. Of the 93 U.S. Attorney positions nationwide, 47 are filled by prosecutors appointed by the Trump Administration and confirmed by the Senate. Almost all appointments are recent, however, reflecting delays in filling these key posts. The remaining 46 positions are a mix of Acting U.S. Attorneys, including some holdovers from the Obama Administration; Interim U.S. Attorneys, nominated by the current administration to fill the role temporarily; and one vacancy filled by a First Assistant U.S. Attorney.²⁹

5. Declared Opioid Abuse a National Emergency.

On March 29, the president convened a task force, led by then-New Jersey Gov. Chris Christie, to study opioid abuse and make recommendations to confront the “public health crisis.”³⁰ Acting on one of the task force’s recommendations,³¹ President Trump officially declared opioid abuse a national emergency on Oct. 26.³² That step was expected to cut some red tape and open access to a crisis fund, but the fund reportedly only had \$57,000 on hand that month.³³ However, the President stated in October that he steered \$1 billion toward controlling opioid abuse,³⁴ with half that amount previously authorized under the Obama Administration.³⁵

The administration’s enforcement response has been broader. On Nov. 29, Sessions announced the establishment of a new Drug Enforcement Agency (DEA) field division, based in Louisville, Ky., to combat opioid abuse in Appalachia.³⁶ The agency also announced it would subject artificial chemical equivalents of fentanyl (a potent type of opioid) to the same criminal penalties as fentanyl.³⁷

6. Resumed the Use of Private Prisons.

In February 2017, Sessions repealed an Obama-era directive that would have wound down the Bureau of Prisons’ (BOP) reliance on incarcerating prisoners in privately-run facilities, saying the older directive would have “impaired the Bureau’s ability to meet the future needs of the federal correctional system.”³⁸

7. Decreased Federal Oversight of Police.

Under President Obama, the Justice Department’s Civil Rights Division undertook more than 20 investigations into police misconduct, at times culminating in “consent decrees” — agreements between the Department and local police to address local problems.³⁹ In March, Sessions called for the review of “all Justice Department activities,” including “existing or contemplated consent decrees.” He added: “It is not the responsibility of the federal government to manage non-federal law enforcement agencies.” Instead, “local control and local accountability are necessary for effective policing.”⁴⁰ Sessions also issued an order in July promoting an expansion of asset forfeiture, allowing state law enforcement to work with the federal government to forfeit seized property even before arrest or conviction.⁴¹

8. Curtailed Federal Grants for Law Enforcement.

The administration has conditioned some federal grants on local law enforcement’s willingness to carry out the administration’s priorities. In July, the Justice Department issued new guidance conditioning receipt of Edward Byrne Memorial Justice Assistance Grants — the largest federal law enforcement grant stream — on local agencies’ compliance with federal immigration officials’ requests for information, and their willingness to surrender immigrants in their custody. Specifically, states

and cities that failed to honor federal detainees (see pages 6-7) or provide information on immigrants in their custody would lose out on grant funds. The move was a first strike against “sanctuary cities,” which are jurisdictions that refuse to cooperate with federal immigration enforcement initiatives.⁴² Federal courts have temporarily halted that decree (see page 7 for more information).

Another planned initiative — not implemented but leaked in January 2018 — would move the High Intensity Drug Trafficking Areas (HIDTA) grant and the Drug Free Communities Act grant, from the White House Office of National Drug Control Policy (ONDCP) to the Departments of Justice and Health and Human Services, respectively. The move would reallocate \$340 million worth of grant funding from ONDCP, slashing its budget by 95 percent.⁴³ HIDTA has been criticized as subsidizing outdated drug war policies.⁴⁴ Its movement to the Justice Department would grant Sessions more control over this grant.

9. Created a Roadblock for Bipartisan Congressional Sentencing Reform and an Opening for Reentry Reform.

The president’s son-in-law and advisor Jared Kushner met with conservative criminal justice reform advocates last fall,⁴⁵ leading some to believe he could convince the White House to support bipartisan legislation to reduce federal sentences where appropriate.⁴⁶ In a January meeting with advocates, President Trump expressed support for legislation that would create “ladders of opportunity” for people returning home from incarceration, and pledged to remain “very tough on crime.”⁴⁷ The meeting focused on increased support for former prisoners, but did not mention efforts to reduce unnecessary incarceration. Reports then surfaced that Sessions personally intervened to

block any attempt, by Kushner or others, to discuss or advance sentencing reform legislation, and that the president was not inclined to oppose Sessions on this point.⁴⁸ In the State of the Union last month, the president reiterated his support for “reforming our prisons to help former inmates who have served their time get a second chance.” Again, there was no mention of efforts to reduce federal sentences or the prison population.⁴⁹

II. IMPACTS

Since many of these shifts were implemented within the last year or even just a few months ago, in some cases the results of the administration’s new prosecutorial philosophy have yet to materialize in the data. In other cases, however, the administration has rapidly executed a new set of priorities, with immediate consequences for people across the country.

1. The New Politics of Crime.

State politicians have taken the president’s cue, stoking false fears of a new, immigration-related crime wave. During last year’s gubernatorial election in Virginia, Republican candidate Ed Gillespie ran ads railing against sanctuary cities and called his Democratic opponent, Gov. Ralph Northam, “weak” on the Central American gang MS-13.⁵⁰ President Trump joined in, tweeting that under Gillespie, “MS-13 and crime will be gone,”⁵¹ and saying Northam was “fighting for the violent MS-13 killer gangs & sanctuary cities.”⁵² Northam prevailed on Election Day, but only after echoing some of Gillespie’s views on immigration.⁵³ This is not an isolated incident: Trump offered similar comments in a special election in Alabama, tweeting that the eventual victor, Sen. Doug Jones (D-Ala.), was “weak on Crime”⁵⁴ and “WEAK on the Border” compared to his Republican opponent.⁵⁵

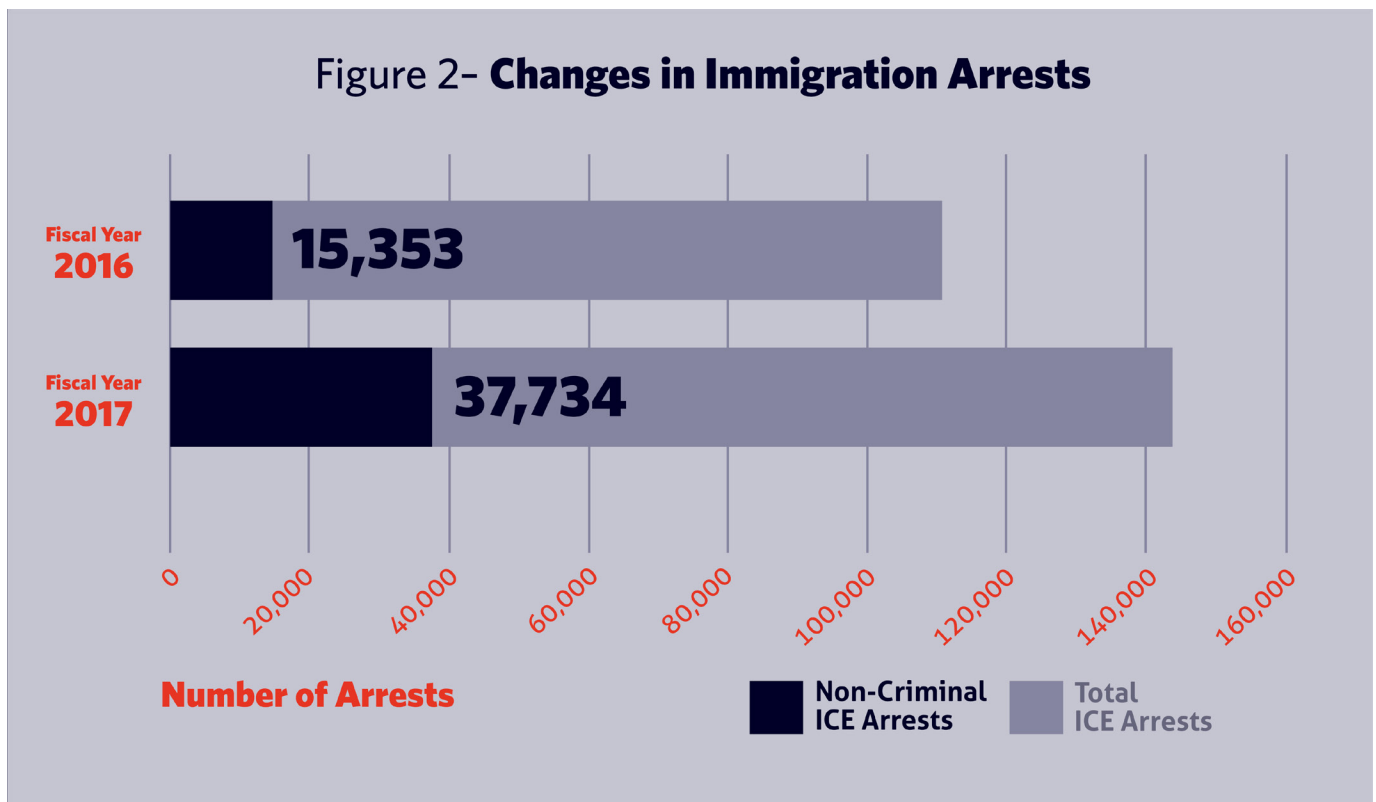
In January 2018, the FBI released mid-year crime data from 2017, corroborating earlier Brennan Center findings, showing the national murder rate stabilizing after increases in 2015 and 2016 and the violent crime rate dropping slightly.⁵⁶ In a *USA Today* op-ed, Sessions abruptly pivoted from warning about a crime wave to taking credit for a crime decline.⁵⁷ However, it is highly unlikely that policies implemented just a few months before could cause a nationwide reversal in crime trends. It is more likely that either the causes behind previous increases have subsided, or the nation’s crime rate is reverting to its downward trend after the recent short-term upticks.

2. More Immigration Arrests.

Driven by President Trump’s executive orders directing broad internal enforcement of federal immigration laws, detainees and arrests by

Immigrations and Customs Enforcement are both up significantly. ICE arrests rose by over 30 percent in the last fiscal year. More notably, ICE arrests of immigrants with no criminal conviction increased by 146 percent — a dramatic increase, and the first uptick of any kind since FY 2009.⁵⁸

For those who had been convicted of a criminal offense the most common offenses were minor. The top four categories were: driving under the influence, drug offenses, other immigration offenses, and traffic offenses — indicating that resources have been focused on nonviolent immigration offenders.⁶⁰ ICE’s FY 2017 report states that its “trend of increased enforcement actions began shortly after the change in administration,” and links the Trump Administration’s policies to major changes in ICE enforcement throughout the document.⁶¹



Source: FY 2017 ICE Enforcement and Removal Operations Report (2018).⁵⁹

3. Conflict with States Over Immigration Enforcement.

ICE also expanded its use of “detainers,” nonbinding requests that state or local law enforcement officers hold a suspect in their custody and surrender them to federal authorities.⁶² Detainers rose by 65 percent in FY 2017 compared to the previous year.⁶³ In response, more municipalities have embraced sanctuary city status — meaning the city’s law enforcement officers will not honor ICE detainers. Interestingly, the number of detainers that local law enforcement declined to honor rose from 7,369 in FY 2015, and 3,623 in FY 2016, to 8,170 in FY 2017.⁶⁴

Some sanctuaries have sued to stop the Justice Department from cutting off federal grants in response (see pages 4-5). In November, a federal judge sided with San Francisco and Santa Clara County, Calif., halting the Justice Department’s effort to cut off federal grants to them based on federalism and separation of powers concerns.⁶⁵

4. More Immigration Detention, but Fewer Removals.

While more people are entering the immigration system, fewer are leaving it. The administration’s effort to commit resources to immigration enforcement near the southwestern border resulted in 100 more immigration judges⁶⁶ hearing 2,700 more detention cases.⁶⁷ Court orders directing an immigrant’s removal from the United States also rose by 30 percent over the previous fiscal year.⁶⁸

However, actual removals of people from the country (including deportations) have stagnated. Removals dropped by around 6 percent, from 240,255 in FY 2016 to 226,119 in FY 2017. ICE attributes the change to a decline in border apprehensions and removals.⁶⁹ The backlog of cases in immigration court also reached 650,000

in November 2017, a record high.⁷⁰

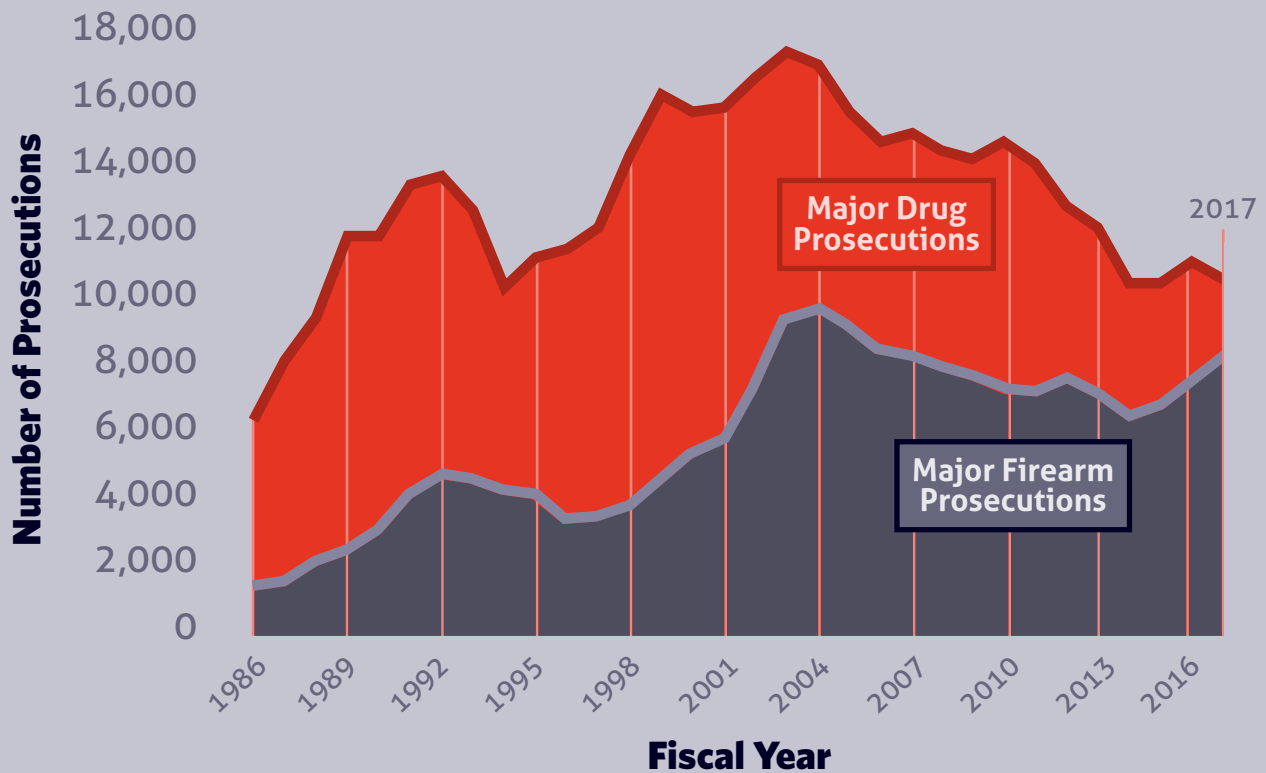
As a result, the Department of Homeland Security expects the average daily population in ICE detainee facilities to rise by 25 percent — from around 41,000 to 51,000 — driven in part by “significantly higher” lengths of stay for people detained on immigration charges.⁷¹ ICE has already begun planning to expand its use of private detention centers for immigrants in its custody. GEO Group, one of the nation’s largest private prison operators, will open a new detention facility this year in Conroe, Texas.⁷² Bid requests suggest that detention facilities in south Texas, Chicago, Detroit, Salt Lake City, and St. Paul, Minn., may soon follow.⁷³

5. Unclear Impact on Federal Prosecutions.

Thus far, the impact of Sessions’ changes to prosecutorial priorities have not materialized in available federal data. According to the most recent quarterly report by the U.S. Sentencing Commission, average sentence length in federal drug cases remains broadly stable, with no clear new trend yet materializing.⁷⁴ Over time, new data will be better able to identify changes in sentencing trends.

As to the number of prosecutions, Sessions has touted a 23 percent increase in firearm cases in the second quarter of 2017,⁷⁵ leading him to close the fiscal year with “the most federal firearm prosecutions in a decade.”⁷⁶ Firearm prosecutions under two firearm statutes did rise 10.6 percent in FY 2017. But this increase continues a trend begun under the Obama Administration in FY 2014.⁷⁷ As shown in Figure 3, below, FY 2017’s total of 8,099 major firearm cases merely kept pace with the post-FY 2014 trend. Similarly, the volume of federal drug prosecutions appears unchanged from the previous, post-FY 2003 downward trend; the number of drug prosecutions declined slightly, by just under 6 percent, in FY 2017.

Figure 3- **Selected Federal Prosecutions by Lead Charge**



Source: Syracuse University, TRACfed (2018).⁷⁹

The “Major Firearm Offenses” trend represents prosecutions commenced under 18 U.S.C. § 922 and § 924. The “Major Drug Prosecutions” trend represents prosecutions under 21 U.S.C. § 841.

Federal cases take time to wind through the system, meaning the full effect of Sessions’ policy changes may not be clear for at least another year, or several more. Anecdotal evidence from federal defenders suggests that prosecutors have increased their reliance on mandatory minimum sentences, a practice that had decreased under the Obama Administration.⁷⁸ Future Brennan Center studies will update these findings with new data.

6. Fewer Federal Prisoners.

As of Feb. 1, 2018, there were approximately 6,000 fewer people in the federal prison system

than there were in 2017, a decrease of just over 3 percent.⁸⁰ Additionally, the number of people in federally-contracted private prisons declined by 14 percent, or around 3,000.⁸¹ These changes were likely the result of the Obama-era policies implemented in the years before. However, in April 2017, federal prisons were still operating 14 percent above capacity, with high-security institutions even more overburdened.⁸² No new construction is planned to alleviate this crowding; BOP’s FY 2018 budget canceled plans to build a new federally-operated facility in Letcher County, Ky.⁸³

7. **Planned Expansion of Private Prisons.**

BOP has already begun planning to expand the use of private prisons for people convicted of federal crimes. In a leaked memo made public in late January 2018, BOP instructed corrections officials to identify inmates suitable for transfer to private facilities, to “alleviate the overcrowding at [BOP] institutions.” Meanwhile, BOP itself plans to eliminate around 5,000 staff positions.⁸⁴

8. **Still-Rising Opioid Overdose Deaths.**

Early reports from the Centers for Disease Control indicate that deaths from opioids — heroin, fentanyl, and related prescription drugs — continued rising in 2017.⁸⁵ Opioid deaths had already reached a record of nearly 50,000 in 2016.⁸⁶ In 2016, Americans died from an opioid overdose around three times more often than from homicide.⁸⁷

III. WHAT TO EXPECT

The effects of these policy decisions will become clearer in the coming years, as cases make their way through the system and the administration finalizes placement of its chosen U.S. Attorneys. The following consequences and expected shifts are likely to appear in the next several years:

1. **Continuation of the Politics of Fear.**

President Trump and far right candidates will likely continue to attack key political adversaries in 2018 and 2020 as “soft on crime.” One point to watch is how Democrats and moderate Republicans respond: by abandoning criminal justice reform, or by embracing it as a way to oppose the administration.

2. **Rising Federal Prison Population.**

In a 2017 budget document, the Justice Department projected a 2 percent increase in

the federal prison population through FY 2018, “based on the current trends and accounting for the recently revised sentencing guidelines.”⁸⁸ To meet that projection, the prison population would have to rise by 7,500 by the fiscal year’s end.⁸⁹

Sessions’ May memo directing the increased use of mandatory minimum sentences (see page 3) could lead to just such an increase. As shown in Figure 4, below, declining usage of mandatory minimums in drug cases coincided with a drop in the federal correctional population. If Sessions presides over an increased reliance on mandatory minimums, the result could be an increase in the federal prison population.

3. **Continued Ramp-Up in Immigration Enforcement.**

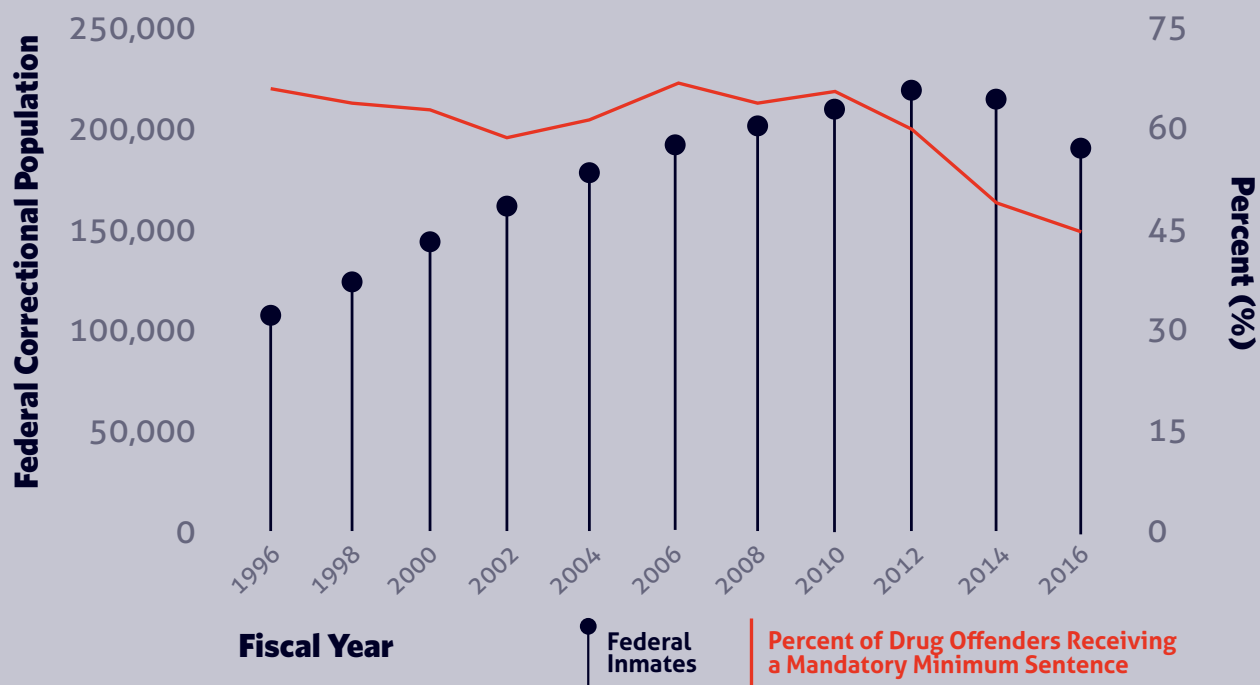
The Justice Department’s surge in immigration enforcement is one area where the Trump Administration has effected a rapid, significant, and undeniable change in enforcement priorities. That shows no sign of abating — and Sessions will likely pursue other ways to expand enforcement, including punishing sanctuary cities that refuse to comply with ICE requests.

However, the growing backlog of immigration cases also shows no sign of declining, and will almost certainly prompt an increase in the number of immigrants detained in ICE custody. As discussed on page 7, in FY 2018, ICE expects a roughly 25 percent increase in the number of detained immigrants.⁹¹

4. **Increased Reliance on Private Prisons for Federal Prisoners and Immigration Detainees.**

Increased immigration enforcement, and greater reliance on mandatory minimum sentences in drug cases, could lead the federal government to turn to private companies to operate both

Figure 4- Federal Correctional Population and Drug Mandatory Minimums



Source: U.S. Sentencing Commission and U.S. Dep't of Justice, Bureau of Prisons.⁹⁰

prisons and immigration detention facilities. BOP, which supervises people convicted of federal crimes, is already identifying inmates to send to those facilities (see page 8). Meanwhile, ICE, which incarcerates people awaiting deportation or suspected of immigration offenses, is expanding its use of private detention facilities to house a projected increase in the detainee population (see page 7).

5. Legislation on Prisoner Reentry, Without Sentencing Reform.

The White House appears poised to support legislation aimed at making it easier for prisoners to reintegrate into communities after returning home. One bill that fits that definition is the CORRECTIONS Act of 2017,⁹² sponsored by Sens. John Cornyn (R-Texas) and Sheldon Whitehouse (D-R.I.).⁹³ But any legislation

that does not include sentencing reform will not substantively reduce unnecessary federal incarceration. It remains an open question whether Republicans will prioritize such legislation. It will be important to watch how Democrats respond to this: by backing reentry legislation as a sign of incremental progress; by refusing to pass a package without meaningful sentencing reform; or by shirking leadership on the issue.

6. Pressure on States with Legalized Marijuana.

The Attorney General has repeatedly made clear his belief that marijuana is a dangerous drug, and that asserting federal supremacy in drug policy is one of his priorities.⁹⁴ This will prompt greater uncertainty in the 30 states and District of Columbia that have eased restrictions on marijuana in some form.⁹⁵

The Justice Department will likely feed that uncertainty, either with targeted prosecutions or by continuing to pressure Congress to relax existing protections for medical marijuana. Key changes to watch in this unfolding dispute are how U.S. Attorneys respond to Sessions' decision to withdraw the Cole Memo — and how Republicans and Democrats react in states that have eased up on marijuana, especially heading into the 2018 elections.

Another point to watch is whether Congress continues to extend protections for medical marijuana. A congressional budgetary provision — the Rohrabacher-Farr, or Rohrabacher-Blumenauer Amendment — blocks the Justice Department from spending public funds to disrupt state medical marijuana policy.⁹⁶ Sessions has lobbied directly against Rohrabacher-Farr's renewal,⁹⁷ but Congress renewed the amendment over his objection in late September, on Dec. 8, Dec. 22, and in the post-shutdown continuing resolution passed on Jan. 22, which extended existing law through Feb. 8.⁹⁸ Federal courts twice made clear to Obama Administration attorneys that the amendment blocks the federal government from prosecuting medical marijuana activity if it is permitted by state law.⁹⁹ Whether Congress will continue extending this restriction — and whether it will move to make it permanent — will be important to watch.

7. Another Year of Increased Opioid Overdose Deaths.

Criticism of the Trump Administration's response to these deaths has been growing.¹⁰⁰ The administration declared a national emergency but has yet to implement major solutions. Without policies at the federal and local level to identify the causes of opioid overuse and issue evidence-based solutions, it is likely that these deaths will continue. Given that rural

areas where President Trump overwhelming won are increasingly affected by opioid use,¹⁰¹ it remains to be seen whether interventions will be implemented as election season approaches.

8. Challenges for Police-Community Relations.

As the Justice Department rolls back police oversight — and expands unpopular programs such as civil asset forfeiture¹⁰² — it is possible that some will view local police forces with greater skepticism, or speak out against perceived police overreach. Many law enforcement leaders believe that enhanced citizen trust in the police is vital to combat crime.¹⁰³ A breakdown in trust could strain community police relations and set back efforts to reduce crime.¹⁰⁴

9. Possible Slowdown of State Efforts to Reduce Unnecessary Incarceration.

While the federal government does not control state police and prosecutors, the administration does set the tone for the rest of the country. As President Trump reverses the Obama Administration's focus on ending mass incarceration and stirs up public fear of crime, it is possible that state and local leaders could take this as a cue, and reduce their own attempts to enact criminal justice reform policies.

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