



2017

Policy Recommendations for the Trump Administration

**NEW YORK
CITY BAR**



POLICY RECOMMENDATIONS TO THE TRUMP ADMINISTRATION

DOMESTIC POLICIES

Workplace and Health Policies Impacting Women and Families (March 31, 2017)

Subject Area(s): Family Care Leave; Women's Workplace Rights; Childcare Assistance; Reproductive Health; Healthcare
Author(s): Sex & Law Committee

The Patient Protection and Affordable Care Act (February 23, 2017)

Subject Area(s): Healthcare
Author(s): Health Law Committee

Proposal for a Comprehensive, Evidence-Based Federal Drug Policy (May 10, 2017)

Subject Area(s): Drug Reform; Syringe Exchange Programs; Controlled Substances Act; Medical Marijuana
Author(s): Drugs & the Law

Ways to Improve the Department of Veterans Affairs Claims and Adjudication Process (January 26, 2017)

Subject Area(s): Veterans; Health Care; Benefits
Author(s): Military Affairs & Justice Committee

Mental Health Policy (January 23, 2017)

Subject Area(s): Mental Disabilities; Correctional Facilities; Community Support Programs; Education
Author(s): Mental Health Law Committee

Corrections and Community Reentry (March 01, 2017)

Subject Area(s): Solitary Confinement; Prisons; Drug Reform; Fair Chance Act; Reentry & Reintegration
Author(s): Corrections & Community Reentry Committee

Mass Incarceration: Where Do We Go From Here? (January 19, 2017)

Subject Area(s): Mass Incarceration; Criminal Justice Reform; Bail Reform; Sealing; Reentry & Reintegration
Author(s): Task Force on Mass Incarceration

National Infrastructure (February 22, 2017)

Subject Area(s): Infrastructure; Construction; Design Build; Environmental Impacts; Environmental Permits
Author(s): Construction Law Committee; Transportation Committee; Project Finance Committee

Environmental and Energy Policy (January 06, 2017)

Subject Area(s): Environmental Law; Energy; Climate Change
Author(s): Environmental Law Committee; Energy Committee; International Environmental Law Committee; Task Force on Legal Issues of Climate Adaptation

Information Technology and Cyber Law (February 14, 2017)

Subject Area(s): Cybersecurity; Infrastructure; Privacy Rights; Electronic Surveillance
Author(s): Information Technology & Cyber Law Committee

National Security Policies (January 30, 2017)

Subject Area(s): Torture; Interrogation; Civil Liberties & Security; Guantanamo Bay
Author(s): Task Force on National Security & the Rule of Law

Animal Welfare (February 14, 2017)

Subject Area(s): Animal Welfare Act; Farm Animals; Licensing of Dealers & Exhibitors; Equine Issues; Companion Animals/Pets; Domestic Violence
Author(s): Animal Law Committee

INTERNATIONAL POLICIES

International Human Rights and International Engagement (April 28, 2017)

Subject Area(s): International Human Rights; National Security; Foreign Policy; Diplomacy; United Nations; International Criminal Court
Author(s): International Human Rights Committee

Consideration of Foreign Law by Courts in the United States (January 23, 2017)

Subject Area(s): Application of foreign, international or Sharia law
Author(s): Foreign & Comparative Law Committee

United States Policies and Actions in Asia (March 08, 2017)

Subject Area(s): Human Rights; Rule of Law; Civil Liberties
Author(s): Asian Affairs Committee

National Security Policies (January 30, 2017)

Subject Area(s): Torture; Interrogation; Civil Liberties & Security; Guantanamo Bay
Author(s): Task Force on National Security & the Rule of Law

The Israeli-Palestinian Conflict (January 23, 2017)

Subject Area(s): Israeli-Palestinian Conflict
Author(s): Middle Eastern & North African Affairs Committee

To further explore the New York City Bar Association's work regarding the 2017 Presidential Transition, please visit: <http://bit.ly/2jVz3gG>.



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
WORKPLACE AND HEALTH POLICIES IMPACTING WOMEN AND FAMILIES**

INTRODUCTION

The Sex and Law Committee of the New York City Bar Association addresses issues pertaining to gender and the law with the aim of reducing barriers to gender equality in the workplace, healthcare, and civic life. Our membership includes attorneys from law firms, government agencies, not-for-profit organizations, and law school faculties. Our work in this area has led members of the Committee to develop substantial expertise regarding issues directly impacting the ability of women to participate in the workforce and contribute to the economy. We respectfully submit this memo to share our views with the Trump Administration on three of those issues: family leave, affordable childcare, and access to healthcare.

As Assistant to the President Ivanka Trump wrote in an op-ed in *The Wall Street Journal*, motherhood is “the greatest predictor of wage inequality in our country.”¹ Ms. Trump explained that our outdated federal policies are poorly suited to a time in which families rely on the incomes of working mothers--noting that two thirds of married couples are dual-income, 70% of mothers with children under 18 work outside the home, and households led by single mothers have doubled in three decades.

Indeed, in the absence of policies supporting working parents, women face significant barriers to reaching their full potential in the workforce. In part due to parenting burdens that fall disproportionately on women, the wage gap between men and women persists, and is particularly wide for women of color. While white women working full-time, year-round earn 76% percent of what white men earn, black women in the same circumstances earn 62% and Hispanic and Latina women earn only 54%.²

Policies that foster the ability of women to participate in the workforce on a more even playing field are beneficial not only to families, but also to the national economy. According to a McKinsey and Company study, 25% of current domestic product is attributable to the increased participation of women in the workforce since 1970.³ However, women’s workforce

¹ Ivanka Trump, *The Trump Plan Will Help Working Mothers*, WALL ST. J., Sept. 14, 2016, at A15.

² U.S. CENSUS BUREAU, *Current Population Survey, Annual Social and Economic Supplements*, Table P-38; U.S. CENSUS BUREAU, *2015 American Community Survey 1-Year Estimates*.

³ Joanna Barsh & Lareina Yee, *Unlocking the full potential of women in the US economy 1*, MCKINSEY & COMPANY, (Apr. 2011), available at

participation in the U.S. has stalled since the 1990s.⁴ This has not been the case in other advanced economies and research suggests a primary cause is the lack of federal family leave policies in the United States.⁵

We urge the Trump administration to: 1) implement a policy of family leave for all parents; 2) address the high costs of childcare in a comprehensive manner; and 3) protect women's ability to time and space their children.

FAMILY LEAVE FOR BOTH PARENTS PROMOTES OPPORTUNITY FOR WOMEN

President Trump's proposal to provide six weeks of paid maternity leave through the unemployment insurance system could be an improvement for mothers in the workforce, given that the United States is currently one of few developed countries that do not require parental leave at all.⁶ However, failing to include paternity leave would ensure that childcare responsibilities continue to fall primarily to women employees and limit their career advancement. Research shows that current college graduates are paid relatively equal wages for equal jobs, but as soon as employees start having children, the wage gap between men and women immediately grows.⁷ Some reports have indicated that the proposal might include only birth mothers, thus excluding foster and adoptive mothers and fathers who also need time to bond with their children. If the maternity leave policy were expanded to include all new parents, including adoptive and foster parents, it would better allow parents to continue working and to share parenting responsibilities.

We also urge the President to consider workers' needs for other forms of paid leave beyond parental leave. In addition to bonding with a new child, workers should have access to paid leave to address their own serious health needs and to care for family members with serious health needs.

THE HIGH COSTS OF CHILDCARE AND CHILDBIRTH AFFECT ALL PARENTS

Access to affordable childcare would allow more women to continue working outside the home after giving birth, since women are much more likely to leave the workforce due to

http://www.mckinsey.com/client_service/organization/latest_thinking/unlocking_the_full_potential. See also Eileen Appelbaum et al., *The Economic Importance of Women's Rising Hours of Work: Time to Update Employment Standards*, CENTER FOR AM. PROGRESS & CENTER FOR ECON. & POL. RESEARCH (Apr. 2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/04/WomensRisingWorkv2.pdf> (all links last visited March 31, 2017).

⁴ Matt Markezich, *Why the United States still needs paid family and medical leave*, WASHINGTON CENTER FOR EQUITABLE GROWTH, Feb. 8, 2017, available at <http://equitablegrowth.org/equitablog/value-added/why-the-united-states-still-needs-paid-family-and-medical-leave/>.

⁵ *Id.*

⁶ *See id.*

⁷ Jaison R. Abel & Richard Dietz, *When Women Out-Earn Men*, LIBERTY STREET ECONOMICS, Aug. 5, 2015 (blog of the Federal Reserve Bank of New York), available at <http://libertystreeteconomics.newyorkfed.org/2015/08/when-women-out-earn-men.html#.VdOI-5frOGc>.

parenting responsibilities, which negatively impacts their lifetime earnings.⁸ We are pleased that President Trump has acknowledged the high cost of early childcare. However, President Trump's proposal to give families a \$5,000 tax deduction to compensate for childcare costs falls short in terms of costs and logistics because \$5,000 is too low to cover most working parents' childcare expenses. Parents pay an average of \$9,589 per year for full-time childcare for children ages 0-4.⁹

Subsidizing childcare by means of a tax deduction would not benefit families with incomes so low that they owe little or no taxes. Approximately 45% of households in the United States already pay zero or negative federal income taxes.¹⁰ President Trump has proposed providing such families "almost \$1,200 per year" for childcare via the Earned Income Tax Credit.¹¹ But that amount is plainly insufficient for the families who most need assistance with childcare costs. Families with young children making \$1,500 a month or less spend an average of 49% of their income on childcare.¹² According to the U.S. Department of Health and Human Services, for childcare to be considered "affordable" it should cost no more than 10 percent of a family's income.¹³ In addition, a tax credit approach reduces funding available to pay for other programs that affect low-income families in order to subsidize the comparatively well off.

Parents of very young infants face special difficulties. Health officials, including the American Academy of Pediatrics, recommend that even healthy, full-term infants should not enter daycare before they are 12 weeks old.¹⁴ Parents who must return to work early must face both the scarcity and high cost of childcare centers that will accept infants at six weeks old. The scarcity of such care is likely due to the substantial staffing costs that providing care to very young children entails. In keeping with the recommendation of the National Association for the Education of Young Children,¹⁵ many states require one staff person for every three infants

⁸ Jacob Mincer & Solomon Polachek, "Family Investments in Human Capital: Earnings of Women," in MARRIAGE, FAMILY, HUMAN CAPITAL AND FERTILITY, (Theodore W. Schultz, ed., (1974); June E. O'Neill & Dave O'Neill, *What Do Wage Differentials Tell Us about Labor Market Discrimination?* (working paper, National Bureau of Economic Research, April 2005).

⁹ Brigid Schulte et al., *The Care Report*, NEW AMERICA (SEPT. 2016), available at <https://www.newamerica.org/better-life-lab/policy-papers/new-america-care-report>. New America, *The Care Report*, available at <https://www.newamerica.org/better-life-lab/policy-papers/new-america-care-report>.

¹⁰ T15-0138 - *Tax Units with Zero or Negative Income Tax*, TAX POLICY CENTER, available at <http://www.taxpolicycenter.org/model-estimates/tax-units-zero-or-negative-income-tax/tax-units-zero-or-negative-income-tax>.

¹¹ *Child Care Fact Sheet*, DONALDJTRUMP.COM, available at https://assets.donaldjtrump.com/CHILD_CARE_FACT_SHEET.pdf.

¹² Sarah Jane Glynn, *Families Need More Help to Care for Their Children*, CENTER FOR AMERICAN PROGRESS, available at <https://www.americanprogress.org/issues/economy/news/2012/08/16/11978/fact-sheet-child-care/>.

¹³ Elise Gould & Tanyell Cooke, *High quality child care is out of reach for working families*, ECONOMIC POL. INST., Oct. 6, 2015, available at <http://www.epi.org/publication/child-care-affordability/>.

¹⁴ American Academy of Pediatrics, American Public Health Association, and National Resource Center for Health and Safety in Child Care and Early Education, *Caring for Our Children: National Health and Safety Performance Standards*, Third Edition (2011).

¹⁵ Teacher Child Ratio Chart, National Association for the Education of Young Children, available at http://www.naeyc.org/academy/files/academy/file/Teacher_Child_Ratio_Chart.pdf.

below the age of six months.¹⁶ Even where childcare for very young children is available, the higher number of staff needed increases the costs to parents. Cutting costs at childcare facilities is not a viable solution. The median wage for childcare workers is less than ten dollars an hour--with nearly half of childcare workers receiving some form of public assistance; and the profit margins for daycare centers are so low that many centers close due to inability to pay insurance and other rising costs.¹⁷

Thus, a \$5,000 tax deduction or \$1,200 tax credit would be ineffective in helping working families deal with the rising costs of childcare. Only a comprehensive system of subsidizing childcare, including HeadStart or universal Pre-kindergarten, would allow parents to leave their young children in safety and be able to rejoin the workforce if they choose to.

Families already struggling with the costs of childcare will experience even greater economic harm if they lose the insurance coverage for childbirth currently required by the Affordable Care Act (ACA). The ACA requires that all insurance plans cover birth as a minimum necessary degree of coverage. This is essential given that the cost of delivering babies has risen, even for pregnancies without any complications. An uncomplicated vaginal birth costs on average \$30,000, with a copayment of \$2,200 for women with insurance. A cesarean section costs \$50,000 on average, with a \$2,700 copayment.¹⁸ Prior to the ACA, a woman with insurance that did not cover childbirth would often be unable to purchase maternity coverage in the event of an unplanned pregnancy, because insurers would consider the pregnancy a pre-existing condition. We urge the Trump administration not to roll back the ACA's protections and leave women to pay tens of thousands of dollars to give birth to a child.

THE ABILITY TO TIME AND SPACE ONE'S PREGNANCIES IS ESSENTIAL TO WOMEN'S PARTICIPATION IN THE WORKFORCE

As the U.S. Supreme Court has recognized, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹⁹ The Trump administration should uphold longstanding constitutional precedent and keep policies in place that have fostered the advancement of women in the workplace and their resulting contributions to the economy.

The U.S. Supreme Court has repeatedly held that the protection of liberty in the due process clauses of the 5th and 14th Amendments includes the rights to bodily integrity and to

¹⁶ "Child Care Centers Staff/Child Ratio Charts" Maryland Public Schools, *available at* http://earlychildhood.marylandpublicschools.org/system/files/filedepot/3/staff-child_ratio_chart_-_child_care_centers.pdf.

¹⁷ Center for the Study of Childcare Employment, The Early Childhood Workforce Index, July 7, 2016, *available at* <http://cscce.berkeley.edu/early-childhood-workforce-index>.

¹⁸ "The Cost of Having a Baby in the United States," Truven Health Analytics, *available at* <http://transform.childbirthconnection.org/wp-content/uploads/2013/01/Cost-of-Having-a-Baby1.pdf>.

¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, (1992) (citing R. PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133, n.7 (rev. ed. 1990)).

make decisions about family and parenthood.²⁰ It has been nearly 45 years since the Court explained that the Constitution protects the right of a woman to end a pregnancy before viability in *Roe v. Wade*.²¹ As the Court put it in one of its many subsequent decisions upholding *Roe*, *Planned Parenthood v. Casey*, this “is a rule of law and a component of liberty we cannot renounce.”²² Overturning *Roe* would be an unprecedented upending of the law that “would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.”²³

If states were permitted to use the force of law to compel a woman to carry a pregnancy to term against her will, it would be a profound violation of our Constitution's most fundamental guarantees. The patchwork of laws that President Trump has correctly observed would result from *Roe* being overturned would not be consistent with our Constitution, which guarantees the rights of all Americans regardless of the state in which they live. It would limit the right to end a pregnancy to those with the financial resources to travel to a state or country where abortion was not a crime, as was the case prior to *Roe*. Denying lower-income women the right to legal abortion in this way would deprive them of the greater opportunities for education and professional advancement that women who are able to time and space their pregnancies enjoy.²⁴ The Trump administration should honor the promises to support women in the workplace made by President Trump and Assistant to the President Ivanka Trump by respecting the long established right of all Americans to decide whether and when to have a child.

Additionally, the Trump administration should leave in place regulations under the Affordable Care Act that have fostered greater equity in compensation between women and men by requiring that health plans provide coverage for women's health needs comparable to that of men.²⁵ The requirement that one's health insurance cover contraception without a copayment is particularly important to low-income women seeking to delay parenthood while pursuing education and professional advancement. Allowing businesses not to comply with or repealing the contraceptive coverage requirement would make contraception—particularly long-acting reversible contraception—cost prohibitive for many minimum-wage employees. This is a matter of economic inequality as well as racial inequities. Because black women make up nearly 16% of female minimum-wage workers, the loss of the contraceptive coverage benefit would

²⁰ *Id.* at 849. (“It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity.”) (citations omitted).

²¹ *Roe v. Wade*, 410 U.S. 113 (1973).

²² *Casey*, 505 U.S. at 871.

²³ *Id.* at 865

²⁴ See Adam Sonfield *et al.*, *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, GUTTMACHER INST. (Mar. 2013), available at <https://www.guttmacher.org/report/social-and-economic-benefits-womens-ability-determine-whether-and-when-have-children>.

²⁵ Prior to the implementation of the ACA, studies found women's out-of-pocket health costs were as much as 69% higher than those of men. Louis Jacobson, *Ruth Bader Ginsburg dissent says women pay 68 percent more out of pocket for health care*, POLITIFACT (July 2, 2014), available at <http://www.politifact.com/truth-o-meter/statements/2014/jul/02/ruth-bader-ginsburg/ruth-bader-ginsburg-dissent-says-women-pay-68-perc/>.

disproportionately impact them and the families they support.²⁶

Improved access to contraception since the regulation went into effect has coincided with a decrease in unintended pregnancy and the lowest rates of abortion since the procedure became legal in 1973.²⁷ Still, at 45%, the United States has one of the highest rates of unintended pregnancy among developed nations.²⁸ The contraceptive coverage requirement is necessary to facilitate the equal participation of women in the economy by enabling them to avoid unintended pregnancy in greater numbers. We urge the administration to keep it in place.

CONCLUSION

Women are a critical part of our labor force and economy. Given the ways motherhood uniquely affects women's ability to pursue a career outside the home, we ask that the Trump administration tailor its policies to meet these challenges. In particular, the administration should put in place and maintain policies that address the disproportionate affects the cost of pregnancy, childbirth, and childcare have on the financial security of women and their ability to contribute to the economy. By promoting solutions that account for the real costs of parenthood, the administration can work to ensure that motherhood is no longer a barrier to women's equal participation in the workplace.

John S. Kiernan
President, New York City Bar Association

Katharine Bodde
Chair, Sex and Law Committee

March 2017

²⁶ Renee Bracey Sherman, *A Right to Contraception Without Access Is a Disaster for the Black Community*, REWIRE (July 1, 2014), available at <https://rewire.news/article/2014/07/01/right-contraception-without-access-disaster-Black-community/>.

²⁷ Joerg Dreweke, *U.S. Abortion Rate Reaches Record Low Amidst Looming Onslaught Against Reproductive Health and Rights*, GUTTMACHER POL. REV. (Jan. 17, 2017), available at <https://www.guttmacher.org/gpr/2017/01/us-abortion-rate-reaches-record-low-amidst-looming-onslaught-against-reproductive-health>.

²⁸ *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Sept. 2016), available at <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states#9>.



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
THE PATIENT PROTECTION AND AFFORDABLE CARE ACT**

This report is respectfully submitted by the Health Law Committee of the New York City Bar Association (“City Bar”). The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the City Bar’s Health Law Committee address legal issues relating to the rights and welfare of patients and the betterment of our healthcare system.

The Health Law Committee is aware of interest on the part of the Administration and members of Congress in repealing key provisions of the Patient Protection and Affordable Care Act (the “ACA”). As healthcare lawyers, members of the Health Law Committee represent a wide range of healthcare stakeholders, each of whom may wish to see different aspects of the ACA changed or remain intact. Well-considered, incremental change that decreases regulatory burdens on all stakeholders would also be welcome by many in the healthcare industry. However, we are not writing to take a position on whether or which aspects of the ACA should be changed.

Instead, consistent with the City Bar’s commitment to the fair administration of laws, the Health Law Committee urges the Administration and Congress not to repeal the ACA, in whole or in part, without a clear and viable replacement for the repealed provisions. The U.S. and New York healthcare systems, like all industries, cannot thrive in an unstable regulatory environment. Before any action is taken to repeal the ACA, the Administration and Congress should first develop, and simultaneously adopt, a comprehensive replacement plan.

Repealing the ACA without a viable replacement will have serious consequences for insurance markets, healthcare providers and consumers. For your consideration, we have set forth below some of the consequences of repealing without a replacement plan.

I. CREATING A REGULATORY VOID AND LEGAL UNCERTAINTY

Clear and enforceable laws are essential to the success of a free market economy in the United States. The stability of statutes and regulations governing the conduct of business and the provision of government services fosters business investment, free trade and commerce, and supports a reliable, skilled and mobile labor force.

Repealing the ACA without a replacement will likely delay or frustrate entire corporate transactions and create ambiguity with respect to the enforcement of existing contracts as well as sow doubt about the formation of new agreements. Furthermore, healthcare providers, payors and investors alike will be reluctant to undertake development and investment in the healthcare industry if there is uncertainty about coverage rules, benefit requirements, reimbursement methodologies, and care delivery models.

II. THREATENING THE STABILITY OF THE HEALTH INSURANCE MARKETS

Without knowing either (a) the extent to which subsidies or alternative financing mechanisms will be available to consumers or (b) the requirements imposed on health insurance issuers with respect to, for instance, guaranteed availability, and benefit and premium rating rules, issuers may be unable to make reliable actuarial projections or to price, design or market health plans. Such uncertainty may lead some insurers to exit the individual market and as a consequence may exacerbate instability in the health insurance markets. This outcome could also have a detrimental impact on healthcare systems, healthcare providers, and state and federal public health programs, as the rolls of the uninsured increase. Such dramatic disruption could fuel litigation and disrupt ordinary business transactions in the healthcare sector.

III. JEOPARDIZING THE HEALTH AND SAFETY OF MILLIONS OF INDIVIDUALS

Repealing the ACA without a replacement plan threatens the coverage of millions of Americans. An estimated twenty-two million people gained coverage under the ACA through the marketplace – 80 percent with federal subsidies – and through the Medicaid expansion. Absent a viable replacement plan, they will have no alternative access to affordable coverage. Millions more who bought coverage without subsidies will face skyrocketing premiums and many will be unable to continue to afford coverage. Uncompensated care at hospitals will likely rise. All of these consequences could have a repercussive effect through the economy, including for instance in the residential housing market, potentially putting more individuals at risk of foreclosure due to medical debt. (Medical debt is the single greatest cause of personal bankruptcy.)

In addition, without clear and enforceable laws in place, health systems and providers will likely delay or defer investment in creating more efficient and effective care delivery models. Delaying health system development and innovation will in turn prevent health systems and providers from improving efficiency and producing better patient outcomes -- a goal shared among all interested parties, across the political spectrum.

* * *

A stable healthcare system is essential for an effective, functioning economy and society. As discussed above, repealing provisions of the ACA without a viable and concrete replacement plan in place would cause major health system instability and, in turn, have detrimental consequences for the economy and society. We respectfully urge you to ensure that a viable replacement plan is developed and put in place prior to repealing provisions of the ACA.

John S. Kiernan
President, New York City Bar Association

Kathleen M. Burke
Chair, Health Law Committee

February 2017



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING A COMPREHENSIVE, EVIDENCE-
BASED FEDERAL DRUG POLICY**

For more than three decades, the New York City Bar Association’s Committee on Drugs and the Law (the Committee) has been studying our nation’s drug laws. The Committee includes individuals with expertise in public health, substance use disorders, and the laws and policies related to the use of substances and their impact on society. We respectfully submit this memo to share our views and recommendations with respect to our nation’s drug policy under the Trump Administration.

The Committee has published several reports and position statements, including a groundbreaking 1994 report titled *A Wiser Course: Ending Drug Prohibition*, in which the Committee concluded that decades of drug prohibition were “a failure that causes more harm than the drug use it is purportedly intended to control.”¹ The harm caused by drug prohibition continues to this day and includes disparate enforcement of the law, resulting in disproportionate arrests, sentencing, and incarceration of the poor and people of color. In 2016, for the United Nations General Assembly Special Session on the World Drug Problem, the Committee revisited these issues in a follow-up report titled *Charting a Wiser Course: Human Rights and the World Drug Problem*, which provided evidence-based recommendations for reducing the harms associated with substance use disorders and drug control.

Federal drug control has spanned more than a century, from the enactment of the Harrison Narcotics Tax Act in 1914, to the implementation of the Controlled Substances Act of 1970 (CSA), to the present.² Despite this long history of enforcement, however, federal drug control has failed to ameliorate the harms associated with drug abuse and instead has exacerbated those problems. Our federal drug policy and enforcement mechanisms have encouraged the creation of criminal markets, earned the United States the unwelcome distinction of being the global leader in the number of incarcerated citizens per capita, and led to the deaths of countless individuals, all while failing to achieve the goals of deterring drug production, trade, and consumption. In light of these failures, the United States must critically reevaluate its commitment to outdated and harmful drug laws.

The Committee respectfully makes the following 10 recommendations to the Trump Administration:

¹ Available at <http://www.nycbar.org/pdf/report/94087WiserCourse.pdf>.

² The CSA is the implementing legislation of the 1961 Single Convention on Narcotic Drugs (the Single Convention). The Single Convention, as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (collectively, the International Drug Control Treaties), are widely recognized to be outdated, overly restrictive, and generally ineffective in addressing current challenges around drugs.

1. Explicitly endorse and expand harm reduction-oriented approaches to drugs, including statutory reform to expressly permit and fund syringe exchange programs (SEPs), safe consumption rooms, and safe injection facilities, all of which increase access to drug treatment and social services and reduce health care costs and the spread of infectious diseases among intravenous drug users without increasing intravenous drug use. These policies are critical to reducing the harms associated with the current opioid crisis.³
2. Work to make quality, evidence-based and medication-assisted drug treatment available on demand. Such treatment should embrace multiple pathways to healing by allowing people with substance use disorders to choose harm reduction and moderation in addition to abstinence goals.
3. Remove marijuana from the Controlled Substances Act. In the alternative, (a) continue to reauthorize the Rohrabacher-Farr amendment, which prohibits the Department of Justice from prosecuting individuals and entities that are following their state medical marijuana laws, and expand its scope to include all state marijuana laws; (b) for marijuana businesses that are following state law, carve out an exception from § 280E of the Internal Revenue Code, which forbids businesses from recording tax deductions or credits for income associated with certain controlled substances; (c) provide a safe harbor for banks and other depository institutions providing services to marijuana businesses that are following state law; and (d) direct the Drug Enforcement Administration to hold evidentiary hearings on the question of the proper classification of marijuana under federal law.⁴

³ In 2015, as governor of Indiana, Vice President Pence instituted an emergency SEP to reduce the spread of HIV/AIDS and hepatitis C among intravenous drug users. Prior to the implementation of Indiana's SEP, there were 184 new HIV infections, the worst outbreak in the state's history. Implementing the emergency SEP significantly decreased new infections. Since Vice President Pence is already familiar with the importance and effectiveness of SEPs, we ask that the Trump Administration encourage the implementation of and federal funding for SEPs to curb the spread of infectious diseases among intravenous drug users. We also respectfully ask that the Administration implement policies to reduce opioid use disorders and provide treatment instead of criminal penalties for individuals with opioid use disorders. Furthermore, the Administration has already demonstrated its commitment to fighting the opioid crisis with an Executive Order on March 29, 2017, whereby the President established the Commission on Combating Drug Addiction and the Opioid Crisis. The Committee seeks to further its understanding of the special role of this Commission due to the apparent overlap between the new Commission and the work already being performed by the White House Office of National Drug Control Policy.

⁴ The Committee seeks clarification on comments made by Attorney General Sessions that implicate conflicts between state and federal marijuana laws. After announcing the formation of a new task force subcommittee – a subcommittee to the Task Force on Crime Reduction and Public Safety – that will partially focus on marijuana enforcement policies, Attorney General Sessions stated,

I realize this may be an unfashionable belief in a time of growing tolerance of drug use. But too many lives are at stake to worry about being fashionable. I reject the idea that America will be a better place if marijuana is sold in every corner store. And I am astonished to hear people suggest that we can solve our heroin crisis by legalizing marijuana – so people can trade one life-wrecking dependency for another that's only slightly less awful. Our nation needs to say clearly once again that using drugs will destroy your life.

4. Respect state sovereignty by allowing continued state taxation and regulation of marijuana within the guidelines set out in the memo from former Deputy Attorney General James M. Cole to United States Attorneys dated Aug. 29, 2013. We recommend that you accomplish this by elevating the memo to an executive order. To date, state reforms of marijuana law have not harmed public health and safety, and have generated substantial revenues (i.e., over \$1 billion for Colorado in 2016 and \$7 billion nationally).
5. Remove federal criminal sanctions for drug use and possession of drugs for personal consumption, a position which is also endorsed by the Global Commission on Drugs, the American Civil Liberties Union, and Human Rights Watch.
6. Increase funding for research and treatment of substance use disorders; specifically, support the development of medications (including medical marijuana) and alternative treatment programs.
7. Focus United States drug policy on promoting global public health and healing for people with substance use disorders, instead of criminalization and incarceration.
8. Support international efforts to ensure that all countries have access to controlled substances for medical use and scientific research.
9. Condemn Philippines President Rodrigo Duterte's mass extrajudicial killings, especially the killings of drug users and sellers, as a violation of human rights under international law. As a global leader on human rights, the United States has a moral obligation to condemn these horrific actions. The Administration's recent invitation of President Duterte to the White House appears to endorse extrajudicial killings and therefore should be retracted.
10. Conduct a thorough review of the demonstrably ineffective and outdated International Drug Control Treaty framework, and related UN institutions, and actively explore options for reform and modernization, such that evidence-based innovation is allowed and encouraged, and the health, human rights, development, and peace and security

Jeff Sessions, U.S. Att'y Gen., Remarks on Efforts to Combat Violent Crime and Restore Public Safety Before Federal, State and Local Law Enforcement (Mar. 15, 2017) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-efforts-combat-violent-crime-and-restore>).

Attorney General Sessions' comments evince not an "unfashionable" position but, rather, a misunderstanding of substance use disorders and the significantly less harmful nature of marijuana as compared to opioids. To protect the lives of those impacted by the opioid crisis that our country faces, government officials involved in addressing this epidemic must educate themselves on the current science with respect to substance use disorders. Furthermore, the Department of Health and Human Services, through the Food and Drug Administration, has determined that the theory of marijuana as a "gateway" to the use of other illicit drugs is not supported by research (Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,687, 53,705 (Aug. 12, 2016))—and, pursuant to 21 U.S.C. § 811(b), the Attorney General is bound by this finding. The Committee respectfully urges the Administration to avail itself of the current literature on substance use disorders, as understanding these topics is critical to the public health of our nation.

goals of the United States, and other UN member states, can be more effectively delivered.

Drug policy reform is necessary because drug control is at the nexus of many issues, including international relations, criminal justice, fiscal policy, and public health. The best approach is for the United States to address the problems created by our current system proactively and responsibly.

The health of the American people is a primary concern for any presidential administration and is a bipartisan issue. In light of the decades-long failures of our federal drug policies, we urge the Trump Administration to discontinue the punitive criminal justice approach to drug control and people with substance use disorders. As we face the devastation associated with our ongoing opioid crisis and mass incarceration, it is imperative that our drug policies and laws move us forward as a society and as a nation. As the Administration pursues its agenda to “Make America Great Again,” we urge you to recognize that greatness encompasses drug policies that are grounded in science, public health, human rights, racial justice, and compassion.

We thank you for considering our recommendations and would be eager to assist the Administration with any questions regarding the policies described above.

John S. Kiernan
President, New York City Bar Association

Zarah Levin-Fragasso
Chair, Drugs and the Law Committee

May 2017



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING WAYS
TO IMPROVE THE DEPARTMENT OF VETERANS AFFAIRS
CLAIMS AND ADJUDICATION PROCESS**

“To care for him who shall have borne the battle and for his widow, and his orphan.”

-Abraham Lincoln, 1865, Upon the Occasion of his Second Inaugural Address

The treatment of the nation’s veterans by its federal government is a recurring theme in our national news. It can be argued that treatment of the nation’s veterans has been a controversial topic as long as the country has been fighting wars, dating to the founding of the republic. Greater attention to veterans’ issues in the United States has, throughout our history, typically come after a tumultuous period in which service and sacrifice in the U.S. Armed Forces is felt, at least by some, to be underappreciated by civilian society. The adoption and creation of the All-Volunteer Force in 1973 has led to: high approval ratings currently for the men and women who volunteer to serve in the Armed Forces of the United States, consternation about a military-civilian divide, and varying levels of concern as to the treatment of veterans once their military service has concluded.

These recommendations offer suggestions on ways the U.S. Department of Veterans Affairs (hereinafter “VA”) could improve its benefit claims and adjudication process. The VA is the nation’s second largest federal agency in terms of both its size and budget with over 300,000 employees. Approximately 90% of VA employees work for the VA’s Veterans Health Administration (hereinafter “VHA”) which operates the nation’s largest healthcare system.¹ As the title of this report suggests, these recommendations do not touch upon the VHA but address the VA’s second largest administration, the Veterans Benefits Administration (hereinafter “VBA”) charged with administering over \$100 billion dollars of VA benefits to veterans every year.²

Lawyers have been able to play a meaningful role in the adjudication of veterans’ benefits since Congress passed the Veterans Judicial Review Act of 1988.³ Prior to the Veterans Judicial Review Act, decisions by the VA were final and not subject to court challenge. By its

¹ See <http://www.va.gov/health/> (last accessed Dec. 5, 2016).

² See <http://www.benefits.va.gov/benefits/> (last accessed Dec. 5, 2016).

³ Pub. L. No. 100-687, 102 Stat. 493 (1988).

own admission, the VA, which receives over a million claims a year, incorrectly adjudicates over 10% of those claims, or over 100,000 claims every year.⁴ Outside observers and most Veterans Service Organizations, put the VA's error rate in processing claims well above the VA's self-reported 10% estimated annual figure.⁵ Claims for benefits are processed by employees at the 56 regional Veterans Benefits Administration offices around the country. Claim adjudicators at the 56 offices are expected to adjudicate multiple claims a day and to do so utilizing various sections of a VA Manual. The law that governs veterans benefits is designed to protect veterans while, at the same time, prevent unjust enrichment at taxpayer expense. These competing interests lead to a legally complex regulatory scheme. VA claims adjudicators are not lawyers, let alone attorneys that specialize in administrative law practice, yet they perform what can be a complex adjudicatory task. As a result, mistakes in processing VA claims are, sadly, not uncommon nor should they be unexpected. For example, the portion of the VA's "M21" Manual series pertinent to the processing of VA Disability Compensation benefit claims for wounded veterans, updated on an almost daily basis by the VA, would, alone, if printed, easily exceed 10,000 pages in length. The paperwork contained within the file that a claim adjudicator must review before issuing a decision on a claim can consist of hundreds and, sometimes, thousands of pages of medical and personnel records. Nevertheless, out of staffing necessity, the VA relies upon non-attorneys to, more or less, act as experts and accurately interpret and apply the law when processing disability compensation claims.

When a veteran believes a benefit claim is incorrectly denied, the veteran can ask that the claim be "reopened" at a later date with "new and material evidence" or appeal the denial within one-year of the agency's denial to preserve the claim's effective date for benefits. As the VA worked to decrease the delay in processing initial claims from veterans (notoriously referred to as the "VA Backlog") an underreported corresponding spike in the number of appeals filed by veterans due to errors in the rushed processing of claims began.⁶ Notably, the VA Appeals process at the VBA is now deluged with hundreds of thousands of appeals, which appeals are taking an average of 2-10 years to work their way through the VA's clogged appellate process.

Despite the lack of sufficiently trained employees to accurately process benefit claims, ideas on the necessity and appropriateness of reforming the VA's claims process have tended to fall into one of two camps. In one camp, the reformers have fixated upon a proposed solution of amending legal protections of VA civil service employees to, in theory, allow VA supervisors greater flexibility in suspending or terminating their low-performing employees. Poor or illegal job performance by VA employees sometimes receives media attention, and, in an agency with over 300,000 employees, it will likely always be the case, even if civil service rules are reformed, that a few "bad apples" will work at the VA. Reforming the civil service rules however, in and by itself, will do little to address the problem of VBA employees who are not

⁴ See Testimony of Ian C. de Planque, American Legion, Deputy Director, Veterans Affairs and Rehabilitation Commission before the House Committee on Veterans Affairs available at <https://veterans.house.gov/witness-testimony/ian-c-de-planque-3> (last accessed Dec. 5, 2016).

⁵ *Id.*

⁶ For a discussion of this issue, see e.g. Alan Zarembo, *VA is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. Times, dtd Nov. 23, 2015, at <http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html> (last accessed Dec. 5, 2016).

adequately trained or appropriately supervised. Little evidence exists to suggest that malfeasance by VA employees, by itself, can explain the hundreds of thousands of adjudication errors the VA makes in processing benefit claims every year. Firing one poorly trained VA employee, and replacing that individual with another poorly trained VA employee, will likely do little to improve the VA's accuracy rate in processing benefit claims.

In the other camp, by contrast, non-reformers suggest little can or should be done to appropriately reform the VBA's claims and adjudication process. For a veteran or veteran's qualified survivor who has waited years or, in many cases, decades for the VA to adequately or correctly award benefits, the position of non-reformers, understandably, feels akin to a slap in the face. The acquiescence of non-reformers to the idea that nothing can or should be done to reform the claims and appeals process becomes an implicit acceptance of the current system. Non-reformers find themselves in the unenviable position of having to defend a system in which veterans can wait, if they are ever successful, years or decades to receive benefits they earned as a result of their military service.

The full cost of war is not, and never has been, cheap. When the bill comes due to care for the nation's veterans and portions of that bill remain unpaid, it translates into long waits for veterans and mistakes in the processing of their claims for benefits. So long as Congress and the VA attempt to address the problem of veterans' claims inexpensively, gaps in caring for the nation's veterans will continue. To that end, we make the following recommendations below:

Recommendation 1: The VA must first become aware, and then admit, that it has a problem, at the Regional Office level, adequately processing veterans' claims due to the inadequate training and qualification levels of its claims adjudicators. The VA's own Inspector General rejects the agency's claim that it is accurately processing 90% of the claims it receives. Multiple reputable Veterans Service Organizations suggest the number is closer to 50%. While it may be politically difficult for a cabinet level secretary of the VA to acknowledge the extent of the problem, so long as the VA mistakenly processes and denies 100,000s of claims every year without any such acknowledgment, there is no realistic hope that veterans' experience with the claims process will change. It is unacceptable that, in FY 2015, a veteran waited 1,029 days after filing an appeal with the VA until a VA attorney at the Board of Veterans Appeals could consider the appeal.

Recommendation 2: In relation to Recommendation 1, the VA should employ a significant number of new, skilled, trained attorneys at the Regional Office level who would review appeals, as a supplement to, and gradual replacement of, the current Decision Review Officer process. Currently, a veteran that is denied benefits can file a Notice of Disagreement within one-year of their denial of benefits if they disagree with the agency's denial. In the Notice, a veteran is asked whether to elect the traditional appellate process (in which the appeal is transmitted to be reviewed by a lawyer at the Board of Veterans Appeals located in Washington D.C.) or to elect to have the appeal first be reviewed by a "senior" member of the Regional Office's appeals team- the Decision Review Officer who is not an attorney. Electing the Decision Review Officer (hereinafter "DRO") can shave years off the time of an appeal, and there are many excellent DROs, but too often DROs find themselves equally overwhelmed by their workload and unable to dedicate the necessary, appropriate time to constructively consider

a veteran's argument in fact or in law that really should be considered by an attorney.

Recommendation 3: Create a statutory right to qualified counsel for veterans seeking benefits. Due to the complex regulatory scheme, veterans are currently permitted to file a reopened claim for benefits an unlimited number of times if it has been denied. Owing to the legal complexity of the regulatory scheme, and because the VA cannot be counted upon to have correctly processed a veteran's initial claim, Congress, historically, has seen fit to allow veterans to file for benefits an unlimited number of times so as not to unfairly deprive veterans of benefits they earned. The effect of that policy is a bottleneck of VA Appeals that includes both meritorious appeals of veterans that earned benefits serving the country and non-meritorious appeals of veterans not entitled to benefits. The simple – but incorrect - answer to this problem would be to limit the number of times a veteran can file for a benefit under the current system (as the VA has proposed). Congress and veterans advocates alike should be very skeptical of the VA's own plan to allow the VA to limit the number of times a veteran can file, reducing its own administrative burden at the potential expense of veterans with meritorious claims, unless and until significant reform is adopted that guarantees a veteran's claim has received the necessary, careful consideration it is due. Critics of a right to counsel recommendation may point to the fact that veterans currently have a right to be represented during the claims and appeals process by a Veterans Service Officer. The right to a Veterans Service Officer is a legacy of the claims system as it existed prior to 1988 for over a century when lawyers had no meaningful role and there existed no right to judicial review. While we believe there are many knowledgeable, experienced, excellent Veterans Service Officers who do and have done an excellent job for the veterans they represent, there is simply no substitute for having a lawyer represent a veteran if the risk of being denied would also entail the veteran losing her ability to file and receive benefits in the future. Implementing a right to counsel by a qualified, accredited attorney would be a way of assuring all necessary and appropriate avenues for legal and equitable relief had been considered in light of attorneys' ethical and competency requirements as members of their profession.

Recommendation 4: Veterans should be allowed to retain an attorney prior to the filing of a Notice of Disagreement provided that the attorney either represents the veteran pro bono or upon a contingency basis for past due benefits. Currently, in most instances, a veteran is unable to retain an attorney to represent her prior to having her claim denied because an accredited attorney is forbidden from charging the beneficiary a fee until a Notice of Disagreement has been filed.⁷ While we strongly encourage attorneys to represent veterans pro bono when possible, *requiring* an attorney to do so in effect means almost all veterans are required to file a claim without the benefit of an attorney even if a beneficiary were willing to pay for an attorneys' services. This is particularly the case when a veteran may have filed for a benefit before, was denied, and must file a reopened claim for benefits. In such a scenario a veteran may not know, and could significantly benefit from knowing, how to revise his claim to give it a higher chance for success. Attorneys would, admittedly, have less work to do during the process of preparing an initial claim as opposed to preparing an appeal, but the contingency fee would also be commensurately smaller given the much smaller period of time during which past due benefits would accrue. Permitting attorneys to assess a fee on a contingency basis of the veterans past-

⁷ 38 C.F.R. § 14.636(c).

due benefits, at the earliest possible stage of the claims process, means giving a veteran the best opportunity to be successful, as early as possible.

Recommendation 5: In a successfully reopened claim, a veteran should receive past due benefits from the date their service-connected condition began as opposed to the date of filing the reopened claim. By law, to preserve an effective date for an award of benefits, a veteran must, if denied, file a Notice of Disagreement and Intent to Appeal within one-year of the VA's decision denying her benefits. If she fails to do so the agency's decision becomes final and will not be disturbed unless the veteran can demonstrate clear, unmistakable, error on the part of the VA in denying the claim. Such a law has a clear financial motive for the taxpayers (it would be expensive to award veterans years of past due benefits in some cases) but it is impossible to reconcile such a decision with a veterans' claims system that Congress also specified is supposed to be friendly to veterans. In such cases, a veteran is told that a legal requirement - the veteran's failure to appeal its earlier, incorrect, denial to preserve the earlier effective date for the award of benefits - has cost the veteran months, years, or even decades' worth of disability compensation. To do right by our veterans, the agency we charge with doing so, the VA, should be able to award benefits from the date the veteran became eligible for the benefit, not the date the veteran became entitled to the benefit by virtue of the filing of his successful claim. Veterans, like their civilian counterparts, are disadvantaged when they are expected to know the law despite having never been counseled about their unique place in our legal system resultant from their military service and their status as veterans.

Recommendation 6: Provide financial sanctions against the VA, in favor of the veteran, when the VA takes more than a year to process a veteran's initial disability claim or when the VA fails to apply the appropriate adjudicatory standard when deciding a veteran's claim. Currently there is no penalty against the VA for its failure to process a claim in a timely fashion. When and if an award is finally made, the veteran will receive past due benefits from the date she filed her claim, without interest. Instead, absent unusual circumstances, the VA should be penalized and sanctioned for failure to complete its adjudication in a timely fashion. The federal government will sanction its own agencies in other contexts. The Equal Employment Opportunity Commission permits an agency to be sanctioned for its failure to produce a report of investigation to a federal employee who has made allegations of racial or sexual discrimination within 180 days of the complaint notwithstanding the merits of the complaint.⁸ The same right to have a thorough adjudication and investigation of a claim should be extended to veterans in their disability and compensation cases. If the VBA were required to begin paying out sanction fees for failure to timely process a disability claim one suspects there would be a noticeable shuffling of the agency's metrics and its priorities.

Substantially more staff is necessary, as is making sure that staff is adequately trained, if the VA and Congress seek to fundamentally and radically improve the claims process. Attorneys can and must, in the complex regulatory framework of veterans' benefits, play a role in helping to bring that radical change about. While the full cost of war is not, and never has been, cheap- the nation can and should demand every effort is made to care for our veterans and their eligible

⁸ 29 C.F.R. § 1614.108(g); See also Equal Employment Opportunity Manual Directive 110, Appendix K *available at* https://www.eeoc.gov/federal/directives/md-110_appendix_k.cfm (last accessed Dec. 5, 2016).

dependents.

John S. Kiernan
President, New York City Bar Association

Michael P. Richter
Chair, Military Affairs and Justice Committee

January 2017



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
MENTAL HEALTH POLICY**

Mental illness affects approximately 44 million adults in the United States, or about one out of five Americans.¹ Of these, approximately 9.8 million suffer from a serious mental illness.² The need for comprehensive, effective and accessible treatment for persons with mental illness is a bipartisan issue that we urge the incoming Administration to address.

Persons with mental illness face degradation, stigmatization, and discrimination. They are more likely to be incarcerated, to be shot and killed by police, to face discrimination at work, and to struggle to find adequate affordable housing. The quality of treatment available—both on an inpatient basis in hospitals and prisons, as well as on an outpatient basis—needs to be improved. There are currently over 40,000 persons with mental illness institutionalized in psychiatric hospitals across the country.³ Between 15-20% of jail and prison inmates suffer from a serious mental illness.⁴ In 2015, a quarter of all police shooting deaths involved persons with signs of mental illness.⁵ And the annual number of persons appearing in immigration proceedings who have mental disabilities has been estimated to be 57,000 people.⁶

¹ NATIONAL INSTITUTE OF MENTAL HEALTH: SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, available at <http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.htm> (43.6 million adults in the U.S. reportedly suffered from “any mental illness” (AMI), of whom 9.8 million suffered from “serious mental illness” (SMI), in 2014).

² *Id.*

³ US CENSUS BUREAU, Table PCT20: GROUP QUARTERS POPULATION BY GROUP QUARTERS TYPE, available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_PCT20&prodType=table.

⁴ E. Fuller Torrey, Aaron Kennard, Don Eslinger, Richard Lamb, and James Pavle, *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States*, available at http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf (May 2010).

⁵ THE WASHINGTON POST 2015 SURVEY, available at <https://www.washingtonpost.com/graphics/national/police-shootings/>.

⁶ See Human Rights Watch and the American Civil Liberties Union, *Deportation by Default: Mental Disability, Unfair Hearings and Indefinite Detention in the US Immigration System* 16 (June 2011), <http://www.hrw.org/reports/2010/07/26/deportation-default> (estimated number of non-citizens with a mental disability in immigration proceedings in 2008, i.e., 15% of total immigrant population in detention).

The New York City Bar Association (“City Bar”) was founded in 1870 and is a private, non-profit organization of more than 24,000 attorneys, law students and law school professors. The City Bar has long supported the vigorous and fair enforcement of laws protecting civil rights. The City Bar’s Mental Health Law Committee respectfully urges the incoming Administration to consider the following measures to provide better treatment and opportunities to millions of Americans with mental illness.

1. PROGRAMS THAT PROVIDE BETTER TRAINING FOR POLICE OFFICERS WHO INTERACT WITH PERSONS WITH MENTAL ILLNESS OR WHO ARE IN PSYCHIATRIC CRISIS

The incoming Administration has proposed the Restoring Community Safety Act,⁷ which would provide an increase in funding for programs to train and assist local police. Specialized training is crucial for law enforcement personnel, who must interact with persons with mental illness in the course of their duties, in order to save lives and reduce unnecessary incarceration. Furthermore, persons with mental illness should be diverted to mental health treatment programs that are set up for the purpose of providing comprehensive community treatment options, rather than placing individuals in psychiatric crisis in the criminal justice system.

Training for law enforcement agencies and personnel should involve the following factors⁸:

- a. De-escalation techniques
- b. Use of nonlethal force
- c. Diversion options instead of incarceration, ensuring that persons with mental illness receive treatment and avoid the criminal justice system

2. PROGRAMS TO PROVIDE BETTER MENTAL HEALTH TREATMENT FOR PERSONS IN CORRECTIONAL FACILITIES

As noted above, 15 to 20% of persons in jails and prisons suffer from a serious mental illness. A 2010 study indicates that nationwide there are far more mentally ill people in prisons and jails than in psychiatric hospitals.⁹ Many of these individuals cycle between prisons and hospitals, receiving little, if any, aftercare. Persons with mental illness in jails and prisons are more likely to serve longer sentences, to have disciplinary infractions, and to have their illness

⁷ Donald J. Trump Contract with the American Voter, available at <https://www.donaldjtrump.com/press-releases/donald-j.-trump-delivers-groundbreaking-contract-for-the-american-vote1> (October 22, 2016).

⁸ See, e.g., City of Memphis Crisis Intervention Team (2016), available at <http://www.memphistn.gov/Government/PoliceServices/CrisisInterventionTeam.aspx>; Amy C. Watson and Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crisis: A Primer for Mental Health Practitioners*, 8 BEST PRACG MENT HEALTH 71, (2012).

⁹ E. Fuller Torrey, Aaron Kennard, Don Eslinger, Richard Lamb, and James Pavle, *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States*, available at http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf (May 2010).

exacerbated from the use of solitary confinement.¹⁰ They are also more likely to commit suicide.¹¹

Programs to improve mental health treatment in correctional facilities should include the following components¹²:

- a. Training for correctional employees to screen and identify persons with mental illness and ensure they receive appropriate treatment, including using de-escalation techniques, reducing punitive segregation, and creating specialized units
- b. Expanding access to effective mental health treatment in correctional facilities that is therapeutic rather than punitive
- c. Re-entry services to include supportive housing and outpatient mental health treatment

3. PROGRAMS TO PROVIDE BETTER COMMUNITY SUPPORTS FOR PERSONS WITH MENTAL ILLNESS

We urge the incoming Administration to maintain support for community-based mental health treatment programs. Too often, persons with mental illness face unnecessary institutionalization because of a lack of adequate community supports, or they are released from hospitals or jails without being connected to appropriate community support and housing programs.

Creating affordable, supportive housing and ensuring community-based services for people with mental illness through enforcement of the Americans with Disabilities Act (“ADA”)¹³ is critical for the safety and wellbeing of this population as well as that of the general public. Persons with mental illness are entitled to the least restrictive alternative where treatment is concerned, and this means living in the community if they are capable of doing so. The ADA requires States to provide community-based treatment, and unjustified isolation is discrimination based on a disability.¹⁴ Yet, persons with mental illness continue to face unjustified isolation due to confinement in both psychiatric hospitals and adult homes.

¹⁰ Council of State Governments, Criminal Justice/Mental Health Consensus Project, *available at*: <https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf> (June 2002)

¹¹ The Sentencing Project, *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription*, *available at*: <http://www.sentencingproject.org/wp-content/uploads/2016/01/Mentally-Ill-Offenders-in-the-Criminal-Justice-System.pdf> (January 2002).

¹² See e.g. City of New York Mayor’s Task Force on Behavioral Health and Criminal Justice, *First Status Report*, *available at*: http://www1.nyc.gov/assets/criminaljustice/downloads/pdfs/BHTF_StatusReport.pdf (July 2015).

¹³ 42 U.S.C. § 12132 (2006).

¹⁴ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999).

Community-based services should include the following components:

- a. Affordable supportive housing
- b. Job training and day programs that emphasize community integration and employment opportunities
- c. Case management to ensure continuity of care
- d. Support for caregivers. The incoming Administration has proposed the Affordable Childcare and Elder Act,¹⁵ which would allow Americans to deduct childcare and elder care expenses from their taxes; this legislation should include family members who care for persons with mental illness or intellectual disabilities.

4. PROGRAMS TO PROVIDE MENTAL HEALTH EDUCATION IN PUBLIC SCHOOLS TO REDUCE STIGMA AND PROVIDE EARLY ACCESS TO TREATMENT¹⁶

One in five children, either currently or at some point in their lives, has had a seriously debilitating mental disorder.¹⁷ Mental health education for public school administrators, faculty and students would promote and advance health and safety for all stakeholders in our school communities.

School-based mental health education programs should include the following components:

- a. Increasing mental health awareness to reduce stigma and create environments where students feel comfortable to speak about these issues
- b. Mental health training for educators and school staff to identify signs and symptoms of mental illness in children, as well as knowledge of resources available
- c. Reducing reliance on suspension and instead using research-based restorative approaches to address the root causes of misbehavior

¹⁵ See *supra* note 6.

¹⁶ See, e.g., National Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, available at: <http://www.ncd.gov/publications/2015/06182015> (June 18, 2015); City of New York Mayor's Leadership Team on School Climate and Discipline, *Safety with Dignity*, available at: <http://www1.nyc.gov/assets/sclt/downloads/pdf/safety-with-dignity-final-complete-report-723.pdf> (July 2015); City of New York Mayor's Leadership Team on School Climate and Discipline, *A Plan for Safety and Fairness in Schools*, available at: http://www1.nyc.gov/assets/sclt/downloads/pdf/SCLT_Report_7-21-16.pdf (July 2016).

¹⁷ NATIONAL INSTITUTE OF MENTAL HEALTH: Any Disorder Among Children, available at <https://www.nimh.nih.gov/health/statistics/prevalence/any-disorder-among-children.shtml>.

The treatment of persons with mental illness is a vitally important issue and we urge the Administration to acknowledge and address these issues affecting millions of Americans.

John S. Kiernan
President, New York City Bar Association

Naomi Weinstein
Chair, Mental Health Law Committee

January 2017



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
CORRECTIONS AND COMMUNITY REENTRY**

The Committee on Corrections and Community Reentry (the “Committee”) of the New York City Bar Association (the “Association”) respectfully submits the following recommendations to the Trump Administration. The Association is a 147-year-old organization of over 24,000 lawyers, advocates, and judges dedicated to improving the administration of justice. Committee members include prosecutors, public defenders, attorneys in private practice, and public policy professionals. We share a commitment to sound policy and the just application of laws related to incarceration and reentry into mainstream society. In this spirit, we make the following three recommendations.

**I. CONTINUE EFFORTS TO LIMIT SOLITARY CONFINEMENT IN
FEDERAL, STATE AND LOCAL FACILITIES**

We urge your administration to take action to reduce the inhumane and counter-productive use of solitary confinement in federal, state, and local facilities. Specifically, your administration should: 1) limit the use of solitary confinement and create alternatives in federal prisons operated by the Bureau of Prisons and immigration authorities; 2) establish best practices and provide funding for limiting the use of solitary confinement and creating alternatives in states and localities; and 3) ensure transparency and oversight of federal, state, and local facilities.

Solitary confinement has never been shown to reduce prison violence. In fact, several state prison systems, including those in Maine, Mississippi, and Colorado, have significantly reduced the number of people in solitary confinement while seeing prison violence *decrease*. A decrease in prison violence means fewer injuries to correction officers and incarcerated people alike.

The sensory deprivation, lack of normal human interaction, and extreme idleness of solitary confinement have been proven to lead to intense suffering and physical and psychological damage.¹ Isolation has been shown to create mental health problems, or exacerbate

¹ See, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, Journal of Law & Policy, Vol. 22:325 (2006), available at: http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy (“Psychiatric Effects of Solitary”); Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 Crime & Delinq. 124 (Jan. 2003), available at: <http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf>; Stuart Grassian and Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, Correctional Mental Health Report, Vol. 13, No. 1 (May/June 2011); Sruthi Ravindran, *Twilight in the Box: The suicide statistics, squalor & recidivism haven’t ended solitary confinement. Maybe the brain studies will,*

pre-existing ones,² and increase the risk of suicide and self-harm. A recent study in New York City jails found that people who were held in solitary confinement were nearly seven times more likely to harm themselves and more than six times more likely to commit potentially fatal self-harm than their counterparts in general confinement.³ The National Commission on Correctional Health Care recently re-examined its guidelines on isolation and concluded that isolation in excess of 15 consecutive days “is cruel, inhumane, and degrading treatment, and harmful to an individual's health” and also further concluded that “[j]uveniles, mentally ill individuals, and pregnant women should be excluded from solitary confinement of any duration.”⁴

In light of the psychological damage solitary confinement inflicts, it is troubling to consider that many states and localities release people from long stays in solitary confinement directly to the streets when their time is up. People who have been subjected to solitary confinement have a higher rate of re-offending than their counterparts in general confinement. Clearly, public safety is not being served by the status quo.

In 2016 the U.S. Department of Justice (“DOJ”) completed a comprehensive analysis of restrictive housing in federal and state facilities and proposed a series of “Guiding Principles” to limit the use of such confinement. The DOJ concluded in its Executive Summary, “as a matter of policy, we believe strongly this practice should be used rarely, applied fairly, and subjected to reasonable constraints.”⁵

II. REMOVE CANNABIS FROM SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT

We urge you to order the Drug Enforcement Administration (“DEA”) to remove cannabis (also known as marijuana) from Schedule I of the Controlled Substances Act. Cannabis should be an unlisted substance, and the DEA and other federal agencies should develop a regulatory scheme similar to the use regulation of alcohol and tobacco.

The tide is turning toward legalizing cannabis. A nationwide Gallup poll released last October showed 60 percent of respondents supporting legal use.⁶ Before the last election, four

Aeon Magazine, Feb. 27, 2014, available at: <http://aeon.co/magazine/living-together/what-solitary-confinement-does-to-the-brain/>; Joseph Stromberg, *The Science of Solitary Confinement*, Smithsonian Magazine, Feb. 19, 2014, available at: <http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/#.Uwoq5RsSWaQ.email>. (All websites last visited February 28, 2017.)

² See Gilligan and Lee Report at 3-5.

³ Homer Venters, et. al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, American Journal of Public Health, Mar. 2014, Vol. 104, No. 3, available at: <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

⁴ National Commission on Correction Health Care, *Solitary Confinement (Isolation), Position Statement* (April, 2016), available at: <http://www.ncchc.org/solitary-confinement>.

⁵ U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, Executive Summary, at 1 (2016).

⁶ Art Swift, “Support for Legal Marijuana Use Up to 60% in U.S.,” Gallup (Oct. 19, 2016), available at http://www.gallup.com/poll/196550/support-legal-marijuana.aspx?g_source=Social%20Issues&g_medium=newsfeed&g_campaign=tiles.

states and the District of Columbia had legalized the adult recreational use of cannabis.⁷ On Election Day last November, four more states followed suit, including California, the nation's most populous state.⁸ Before the election, 25 states had legalized the medical use of cannabis.⁹ On Election Day three more followed suit, including Florida.¹⁰ These state actions are inconsistent with federal law, because the DEA continues to list cannabis among "drugs with no currently accepted medical use" on Schedule I. At a time when many states are responding to their constituents' changing views of cannabis and charting new policy courses, the federal government should not maintain an inflexible, contrary policy.

When properly regulated, cannabis can become a major generator of tax revenue. Economists estimate that between \$4 billion and \$12 billion in federal tax revenues can be generated from legal cannabis sales.¹¹ Furthermore, each individual state can reap tens of millions of dollars in new tax revenue for state coffers. For example, Oregon collected more than \$25 million in new tax revenue from cannabis sales in the first six months of 2016.¹² States with larger populations, such as New York, Florida, and Texas, stand to realize even greater tax revenue gains.

In addition to generating new tax revenue, states and the federal government will be able to cut billions of dollars in spending. States spend approximately \$3.6 billion every year enforcing prohibition of cannabis.¹³ Cannabis prohibition is, in many cases, a "gateway" to criminalization, whereby young people are marked with a criminal record for cannabis possession or sale. This forms a foundation for more and more severe consequences for further offenses. Removing cannabis from Schedule I would send a clear message to the states that have not de-criminalized cannabis possession that they should consider doing so. In addition to reducing expenditures, decriminalizing cannabis possession would free law enforcement to focus more attention on its most vital tasks: fighting serious crime and terrorism.

Even if your administration is not prepared to move cannabis out of Schedule I immediately, it is long past time for the federal government to hold evidentiary hearings on the proper classification of cannabis and whether the Department of Justice (rather than the

⁷ Joseph Henchman & Morgan Scarborough, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, The Tax Foundation (May 12, 2016), available at http://taxfoundation.org/article/marijuana-legalization-and-taxes-lessons-other-states-colorado-and-washington#_ftn1blog.ericgoldman.org/archives/2013/09/when_should_sea.htm.

⁸ Jag Davies, "Marijuana Wins Big, as Dark Struggles Loom," Drug Policy Alliance (Nov. 9, 2016), available at <http://www.drugpolicy.org/blog/marijuana-wins-big-dark-struggles-loom>.

⁹ Henchman & Scarborough, *Marijuana Legalization and Taxes*.

¹⁰ Davies, "Marijuana Wins Big."

¹¹ Jacobi, Liana and Michelle Sovinsky. 2016. "Marijuana on Main Street? Estimating Demand in Markets with Limited Access." *American Economic Review*, 106(8): 2009-45 at 2040.

¹² Noelle Crombie, *Oregon collects \$25.5 million in marijuana taxes since start of the year*, The Oregonian/OregonLive (Aug. 22, 2016), available at http://www.oregonlive.com/marijuana/index.ssf/2016/08/oregon_collects_255_million_in.html.

¹³ *Marijuana Arrests by the Numbers*, ACLU (retrieved Jan. 6, 2016), available at <https://www.aclu.org/gallery/marijuana-arrests-numbers>.

Department of Health and Human Services, or the Treasury Department) should continue to have primary regulatory authority over it.

III. MAINTAIN A FAIR CHANCE EMPLOYMENT POLICY

We urge your administration to maintain the current federal fair chance employment policy. The two components of this policy are: 1) rulemaking from the Office of Personnel Management (“OPM”) that “bans the box”—the box on an initial job application that asks about a criminal record—and thereby delays inquiry into criminal history until later in the federal hiring process; and 2) the Fair Chance Business Pledge, which has been taken by some of the nation’s preeminent corporations.

Including both convictions and offenses charged but never proven, around 70 million Americans have some sort of criminal record. This number represents almost one in three working-age Americans.¹⁴ Given these statistics, a fair chance employment policy is necessary so that a wide swath of the potential labor force is not automatically disqualified from employment because of a criminal record. Our society’s shared goal should be to avoid a permanent class of unemployed citizens that saps the economic strength of local communities and the nation.

A fair chance policy strengthens the workforce by opening the path to gainful employment. Having legitimate work helps curb recidivism for those trying to overcome the specter of past wrongdoing. In the absence of a fair chance policy, all too often a criminal record is an automatic barrier to employment, regardless of an applicant’s particular circumstances. Employment disqualification for those with criminal records further punishes people who have already paid their debt to society. It also restricts opportunities that would help the formerly incarcerated successfully reintegrate and become productive members of society, rather than returning to crime.

OPM finalized its version of “ban the box” in December 2016. This follows the directive of the Presidential Memorandum issued in April 2016 declaring that hiring practices within the federal government must be altered to promote the “rehabilitation and reintegration of formerly incarcerated individuals.”¹⁵

In addition to the federal government, 24 states have adopted similar “ban the box” policies pertaining to government employment. Nine states, the District of Columbia, and 29 cities and counties have also required removal of the past conviction question on the initial applications of private employers.¹⁶

¹⁴ Statistics on American incarceration rates are from <https://www.whitehouse.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

¹⁵ For discussion and background concerning OPM’s “ban the box” rule, *see* <https://www.federalregister.gov/documents/2016/12/01/2016-28782/recruitment-selection-and-placement-general-and-suitability>.

¹⁶ The 24 states are: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin, while the nine states adopting removal of conviction

The Fair Chance Business Pledge represents a vital next step in federal fair chance policy. Companies taking the pledge demonstrate an awareness of the traditional bias toward people with prior convictions and an ongoing commitment to reducing needless barriers to employment. The pledge commits employers to actions including “banning the box,” ensuring that information about an applicant’s criminal record is considered in its proper context, and engaging in a pattern of hiring that does not categorically eliminate certain jobs for those with criminal records. Major companies and organizations that have already taken the pledge include: American Airlines, Coca-Cola, Facebook, Georgia Pacific, Google, Hershey, the Johns Hopkins Hospital and Health System, Koch Industries, Libra Group, PepsiCo, Prudential, Starbucks, Uber, Under Armour/Plank Industries, Unilever and Xerox.¹⁷

The best practices set forth by the U.S. Equal Employment Opportunity Commission (“EEOC”) in 2012 provide private employers with useful guidance on hiring people with criminal records. The EEOC identifies an employer’s individualized assessment of the applicant’s background as a fundamental part of developing a meaningful fair chance policy.¹⁸

We thank you for considering these recommendations.

John S. Kiernan
President, New York City Bar Association

Alex Lesman
Chair, Corrections and Community Reentry Committee

February 2017

history from private employment applications are: Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont. A listing of the localities that have extend their fair-chance laws to private employers within their areas includes: Austin, Baltimore, Buffalo, Chicago, Columbia (MO), the District of Columbia, Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George’s County (MD), Rochester, San Francisco, and Seattle. Statistics on jurisdictions adopting fair-chance laws are found at <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

¹⁷ See <https://www.whitehouse.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

¹⁸ For a statement on EEOC guidance regarding the use of arrest or conviction records in employment decisions see “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VIII

MASS INCARCERATION: Where Do We Go From Here?

**NEW YORK
CITY BAR**

MASS INCARCERATION: WHERE DO WE GO FROM HERE?

JANUARY 2017

Table of Contents

I.	INTRODUCTION.....	1
II.	LOOKING BACK ON THE PAST YEAR	3
A.	Making Criminal Justice Reform a National Priority.....	3
B.	New York as a Model for Reform	5
1.	<i>Rikers Commission</i>	6
2.	<i>Warrant and Summons Reform</i>	7
3.	<i>Funding for Indigent Representation</i>	7
4.	<i>Alternatives to Incarceration</i>	8
III.	LOOKING AHEAD TOWARD FURTHER REFORM.....	9
A.	Maintaining the Momentum Nationally	9
1.	<i>Sentencing Reform</i>	9
2.	<i>Early Release Programs</i>	10
3.	<i>Reentry Programs</i>	10
4.	<i>Improving the Conditions of Incarceration—Substance Abuse and Mental Health Treatments</i>	11
B.	Building on Key Initiatives in New York.....	11
1.	<i>Bail Reform</i>	11
2.	<i>Second Chance Amendment and Earned Early Release Legislation</i>	12
3.	<i>Parole Reform</i>	13
4.	<i>Raise the Age Reform</i>	13
5.	<i>Minimizing Collateral Consequences</i>	13
IV.	CONCLUSION	15
	ENDNOTES.....	16

* This report was developed by the New York City Bar Association’s Task Force on Mass Incarceration (see <http://www.nycbar.org/member-and-career-services/committees/mass-incarceration-task-force-on>), under the leadership of Task Force Chair John F. Savarese. Special thanks go to Mr. Savarese’s colleagues, Carol Miller and Robinson Strauss, at Wachtell, Lipton, Rosen & Katz for so expertly guiding this process.

I. INTRODUCTION

The devastating consequences of mass incarceration have drawn unprecedented attention over the past few years. Journalists, academics and public interest groups have published extensive research, written compelling articles and lobbied politicians on both sides of the aisle to take concrete steps to reduce both our nation's prison population and the terrible toll mass incarceration continues to inflict on vulnerable communities.¹ As we show in this Report, progress has been made in the year since our Task Force was established, but much remains to be done. There also is considerable uncertainty about whether successful past initiatives will be carried forward by the Trump administration. This Report therefore aims, in section II below, to chronicle past successes (as well as frustrations) at both the federal and state/local levels in reducing the country's prison population and the harmful consequences and burdens of mass incarceration. Then, in section III below, we look ahead to areas for potential further action, again at the federal and the state/local levels. We close with a plea to public officials to use the information and initiatives highlighted here to recognize the enormous economic and social costs of over-incarceration, to emulate the promising examples of progress and reform recounted here, and to be creative in seeking to reduce the public cost and burden of our over-reliance upon incarceration while still maintaining public order and safety in all communities.

As noted, mass incarceration has been a focus at all levels of federal, state and local government. President Obama has made criminal justice reform a priority during the latter part of his tenure. He has instituted a federal clemency initiative under which more than 1,000 individuals have had their sentences commuted,² and has recommended the creation of a presidential commission to study mass incarceration and suggest high-impact reforms.³ The President has also taken steps to end the federal subsidization of mass incarceration⁴ and has proposed a rule "banning the box" on applications for federal employment.⁵ For its part, Congress, in a welcome display of bipartisanship, has been focusing on sentencing reform by considering a broadly supported bill that would reduce mandatory minimums.⁶

Many states have acted to address some of the root causes of mass incarceration in the past year.⁷ In New York, the State Legislature unanimously passed a bill to shift the cost of providing legal representation for indigent defendants from individual counties to the state.⁸ On the local level, New York City has been working to reduce the jail population through a series of targeted efforts across the criminal justice system,⁹ among other things establishing the Rikers Commission to reduce this massive jail's population, and further acting to reduce the number of individuals incarcerated for low-level offenses.¹⁰

Notwithstanding the efforts undertaken to date, our country continues to incarcerate people at a rate far higher than anywhere else in the world. The American criminal justice system currently holds more than 2.2 million people in an estimated

1,719 state prisons, 102 federal prisons, 942 juvenile correctional facilities, 3,283 local jails, and 79 Indian Country jails, as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories.¹¹ No matter how many times the statistics are repeated, they remain shocking: The United States has 4% of the world's population and 21% of the world's prisoners, nearly 40% of whom are African-American.¹² If the prison population were a state, it would be the country's 36th largest -- bigger than Delaware, Vermont and Wyoming combined.¹³

Unsurprisingly, correctional budgets have grown exponentially to support these incarceration levels and are now a substantial burden on taxpayers. In recent years, government expenditures on corrections in the United States have totaled nearly \$80 billion annually, which in real terms is more than 350% higher than the \$17 billion spent in 1980.¹⁴ Federal, state and local spending all follow similar patterns which experts believe have "been driven almost entirely by increased numbers of prisoners."¹⁵ Per prisoner, states on average spend \$37,000 per year,¹⁶ while the average annual cost for each individual incarcerated in federal prisons in 2015 was nearly \$32,000.¹⁷ Skyrocketing correctional spending is now growing faster than almost all other government services.¹⁸ A recent federal Department of Education report indicates that state and local spending on prisons and jails grew at triple the rate of spending on public education from 1980 to 2013.¹⁹ Clearly, there is an enormous amount of work still to be done.

A little over one year ago, the New York City Bar Association issued a report calling for action by our federal, state and local leaders to reduce the jail and prison population as well as the extraordinary costs and unnecessary burdens associated with mass incarceration.²⁰ Specifically, the City Bar highlighted the need for reforms such as repealing or reducing mandatory minimum sentencing provisions, reducing sentences recommended by sentencing guidelines for non-violent offenses, expanding alternatives to incarceration available to judges, eliminating or reducing financial conditions of pretrial release, providing the opportunity for individuals with misdemeanor or non-violent felony convictions to seal their records, and raising the age of juvenile jurisdiction in New York from 16 to 18 years old. The City Bar also formed the Task Force on Mass Incarceration, made up of representatives of government, leaders of not-for-profit institutions, academics and private practitioners.

Since its formation, the Task Force has harnessed the resources of the City Bar to draw attention to these issues, monitor developments on the federal, state and local levels, encourage dialogue among various groups with differing interests, and advocate for reform. Through the efforts of our six subcommittees, we have held two conferences and co-sponsored numerous others,²¹ supported legislation, and lobbied lawmakers and agency representatives for change.²²

Reducing the incarcerated population and addressing the pervasive impact of mass incarceration will continue to require a multi-faceted approach. To have the

greatest impact, all initiatives will need bipartisan support. Our newly elected officials in Washington and in Statehouses across the country must be encouraged to recognize mass incarceration's scope, breadth and impact on millions of people and countless communities across the country.

As our Nation prepares for a change of leadership in Washington, we have prepared this Report as part of the City Bar's effort to carry forward the momentum generated in the Obama years, and with the hope that progress will not stall during the new administration. Below, we highlight the positive steps that have been taken over the past year, and identify key priorities for the new administration and lawmakers going forward.

II. LOOKING BACK ON THE PAST YEAR

A. Making Criminal Justice Reform a National Priority

Over the last year, President Obama has made progress on a number of initiatives designed to reduce mass incarceration and make the criminal justice system fairer. President Obama has demonstrated his commitment to improving the system by becoming the first U.S. president to visit a federal prison while in office.²³

One of the most highly publicized reforms is the Clemency Initiative through which -- since its inception in 2014 -- President Obama has pardoned or commuted the sentences of more than 1,000 people convicted of non-violent offenses.²⁴ He has recognized that the vast majority of these people sentenced years ago would receive a lower sentence today and has adjusted sentences accordingly. Although the clemency program has affected the lives of thousands of prisoners and their families, and has inspired countless attorneys to represent incarcerated individuals on a pro bono basis, its scope is limited, as is its effect: it has affected less than one-tenth of one percent of the national prison and jail population. The Task Force would welcome and applaud additional bold acts of clemency in the final days of President Obama's administration, and we urge President-elect Trump to follow his lead. We encourage the states to develop similar programs to rein in the overuse of state prisons as well.

Recognizing the importance of higher education and training for incarcerated persons in order to improve their chances of success once released, the Department of Education announced a pilot program to provide higher education and training programs to about 12,000 incarcerated individuals.²⁵ This Second Chance Pell program, which connects 67 educational institutions with more than 100 federal and state correctional institutions,²⁶ will begin to compensate for Congress's misguided decision in 1994 to eliminate Pell Grant eligibility for incarcerated students.²⁷ We strongly encourage President-elect Trump to continue and expand this initiative.

The Obama administration has taken significant steps to address the conditions of confinement, announcing early in 2016 that federal prisons would no longer permit solitary confinement for juveniles. The President has also acted to reduce reliance on solitary confinement more generally. The Justice Department developed guiding principles to reduce the use of so-called “restrictive housing” throughout the criminal justice system.²⁸

The Justice Department has also focused on reducing recidivism by developing guidelines to facilitate adoption of reentry reforms at the federal level.²⁹ These multi-agency efforts include crafting reentry plans for individuals leaving federal custody, improving educational opportunities,³⁰ and providing assistance with obtaining employment and affordable housing. As noted above, President Obama has called on Congress to enact “ban the box” legislation and, in response to a presidential memorandum, the Office of Personnel Management has recently proposed rules banning the box (i.e., removing questions about applicants’ arrest and criminal conviction histories) on most federal job applications.³¹

More recently, the Justice Department announced it would phase out the use of private prisons, based in part on the success of the 2013 Smart on Crime Initiative.³² Deputy Attorney General Sally Yates stressed that private prisons “compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security.”³³

There have been some major disappointments since our first report. Chief among them is the failure to make headway on federal sentencing reform. Conditions seemed ripe for change when the Sentencing Reform and Corrections Act of 2015 (SRCA)³⁴ was endorsed by the Senate Judiciary Committee in October 2015, and the Sentencing Reform Act of 2015, a companion bill to the SRCA, was introduced in the House of Representatives and approved by the House Judiciary Committee in November 2015.³⁵

As part of a criminal justice reform package, however, the House Judiciary Committee also approved H.R.4002 which would create a criminal intent element (*mens rea*) for all federal crimes that are presently silent with regard to *mens rea*. The law would require prosecutors to prove that defendants “knew, or had reason to believe, the conduct was unlawful.”³⁶ On a panel in January 2016, House Judiciary Committee Chairman Bob Goodlatte warned that criminal justice reform efforts would not move forward without *mens rea* reform, saying that “a deal that does not address this issue [*mens rea*] is not going anywhere in the House of Representatives.”³⁷ The vocal opposition of several Republican Senators has also contributed to Senate Majority Leader Mitch McConnell’s reluctance to move the legislation forward.³⁸

Thus, despite initial high hopes for progress, and encouraging, concerted efforts to reach bipartisan agreement, federal criminal justice reform efforts have stalled in Congress. None of these bills have been brought to the House or Senate floor for a vote. The City Bar has previously written to the congressional leadership arguing that even well-meaning efforts to address the issue of *mens rea* should not be permitted to block sentencing reform that both parties agree is long overdue and sorely needed.³⁹

B. New York as a Model for Reform

As noted above, over the past few years, New York has succeeded in decreasing the rate of incarceration through a variety of policies on diversion and enforcement, demonstrating opportunities for reform that can be realized. In 2015, the State had the 12th lowest incarceration rate in the country.⁴⁰ New York City continues to have the lowest incarceration rate of the 10 largest cities in the U.S., as its jail population has dropped by half in the last 20 years and by 14% in the past two years.⁴¹ New York City also has the highest rate of those released on recognizance at arraignment in the nation (70%),⁴² and the majority of people who are released on bail generally post bail within one week of admission.⁴³ At the same time that jail and prison populations have decreased dramatically, New York City has also experienced an unprecedented reduction in crime.⁴⁴

The City is continuing to invest in strategies to reduce the number of people who enter jail as well as the length of time they stay, the two factors that drive the jail population. For example, supervised release as an alternative to detention, which began in March 2016, has diverted approximately 2,000 individuals who would otherwise likely have been held on bail.⁴⁵ The City also has one of the most robust alternatives to incarceration programs in the country, which provides post-sentencing diversion options for approximately 2,800 otherwise jail-bound individuals. Upcoming initiatives include an expansion of supervised release, the expansion of bail funds for those detained on misdemeanors with bails of less than \$2,000, a revision of the City's failure to appear tool to increase the number of individuals released on recognizance, and an expansion of alternatives to incarceration for individuals receiving City sentences.

The City is also focusing on reducing case delay in an effort to reduce the amount of time people spend in the City's jails through a partnership with the courts, district attorneys, the defense bar, and the Department of Correction. In the first phase of the initiative, the City focused on eliminating the backlog of cases older than one year in which the defendant remains incarcerated; approximately 90% of the over 1,400 cases originally identified in April 2015 have been resolved through these efforts.⁴⁶ The City's next phase is to develop more enduring system changes (including recommending case milestones between critical points during the life of felony cases) to reduce the amount of time individuals spend in jail. Thus far, this effort is showing encouraging results across boroughs.

Although the City has seen an historic reduction in its jail population, and current efforts are producing noticeable reductions, there is still work to be done. Like all jurisdictions, the City's jails hold people who are awaiting trial and have not been convicted of the crime of which they are accused. Posting bail, even a "low" amount of \$500 or \$1,000, may be challenging for some individuals.⁴⁷ On any given day, approximately 400 individuals are detained on bail of less than \$2,500.⁴⁸ Finally, the physical location of Rikers Island, which requires time-consuming travel for family visitors as well as for detainees attending court appearances, exacerbates the effects of incarceration. In November 2016, the City Council announced that it had added \$600,000 to the 2017 budget to allow video visitation at 22 library branches around the City; previously, this program only existed in Brooklyn.⁴⁹

1. *Rikers Commission*

The Rikers Commission, formally called the Independent Commission on New York City Criminal Justice and Incarceration Reform, was proposed by New York City Council Speaker Melissa Mark-Viverito to look at additional ways to reduce the population of the Rikers Island jail facilities, with the ultimate aim being the possible closing of the jail.⁵⁰

Although the City has seen an historic reduction in its jail population, Rikers continues to exemplify the need for criminal justice reform.⁵¹ Roughly 75% of individuals incarcerated on Rikers Island are awaiting trial or have otherwise pending cases, and have not been convicted of any crime.⁵² As noted above, many simply cannot afford bail. And like other jails, Rikers disproportionately holds people of color and the mentally ill; 88% of those incarcerated in New York City jails are black or Latino,⁵³ and almost 40% have been diagnosed with some form of mental illness.⁵⁴

The Rikers Commission, which is fully independent and chaired by former New York State Court of Appeals Chief Judge Jonathan Lippman, is considering how to further shrink the population of Rikers, including by examining procedural changes that reduce the time spent on Rikers Island, alternatives to the bail system, how to shorten case delays, and how to expand alternative-to-incarceration programs.⁵⁵ The Commission also is examining how a jail would ideally look if it were being built from scratch today.⁵⁶

The Rikers Commission expects to issue a report of its findings and recommendations in April 2017. Its creation marks a significant opportunity to rethink incarceration in New York City and improve our criminal justice system from the inside out.

2. *Warrant and Summons Reform*

New York City has also taken steps to reduce the number of people who spend time in jail for low-level offenses. A set of eight bills (collectively, the “Criminal Justice Reform Act” or “Act”), which went into effect in 2016, are designed to address the huge number of criminal summonses issued each year, by permitting the New York Police Department (“NYPD”) to issue civil, rather than criminal, summonses.⁵⁷ In 2015, the NYPD issued over 150,000 criminal summonses for low-level infractions, such as having an open container of alcohol, being in a park after hours, littering, or public urination.⁵⁸ Overwhelmingly, these cases are dismissed; only 21% of people are found guilty and the penalty is usually a fine – no jail time. However, the summonses generally require a court appearance and a failure to appear can result in the issuance of an arrest warrant. In addition, the summonses can result in a permanent criminal record.⁵⁹ In contrast, when civil summonses are issued, appearances can be made by phone, fines can be paid online, and an individual who receives a civil summons does not run the risk of a warrant, arrest and a permanent criminal record. The City Council expects that, through the use of civil summonses, over 100,000 cases will be diverted from the criminal justice system and put into New York City’s Office of Administrative Trials and Hearings each year, thereby reducing the number of warrants as well as related collateral consequences, the financial burden of penalties, and lightening the touch of low-level law enforcement.⁶⁰

3. *Funding for Indigent Representation*

In New York, the financial costs of making good on the constitutional promise of counsel for all defendants, regardless of ability to pay, has historically been placed on individual counties. The resulting patchwork of services has proven insufficient to meet the needs of New York’s indigent defendants. In 2005, the New York Civil Liberties Union sued the State of New York on behalf of criminal defendants, alleging that the State’s failure to adequately fund and oversee the public defense system resulted in violations of the constitutional right to meaningful and effective assistance of counsel.⁶¹ That case, *Hurrell-Harring v. State of New York*, was resolved by a settlement under which the State agreed to provide increased funding for five counties⁶² and to ensure quality legal representation in those counties. New York’s 57 other counties, however, remain without any additional funding.

In June 2016, both houses of the New York State legislature unanimously passed A.10706/S.8114, a bill that would require increased funding throughout the rest of the State. The legislation would shift some of the cost of providing legal services to the State, which would pay approximately \$390 million currently funded by county governments and New York City.⁶³ The Task Force has written in support of the bill.⁶⁴ Following the Governor’s decision to veto the bill on December 31, 2016, the Task Force plans to review any alternative bills introduced this legislative session and will continue its advocacy in support of this important change in the law.

4. *Alternatives to Incarceration*

New York City currently funds and oversees 20 alternatives to incarceration programs citywide. In fiscal year 2016, approximately 2,800 individuals who would ordinarily be facing jail or prison sentences were diverted to treatment or other programs through these efforts. A rise in the use of non-incarcerative sentences corresponded to the substantial drop in the jail population over the past 20 years.⁶⁵

On the federal level, in January 2012 the Pretrial Opportunity Program (“POP”), a specialized drug court, was created at the direction of the Board of Judges of the U.S. District Court for the Eastern District of New York. In 2013, the Special Options Services program, which provides intensive supervision for youthful offenders, was expanded to include regular meetings between participants and magistrate judges.⁶⁶ Their recent successes affirm the importance of these types of programs and offer examples that could be emulated across the country.

POP is a presentence program which offers participants the opportunity to avoid incarceration entirely. Participants meet with drug counselors, pretrial services officers, and judges in programs designed to provide support and motivation. To successfully complete the program, participants must meet certain requirements, including remaining drug-free and participating in monthly meetings for at least twelve months. Participation can result in early termination of supervised release, which reduces both costs and recidivism rates.

The results are impressive. As of January 2015, of those who successfully completed the program only one participant was rearrested (and those charges eventually were dropped). All participants retained their jobs, and one had his charges dismissed entirely. The report issued in 2015 by the Board of Judges recognizes these achievements, but also acknowledges that there is still much left to be done – including additional study of alternatives to incarceration programs to improve and expand them.⁶⁷

Another successful diversion initiative is the Law Enforcement Assisted Diversion (“LEAD”) program which is being tested in Albany. The LEAD program, developed by national experts in harm reduction, racial justice and criminal process (and initially piloted in Seattle), empowers police officers to divert into drug treatment and other social services individuals they would ordinarily have arrested for low-level drug possession and use crimes.⁶⁸ In its pilot phase, the LEAD program has been proved to reduce recidivism, not only by providing needed treatment, but by helping individuals avoid the myriad collateral consequences of a criminal conviction.⁶⁹ Law enforcement agencies in Albany are testing the LEAD program now, anticipating that it will allow almost 500 individuals the chance of beating addiction and avoiding the collateral consequences that may follow even a minor arrest.⁷⁰ The program should be piloted across the state.

III. LOOKING AHEAD TOWARD FURTHER REFORM

A. Maintaining the Momentum Nationally

Notwithstanding discouraging signals from the campaign trail that may portend a return to reflexive over-reliance upon incarceration, along with its attendant enormous costs and harmful social consequences, we remain hopeful that President-elect Trump and the newly constituted Congress will continue to build on bipartisan initiatives to address the problem of mass incarceration.

1. *Sentencing Reform*

We cannot stress enough the importance of making headway on sentencing reform. As noted above, although other sentencing reform bills have previously been submitted to Congress, the Sentencing Reform and Corrections Act is the first to have significant support from both sides of the aisle. Though it does not go far enough, we urge Congress to make the passage of this legislation one of its highest priorities in 2017. Among other key provisions, the bill would:

- Reduce enhanced mandatory minimum sentences for individuals with prior drug felonies (in some cases retroactively), specifically by reducing the mandatory minimum sentence from life to 25 years for people convicted of three drug-related crimes under the federal “three strikes law”; and the reduction of the mandatory minimum sentence for a second drug conviction from 20 years to 15 years;
- Give judges more discretion to impose sentences below the statutory minimums for defendants who have not been involved in violent crimes or possessed firearms, and who are not part of a “continuing criminal enterprise”;
- Reduce sentences retroactively for incarcerated persons who were sentenced under harsh guidelines for possession of crack cocaine that were required by federal law until 2011, with the goal of eliminating the unfair disparity in mandatory minimum sentences for possession of crack cocaine and crack; and
- Allow for expungement and sealing of certain types of juvenile records; and authorizing reentry demonstration projects that could include substance use disorder treatment services and vocational and educational training, designed to support effective reintegration into the community.⁷¹

In addition to sentencing reform, the Task Force encourages our legislators in Washington to support other initiatives aimed at reducing the prison population. Specifically, we urge Congress to consider policies, a number of which are outlined below, which would encourage the early release of individuals who are least likely to be

convicted of new crimes and increase and enhance reentry programs. We also believe that improving the conditions of incarceration and offering desperately needed substance abuse and mental health services will assist many individuals in making a more successful transition back to their communities once their prison terms are over.

2. *Early Release Programs*

In 2015, the U.S. Sentencing Commission lowered the Sentencing Guidelines for drug offenses through a provision called “drugs minus two” that reduced the guidelines portion of federal sentences.⁷² A further amendment made this change retroactive, applying to an estimated 46,000 individuals serving time under the old Guidelines.⁷³ The sentence reductions are not automatic—the defendant must meet certain specified conditions, and, separately, a district judge must determine whether or not a sentence reduction is appropriate.⁷⁴

The Department of Justice should work with judges and other relevant stakeholders to address the cases of all those individuals eligible for the reduction whose files have not yet been processed. Furthermore, the Sentencing Commission should consider other amendments which would have the effect of permitting non-violent individuals early release and, accordingly, consider the application of those amendments retroactively. Indeed, the Task Force has advocated for an amendment to the Sentencing Guidelines expressly authorizing a downward departure for judge-involved intensive presentence supervision programs.⁷⁵

3. *Reentry Programs*

As noted above, the Obama administration has already explored reforms aimed at eliminating and/or reducing the many significant barriers that individuals face on release when seeking employment, looking for housing, or obtaining public assistance. In April, the Justice Department published its “Roadmap to Reentry,” a series of principles designed to reduce recidivism through improved reentry outcomes at the Federal Bureau of Prisons.⁷⁶ The goal is to implement these principles of reform throughout the prison system. These principles include, among others: the requirement that every individual receive an individualized reentry plan; that while incarcerated every individual be provided with education, employment training, life skills, substance abuse and mental health treatments, and other programs that maximize his or her likelihood of success upon release; and that, before leaving custody, each individual be provided with comprehensive reentry-related information and access to resources necessary to succeed in the community. The Task Force wholeheartedly supports these guiding principles and we urge federal legislators to ensure that adequate funding and support for these efforts is made available. We also hope that new leadership at the Justice Department recognizes the importance of this initiative and continues to make reentry reform a top priority.

4. *Improving the Conditions of Incarceration—Substance Abuse and Mental Health Treatments*

In 2010, more than half of all individuals in federal custody met the medical criteria for substance use disorder. However, only 11% of those individuals received treatment for their conditions.⁷⁷ The Center for Addiction and Substance Abuse posits that, over the long term, substance use disorder treatment could save the country approximately \$90,000 per incarcerated individual per year—a significant sum over the long term.⁷⁸ We urge the federal government to invest in substance addiction programs for incarcerated persons, both to improve the likelihood of a successful reentry and to realize substantial financial savings.

The relationship between incarceration and mental illness is well-established. Estimates suggest that “at least 400,000 inmates currently behind bars in the United States suffer from some sort of mental illness, and, likewise, between 25% and 40% of all mentally ill Americans” will face some form of incarceration.⁷⁹ This obvious link warrants attention on multiple levels. *First*, more resources need to be devoted to treating mental health issues while in prison. *Second*, the use of solitary confinement, which has been shown to be strongly associated with severe psychological side-effects, needs to be reexamined as a method of punishing incarcerated individuals and, ultimately, should be severely limited.

B. Building on Key Initiatives in New York

As noted above, New York has achieved historic reductions in its jail population over the past two years and is in the process of implementing several new initiatives that aim to realize further reductions.

1. *Bail Reform*

Approximately 47,000 people will stay in jail this year in New York City - before they ever get a trial or are convicted - simply because they can't pay bail.⁸⁰ As noted above, the City is taking steps to ameliorate this problem, including a supervised release program launched in March 2015.⁸¹ Under this program, judges can now assign eligible lower-risk defendants to a supervisory program rather than rely on monetary bail. The eligibility of defendants for this program is risk-driven; a tool developed by the City's Criminal Justice Agency is designed to help identify eligible candidates and set appropriate levels of supervision as conditions of release.⁸² All participants in this program will receive phone calls or text messages reminding them of court dates and other critical dates.⁸³ The Mayor's office also requires that supervised release providers conduct a monthly, individualized assessment to determine whether levels of supervision should be adjusted.⁸⁴ Once fully implemented, this program is expected to involve 3,000 individuals each year.⁸⁵

In partnership with state courts, the City is now working to launch the first-ever online bail payment system that will allow families to post bail earlier and more easily.⁸⁶ This program will help defendants avoid unnecessary jail time; indeed, obstacles to posting bail are reported to contribute to approximately 12,000 unnecessary jail stays each year.⁸⁷ To facilitate payment for those with bail set at arraignment, the City will install ATMs in the courthouses and will allow for online bail payment starting in the spring of 2017.⁸⁸ Additionally, the City is working with the City Council, the Department of Finance, and the Office of Management and Budget to eliminate a 3% fee that is currently imposed when a defendant released on bail ultimately pleads guilty or is found guilty.⁸⁹ This will ensure that anyone who pays bail will have the full bail amount returned as long as the defendant makes all required court appearances. In addition, a City Council backed bail fund, The Liberty Fund, will launch in 2017 to assist those charged with non-violent misdemeanors who have bail set at \$2,000 or less.⁹⁰ The Task Force applauds State and City officials for continuing to make bail reform a high priority.

The City is engaging in other bail reforms as well. To better assess a defendant's risk of failure to appear ("FTA") at a future court date, the City is planning to introduce a new risk assessment tool which will provide judges with guidelines on defendants' level of FTA risk with the intent of reducing the number of people held. While the City is continuing an effort to consider danger as well as flight risk in making the bail decision by submitting legislation at the state level,⁹¹ prior efforts to pass legislation that, among other things, would allow judges to consider dangerousness in bail determinations have met with opposition, including from the City Bar in a 2013 report.⁹² However, as long as New Yorkers who have not been convicted of any crime are jailed simply because they are too poor to pay bail, the need for reform is undeniable. The Task Force looks forward to studying any new legislation that is introduced in the upcoming session. In the meantime, judges should be encouraged to use all facets of the current bail system to reduce unnecessary incarceration and should set bail amounts only after taking into account an individual's ability to pay. For example, judges can allow bail to be secured with a credit card that will be charged only if the person fails to appear, or with an unsecured bond that will come due only if the person fails to return to court. These non-cash forms of bail are routinely used elsewhere and are already legal options in New York.

2. *Second Chance Amendment and Earned Early Release Legislation*

We urge State lawmakers to consider adding a new subsection to Criminal Procedure Law 440.20 (governing motions to set aside a sentence) that would allow an individual under certain circumstances to petition the original sentencing judge to request that his or her sentence be reduced or modified on the ground that the sentence is excessive -- that is, greater than necessary to achieve the purposes of incarceration. This would give individuals the chance to prove, while still serving their sentences, that they deserve a reduced sentence. Petitioners would be allowed to present evidence about good behavior and achievements while incarcerated, as well as information about their age,

personal circumstances, and medical condition. Permitting this mid-sentence reset opportunity would incentivize good behavior and participation in educational and vocational programs.⁹³

We also support the development of legislation that would provide an avenue to automatic sentence reductions – beyond the current merit and good-time programs – based on an individual’s conduct while incarcerated. This legislation would incentivize people to complete educational and rehabilitative programs and meet goals consistent with evidence-based practices that will help them successfully reenter society after release. Unlike merit time, which requires a discretionary decision by the parole board, and the proposed Second Chance amendment, which would require a discretionary decision by the sentencing judge, this proposal would create an automatic sentence reduction when the reentry factors have been met, as determined by the New York State Department of Corrections and Community Supervision.

3. *Parole Reform*

The Task Force supports State efforts to bring much needed reform to the parole system. A recent investigatory series in the *New York Times* has highlighted the discriminatory impact of parole release decisions, including a racial disparity in determinations of parole for low-level felonies.⁹⁴ Governor Cuomo has directed the State Inspector General to investigate any parole disparities and has announced positive steps toward reform including new Parole Board appointments, which will ensure that the Board is more diverse and reflective of the State’s population.⁹⁵ We urge the Governor to make those appointments promptly and urge the Senate to act on them without delay. Additionally, we support proposed revisions to Parole Board regulations that would require the Board to better use “risk and needs” principles in guiding parole decisions. Finally, we believe that there should be greater transparency in parole decisions.⁹⁶

4. *Raise the Age Reform*

In 2015, Governor Cuomo rightly called upon the New York State Legislature to enact legislation to raise the age of adult criminal responsibility to, at a minimum, 18 years old.⁹⁷ To date, the Legislature has failed to act.⁹⁸ As we noted in our 2015 report, New York remains one of only two states in the country that automatically prosecutes all 16 and 17 year-old children as adults.⁹⁹ We urge the newly elected state legislators to remedy this situation and raise the age of criminal responsibility to a minimum of 18 years.

5. *Minimizing Collateral Consequences*

As experience and common sense reflect, the harsh consequences that flow from criminal convictions -- *e.g.*, difficulty in obtaining employment and access to benefit programs, limited eligibility for subsidized housing, obstacles to obtaining educational

benefits -- often set up recently released individuals for failure.¹⁰⁰ The Task Force strongly supports legislation to seal or expunge criminal records in certain circumstances¹⁰¹ so that individuals do not face the kinds of collateral consequences that create virtually insurmountable barriers to successful reentry into their communities.

We urge the State to enact legislation that is similar to New York City's Fair Chance Act. This Act makes it unlawful for "most employers in New York City to ask about the criminal record of job applicants before making a job offer."¹⁰² This ban applies to ads, applications, and interview questions.¹⁰³ If, upon making a job offer, the employer wants to revoke the offer due to the applicant's criminal record, it must provide the applicant with "Fair Chance Notice" explaining its reasons.¹⁰⁴ The employer must also provide the applicant the criminal record information that informed its decision.¹⁰⁵ While there is some evidence that this type of ban-the-box legislation may have a negative impact on job applicants of color, the studies are conflicting.¹⁰⁶

Recognizing the potential barriers faced by individuals seeking educational opportunities upon release from incarceration, the SUNY Board of Trustees recently voted to "ban the box" on college applications and will now refrain from inquiring about arrest and conviction histories on applications.¹⁰⁷ We urge other colleges and universities, public and private, to follow suit.

We also favor legislation that would create a uniform "Certificate of Rehabilitation" in lieu of the current Certificates of Relief from Disabilities and Good Conduct.¹⁰⁸ The Certificate of Rehabilitation would have all the attributes of the two current documents and none of the apparent disadvantages:¹⁰⁹ among other things, it would lift automatic bars to occupational licensing, and employers would be required to consider the Certificate when evaluating job applicants and current employees.

We urge New York lawmakers to focus resources on prison programs that facilitate successful reentry, and penal institutions should implement validated programming to prepare individuals for release. To that end, we encourage the development of a system for measuring successful reentry programs and policies undertaken by New York State prisons, both across the system and prison by prison. We recommend a data-driven management system -- modeled after NYPD's CompStat -- to track key reentry performance measures for people returning home to their communities from New York State prisons, in particular recidivism, as well as the percentage of people with stable housing, employment, a plan for drug treatment and mental health services, valid personal identification, health insurance, and an accurate criminal history report. The primary goal should be to enable individuals leaving state custody to be in the best possible position to return to their communities as contributing law-abiding citizens.

IV. CONCLUSION

The effort to reduce the huge numbers of people incarcerated across our nation and the consequences that flow from this incarceration and from criminal convictions themselves, should not be partisan issues. The pernicious effects of mass incarceration affect individuals, families, communities, employers, and hard-pressed government budgets in *all* states and in *all* communities across the country. We remain cautiously optimistic that voices of reason on both sides of the aisle will succeed in toning down the divisive rhetoric that accompanied the campaign, and that our elected representatives will make a concerted effort to work together on implementing criminal justice reforms, including the many initiatives we have highlighted in this Report. As the new administration grapples with these important issues for the first time, however, achieving progress at the state and local levels may become more crucial than ever. We urge all of our elected leaders in the strongest possible terms to sustain the momentum for meaningful reform in the coming year.

Task Force on Mass Incarceration
John F. Savarese, Chair

January 2017

ENDNOTES

¹ See, e.g., Dr. James Austin et al., Brennan Center for Justice, *How Many Americans Are Unnecessarily Incarcerated?* (Dec. 2016), <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>; Elizabeth Swavola et al., Vera Institute of Justice, *Overlooked: Women and Jails in an Era of Reform* (Aug. 15, 2016), <https://www.vera.org/publications/overlooked-women-and-jails-report>; The Sentencing Project, *Strategizing for Reform: State Campaign Successes* (Oct. 5, 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/Strategizing-for-Reform-State-Campaign-Successes.pdf>; Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, The Atlantic (Apr. 28, 2016), <http://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>.

² Juleyka Lantigua-Williams, *President Obama Hits Another Commutation Milestone*, The Atlantic (Nov. 22, 2016), <https://www.theatlantic.com/amp/article/508538/>; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811 (2017). See sources cited *infra* note 24.

³ Grainne Dunne, Brennan Center for Justice, *Four Ways the Obama Administration Has Advanced Criminal Justice Reform* (May 19, 2016), <https://www.brennancenter.org/blog/four-ways-obama-administration-has-advanced-criminal-justice-reform>. See generally Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, *supra* note 2.

⁴ *Id.* For example, the Justice Department has adopted meaningful changes to the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, the nation's largest criminal justice grant program. The JAG program previously included perverse incentives to increase unnecessary incarceration as funding relied on outdated statistics such as arrest volume and the number of new drug-related cases. The Justice Department will now utilize a "success-oriented funding" model that creates incentives for states, cities and local police to reduce "both crime and unnecessary incarceration" as funding will be based upon data including crime rate changes and the percent of cases where alternatives to prison were recommended by prosecutors. Jon Frank, Brennan Center for Justice, *Justice Department Issues Changes to Largest Criminal Justice Grant* (Jan. 8, 2016), <https://www.brennancenter.org/blog/justice-department-issues-changes-largest-criminal-justice-grant>.

⁵ In April, President Obama issued a presidential memorandum to formally establish the Federal Interagency Reentry Council "to ensure that the Federal Government continues" to focus on the "rehabilitation and reintegration of individuals returning to their communities from prisons and jails." This Memorandum also directed the heads of executive departments and agencies to, among other things, implement rules prohibiting federal agencies from asking whether job applicants have a criminal record until the final phase of the hiring process. Presidential Memorandum on Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals, 81 Fed. Reg. 26993 (Apr. 29, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-05-04/pdf/2016-10662.pdf>. See also sources cited *supra* note 31 (discussing a "ban the box" rule proposed by the Office of Personnel Management); Federal Interagency Reentry Council, *A Record of Progress and a Roadmap for the Future* (Aug. 2016), <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, *supra* note 2.

⁶ See e.g., FAMM, *Sentencing Reform and Corrections Act of 2015 (S. 2123)* (last accessed Jan. 4, 2017), <http://fam.org/sentencing-reform-and-corrections-act-of-2015/> (analyzing provisions and potential impact of sentencing reform bills introduced during the 114th Congressional session). As we discuss on pages 4-5 *infra*, none of these bills were adopted.

⁷ Brennan Center for Justice, *Justice Update: Majority of States Cut Both Crime and Incarceration* (June 16, 2016), <https://www.brennancenter.org/newsletter/justice-update-majority-states-cut-both-crime-and-incarceration>; Rebecca Silber et al., Vera Institute of Justice, *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015* (May 2016), <http://archive.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2014-2015.pdf> (detailing how "[i]n 2014

and 2015, 46 states enacted at least 201 bills, executive orders and ballot initiatives to reform at least one aspect of their sentencing and corrections systems”).

⁸ A.10706/S.8114, <https://www.nysenate.gov/legislation/bills/2015/s8114/amendment/original>; Joel Stashenko, *Indigent Defense Proponents Hail ‘Historic Moment’ in NY*, N.Y.L.J. (June 21, 2016), <http://www.newyorklawjournal.com/id=1202760482280/Indigent-Defense-Proponents-Hail-Historic-Moment-in-NY>. See also Task Force Letter to Gov. Cuomo, *infra* note 22, and related discussion *infra* p. 7. Regrettably, this bill was vetoed by Governor Cuomo on December 31, 2016, with the Governor indicating that he will introduce his own statewide indigent defense funding plan for consideration by the Legislature this session. Governor’s Veto Message – Veto No. 306 of 2016, <http://politi.co/2ikRBZ0>. The Task Force plans to continue its advocacy on this important issue.

⁹ See *infra* pp. 5-8.

¹⁰ Hon. Jonathan Lippman, Independent Commission on New York City Criminal Justice and Incarceration Reform, *Rethinking Rikers Island*, More Just NYC (July 13, 2016), <http://www.morejustnyc.com/about-us/rethinking-rikers-island>.

¹¹ Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2016*, (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>.

¹² Roy Walmsley, Institute for Criminal Policy Research, *World Prison Population List 5* (11th ed. 2016), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf; Federal Bureau of Prisons, *Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (37.8% of Federal inmates are African-American as of Oct. 29, 2016 per “[s]tatistics based on prior month’s data.”). See also Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 1 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (noting that the U.S. incarceration rate is “5 to 10 times higher than the rates in Western European and other liberal democracies”).

¹³ Lauren-Brooke Eisen & Inimai N. Chettiar, Brennan Center for Justice, *The Reverse Mass Incarceration Act 1* (Oct. 12, 2015), <https://www.brennancenter.org/publication/reverse-mass-incarceration-act>.

¹⁴ See Melissa S. Kearney et al., The Hamilton Project, *Ten Economic Facts about Crime and Incarceration in the United States* 13 (May 2014), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf (noting that in FY 2010, more than 57% of correctional spending was by the states, 33% by local governments, and 10% by the federal government). From 1985 to 2012, state-level correctional spending increased from \$6.7 to \$53.2 billion; by 2010 spending on jails totaled \$26.8 billion. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, *supra* note 12, at 315. The Bureau of Prisons (“BOP”) budget increased from \$330 million in FY 1980 to nearly \$7.5 billion in FY 2016. The BOP budget in FY 1980 “accounted for 15% of the total amount appropriated for DOJ; in FY 2016 it was 26%.” Nathan James, Congressional Research Service, *The Federal Prison Population Buildup: Options for Congress* 2-3 (May 20, 2016), available at <https://fas.org/sgp/crs/misc/R42937.pdf>.

¹⁵ *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, *supra* note 12, at 315.

¹⁶ *Id.* at 316.

¹⁷ *Annual Determination of Average Cost of Incarceration*, 81 Fed. Reg. 46957 (July 19, 2016), <https://www.federalregister.gov/d/2016-17040>.

¹⁸ *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, *supra* note 12, at 314-15.

-
- ¹⁹ U.S. Dept. of Education, *State and Local Expenditures on Corrections and Education 1* (July 2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>.
- ²⁰ New York City Bar, *Mass Incarceration: Seizing the Moment for Reform* (Sept. 2015), http://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf.
- ²¹ On November 15, 2016, the Task Force held its first annual event, *A New President, A New Approach to Sentencing Reform*. Other City Bar conferences have included *Mass Incarceration: Causes and Solutions* (May 3, 2016); *Examining Conditions of Confinement in New York's Correctional Facilities: A Focus on Prisoner's Rights* (Sept. 21, 2016); and *Perpetual Punishment? The Afterlife of Hyper-Incarceration in the U.S.* (June 28, 2016).
- ²² See, e.g., *Report on Legislation by the Task Force on Mass Incarceration* (May 2016), <http://onenorth-nyc-bar.s3.amazonaws.com/files/ade67af6d9e1aa9f274d1f55ef92251f.pdf> (approving A.6202-C/ S.6341-B (requiring New York State to fully fund indigent defense services in all counties)); Task Force Letter to Hon. Andrew Cuomo, Support the Full Funding of Indigent Defense Services (Aug. 1, 2016), http://s3.amazonaws.com/documents.nycbar.org/files/20073150-Indigent_Defense_Services_Full_Funding_Mass_Incarceration_Report_FINAL_8.1.16.pdf (urging Gov. Cuomo to sign bill A.10706/S.8114); Task Force Letter to Chief Judge Patti Saris, Chair, U.S. Sentencing Commission, Inclusion of a Sentencing Departure for Successful Alternatives to Incarceration (Sept. 21, 2016), http://documents.nycbar.org/files/20073160-SentencingDeparture_MassIncarceration_ReportFINAL_9.21.16.pdf.
- ²³ Tom LoBianco, "President Barack Obama Makes Historic Trip to Prison, Pushes Reform," CNN (July 17, 2015), <http://www.cnn.com/2015/07/16/politics/obama-oklahoma-federal-prison-visit/>.
- ²⁴ See Press Release, U.S. Department of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014); Press Release, Clemency Project 2014, As Thanksgiving Approaches, President Obama Announces 79 New Clemency Grants; Total Grants Surpass 1,000 (Nov. 22, 2016), <https://www.clemencyproject2014.org/media/161122>; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, *supra* note 2, at 836-38.
- ²⁵ Press Release, U.S. Department of Education, 12,000 Incarcerated Students to Enroll in Postsecondary Educational and Training Programs Through Education Department's New Second Chance Pell Pilot Program (June 24, 2016), <http://www.ed.gov/news/press-releases/12000-incarcerated-students-enroll-postsecondary-educational-and-training-programs-through-education-departments-new-second-chance-pell-pilot-program>; Danielle Douglas-Gabriel, *12,000 Inmates to Receive Pell Grants to Take College Classes*, *The Washington Post* (June 24, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/24/12000-inmates-to-receive-pell-grants-to-take-college-classes/?utm_term=.627c3a08e124.
- ²⁶ Press Release, U.S. Department of Education, 12,000 Incarcerated Students to Enroll in Postsecondary Educational and Training Programs Through Education Department's New Second Chance Pell Pilot Program (June 24, 2016).
- ²⁷ See *Mass Incarceration: Seizing the Moment for Reform*, *supra* note 20, at 5-6.
- ²⁸ Press Release, The White House, Fact Sheet: Department of Justice Review of Solitary Confinement (Jan. 25, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; U.S. Dept. of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Jan. 2016), <https://www.justice.gov/dag/file/815551/download>.
- ²⁹ See U.S. Dept. of Justice, *Roadmap to Reentry: Reducing Recidivism through Reentry Reforms at the Federal Bureau of Prisons* (Apr. 25, 2016), <https://www.justice.gov/reentry/roadmap-reentry>.

-
- ³⁰ U.S. Dept. of Education, White House Announces New Commitments to Fair Chance Higher Education Pledge (Sept. 14, 2016), <http://www.ed.gov/news/press-releases/fact-sheet-white-house-announces-new-commitments-fair-chance-higher-education-pledge>.
- ³¹ Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 26173 (May 2, 2016) (to be codified at 5 C.F.R. pts. 330 & 731), <https://www.gpo.gov/fdsys/pkg/FR-2016-05-02/pdf/2016-10063.pdf>; Beth F. Cobert, Director, Office of Personnel Management, “Banning the Box” in Federal Hiring, OPM Director’s Blog (Apr. 29, 2016, 9:30 a.m.), <https://www.opm.gov/blogs/Director/2016/4/29/Banning-the-Box-in-Federal-Hiring/>; Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, *supra* note , at 833-34. See also sources cited *supra* note 6.
- ³² Memorandum from Sally Yates, Deputy Attorney General to the Acting Director, Federal Bureau of Prisons, *Reducing Our Use of Private Prisons 1* (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download>. That initiative involved, among other things, a shift away from putting “low-level, nonviolent” offenders behind bars.
- ³³ *Id.*
- ³⁴ S.2123, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/2123>. The SRCA bill would, among other things: abolish certain mandatory minimum sentences, limiting mandatory minimums to serious drug felonies and violent crimes; give judges greater discretion in sentencing; ban solitary confinement for juveniles; make juveniles eligible for parole after a maximum of 20 years; and promote reentry services for people nearing the ends of their sentences. See U.S. Senate Judiciary Committee, *The Sentencing Reform and Corrections Act of 2015* (last accessed Jan. 4, 2017), <https://www.judiciary.senate.gov/download/sentencing-reform-and-corrections-act-section-by-section>; FAMM, *The Revised Sentencing Reform and Corrections Act of 2015 (S.2123)* (last accessed Jan. 4, 2017), <http://famm.org/wp-content/uploads/2016/05/FS-S2123-Sentencing-Reform-Corrections-Act.pdf>.
- ³⁵ H.R.3713, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/3713>.
- ³⁶ H.R.4002, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/4002>. Sen. Orrin Hatch (R-UT) introduced a similar bill named “Mens Rea Reform Act of 2015” requiring prosecutors to prove that a defendant acted “willfully, with respect to any element [of a criminal statute or regulation] for which the text of the covered offense does not specify a state of mind.” S.2298, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/2298>.
- ³⁷ Ben Geman, *Obama’s Capitol Hill Wish List*, *The Atlantic* (Jan. 12, 2016), <http://www.theatlantic.com/politics/archive/2016/01/obamas-capitol-hill-wish-list-a-few-possibilities-peek-through-in-sotu/459102/>.
- ³⁸ See Perry Bacon Jr., *Are Bipartisan Efforts on Criminal Justice Reform at an Impasse?*, Meet the Press (June 6, 2016), <http://www.nbcnews.com/meet-the-press/are-bipartisan-efforts-criminal-justice-reform-impasse-n584921>; Maurice Chapman, *Two Parties, Two Platforms on Criminal Justice*, The Marshall Project (July 18, 2016), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice#.uHsfjHm6>; Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, *supra* note 2, at 827-29.
- ³⁹ See Letter from Ira Feinberg, Chair, Federal Courts Committee of the City Bar, to the Hon. Charles E. Grassley et al. (Aug. 16, 2016), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-expressing-concerns-regarding-the-mens-rea-reform-act-of-2015-and-the-criminal-code-improvement-act-of-2015>.
- ⁴⁰ E. Ann Carson, U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, at 9 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

⁴¹ Judith Greene & Vincent Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, 26 Federal Sentencing Reporter 22 (Oct. 2016), https://www.hks.harvard.edu/ocpa/cms/files/criminal-justice/research-publications/fsr2901_04_greeneschiraldi.pdf.

⁴² Mayor's Office of Criminal Justice, *Safely Reducing the New York City Jail Population* (last accessed Jan. 4, 2017), <http://www.justice-data.nyc/safely-reducing-the-jail-population/> (citing arraignment outcomes in 2014).

⁴³ *Id.*

⁴⁴ See e.g., Greene & Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, *supra* note 42.

⁴⁵ Estimate of supervised release participants provided by Mayor's Office of Criminal Justice. See also Press Release, Office of the Mayor, Mayor de Blasio Announces Citywide Rollout of \$17.8 Million Bail Alternative, *infra* note 82.

⁴⁶ Mayor's Office of Criminal Justice, *Cutting Case Processing Times*, http://www1.nyc.gov/site/criminaljustice/work/cutting_case_processing_times.page (last updated Sept. 29, 2016, citing Office of Court Administration statistics).

⁴⁷ Hon. Jonathan Lippman, Independent Commission on New York City Criminal Justice and Incarceration Reform, *Rethinking Rikers Island*, More Just NYC (July 13, 2016), <http://www.morejustnyc.com/about-us/#about-us/rethinking-rikers-island>.

⁴⁸ This includes individuals charged with misdemeanor and felony offenses. Mayor's Office of Criminal Justice (analysis of Department of Correction data).

⁴⁹ Erin Durkin, *More library branches to offer video conferencing for families of Rikers Island inmates*, N.Y. Daily News (Nov. 30, 2016), <http://www.nydailynews.com/new-york/library-branches-offer-video-chat-rikers-families-article-1.2893506>.

⁵⁰ *Rethinking Rikers Island*, *supra* note 47.

⁵¹ The story of Kalief Browder, who was sent to Rikers Island at age 16 for allegedly stealing a backpack, remains a heartbreaking example of the conditions faced by incarcerated persons and, in particular, by young people. Browder was subjected to beatings by both staff and incarcerated persons and almost two years of solitary confinement. Unable to post \$3,000 bail, he was released after waiting three years for trial when the charges against him were dropped. He committed suicide two years later. His story, and his mother's pain and suffering in the aftermath of his death, are detailed in recent articles. See e.g., The Marshall Project, *Kalief's Mother on Her Torment* (Oct. 17, 2016), <https://www.themarshallproject.org/2016/10/17/kalief-s-mother-on-her-torment>.

⁵² *Rethinking Rikers Island*, *supra* note 47.

⁵³ *Id.*

⁵⁴ Michael Winerip & Michael Schwartz, *For Mentally Ill Inmates at Rikers Island, a Cycle of Jail and Hospitals*, N.Y. Times (Apr. 10, 2015), <http://www.nytimes.com/2015/04/12/nyregion/for-mentally-ill-inmates-at-rikers-a-cycle-of-jail-and-hospitals.html> (Individuals with diagnosed mental illness at Rikers total approximately "4,000 men and women at any given time, more than all the adult patients in New York State psychiatric hospitals combined.").

⁵⁵ *Rethinking Rikers Island*, *supra* note 47. As noted *infra*, there has, in fact, been a citywide expansion of supervised release (a pre-trial diversion program) and a multi-agency effort to reduce unnecessary pretrial detention for low-risk detainees.

⁵⁶ *Rethinking Rikers Island*, *supra* note 47. The Commission will also explore possibilities for potential use of Rikers Island if it is no longer used as a jail. It will consult with city planners, land use experts, environmentalists, architects, and others to consider options that may include residential, manufacturing, recreational, entertainment, and transportation uses, among others. The City, however, will make the final determinations on the future of Rikers Island.

⁵⁷ Press Release, Office of the Mayor, Mayor de Blasio Signs the Criminal Justice Reform Act (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

⁵⁸ New York City Council, *Criminal Justice Reform Act*, <http://labs.council.nyc/legislation/criminal-justice-reform/>. The District Attorneys' Offices across the City have also experimented with warrant days—opportunities for those with outstanding warrants to clear their records in a non-traditional and non-confrontational manner in a safe, neighborhood environment. *See, e.g.*, Press Release, Brooklyn District Attorney's Office, Brooklyn District Attorney Ken Thompson Announces Initiative to Address Backlog of Summons Warrants by Helping to Resolve Them in a Fair and Efficient Manner (June 19, 2015), <http://brooklynda.org/2015/09/10/brooklyn-district-attorney-ken-thompson-announces-initiative-to-address-backlog-of-summons-warrants-by-helping-to-resolve-them-in-a-fair-and-efficient-manner/>.

⁵⁹ *Criminal Justice Reform Act*, *supra* note 58. Communities of color and low-income communities have been disproportionately impacted by criminal summonses. For instance, one study found that between 2008 and 2011, eight criminal summonses were issued for riding a bicycle on the sidewalk in a Park Slope precinct, while 2,050 were issued for the very same activity in a Bedford-Stuyvesant precinct. *See* Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* 26 (June 18, 2006), http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

⁶⁰ *Criminal Justice Reform Act*, *supra* note 59.

⁶¹ *Hurrell-Harring v. State of New York*, Index No. 8866-07 (N.Y. Sup. Ct. Albany Cty.). *See also* Press Release, NYCLU, *Hurrell-Harring et al. v. State of New York* (challenging New York State's failure to provide adequate public defense services), <http://www.nyclu.org/node/1538>.

⁶² Press Release, NYCLU, Settlement Begins Historic Reformation of Public Defense in New York State (Oct. 21, 2014), <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state>. The counties covered by the settlement are: Onondaga, Ontario, Schuler, Suffolk and Washington.

⁶³ According to the New York Office of Indigent Legal Services ("ILS"), in 2015 the State contributed only \$80 million. This shift in fiscal responsibility would take place over seven years, with full implementation in 2023. *See* Hon. William Cherry & Stephen J. Acquario, New York State Association of Counties, *Indigent Legal Defense Services: Balanced Justice and Mandate Relief* (June 2016), [http://nysac.membershipsoftware.org/files/NYSAC_Indigent_Legal_Defense_Services_White_Paper\(1\).pdf](http://nysac.membershipsoftware.org/files/NYSAC_Indigent_Legal_Defense_Services_White_Paper(1).pdf) (citing ILS data). *See also* *Indigent Defense Proponents Hail 'Historic Moment' in NY*, N.Y.L.J., *supra* note 8.

⁶⁴ *See* New York City Bar, *Report on Legislation by the Task Force on Mass Incarceration* (May 2016), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-legislation-to-fully-fund-indigent-legal-services-throughout-new-york-state>.

⁶⁵ Greene & Schiraldi, *Better by Half: The New York City Story of Winning Large-Scale Decarceration While Increasing Public Safety*, *supra* note 41.

⁶⁶ The Special Options Services program was originally instituted in 2000.

-
- ⁶⁷ *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program, Second Report to the Board of Judges* (Aug. 2015), https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf.
- ⁶⁸ Law Enforcement Assisted Diversion (LEAD), *About LEAD*, <http://leadkingcounty.org/about/>.
- ⁶⁹ See Susan E. Collins et al., University of Washington LEAD Evaluation Team, *Summary of “LEAD Program Evaluation: Recidivism Report”* (Apr. 7, 2015), <https://depts.washington.edu/harrtlab/wordpress/wp-content/uploads/2015/04/2015-04-08-LEAD-Press-Release-and-Evaluation-Summary.pdf> (Quantitative analyses found “significantly reduced recidivism” among LEAD participants).
- ⁷⁰ Press Release, City of Albany, NY, Albany Police Department Receives Grant to Aid Implementation of Innovative “Lead” Program to Address Root Causes of Crime (Dec. 15, 2015), http://www.albanyny.org/newsandevents/news/15-12-15/albany_police_department_receives_grant_to_aid_implementation_of_innovative_%e2%80%9clead%e2%80%9d_program_to_address_root_causes_of_crime.aspx.
- ⁷¹ See sources cited *supra* note 34.
- ⁷² U.S. Sentencing Commission, *FAQ-Retroactive Application of the 2014 Drug Guidelines Amendment* (July 24, 2014), http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ.pdf.
- ⁷³ *Id.*
- ⁷⁴ *Id.*
- ⁷⁵ See Task Force Letter to Chief Judge Patti B. Saris (Sept. 21, 2016), *supra* note 22.
- ⁷⁶ U.S. Dept. of Justice, *Roadmap to Reentry: Reducing Recidivism through Reentry Reforms at the Federal Bureau of Prisons* (Apr. 25, 2016), <https://www.justice.gov/reentry/roadmap-reentry>. See also Remarks of Attorney General Loretta E. Lynch, *infra* note 100.
- ⁷⁷ The National Center on Addiction and Substance Abuse, *CASA Report Finds 65% of all U.S. Inmates Meet Medical Criteria for Substance Abuse Addition, Only 11% Receive Any Treatment* (Feb. 26, 2010), <http://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II>.
- ⁷⁸ *Id.*
- ⁷⁹ Matt Ford, *America’s Largest Mental Hospital is a Jail*, *The Atlantic* (June 8, 2015), <http://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/>.
- ⁸⁰ Press Release, Office of the Mayor, Mayor De Blasio Launches Bail Lab to Safely Reduce Overreliance on Money Bail (Oct. 13, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/711-15/mayor-de-blasio-launches-bail-lab-safely-reduce-overreliance-money-bail>. See also The Mayor’s Office of Criminal Justice, *Bail in New York City, Data Profile* (last accessed Jan. 4, 2017), <http://bail-lab.nyc/data-profile-2>.
- ⁸¹ In the last year, the City has tripled the number of people awaiting trial at home instead of in jail through its supervised release program. The Mayor’s Office of Criminal Justice, *Bail: Prediction in the Dark?* (Sept. 26, 2016), <http://us10.campaign-archive1.com/?u=b08c13d9bd46c3921750dffa2&id=1acd822658>.
- ⁸² Press Release, Office of the Mayor, Mayor de Blasio Announces Citywide Rollout of \$17.8 Million Bail Alternative Program (Apr. 8, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/336-16/mayor-de-blasio-citywide-rollout-17-8-million-bail-alternative-program>. Some have expressed concern that this tool has had a racially disparate impact. We encourage the City to continue to study and monitor the use and effect of the tool to ensure that it is applied in a racially neutral manner.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Press Release, Office of the Mayor, Mayor de Blasio Announces Online Bail Payment, Helping to Reduce Unnecessary Jail Time (Nov. 1, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/858-16/mayor-de-blasio-online-bail-payment-helping-reduce-unnecessary-jail-time>.

⁸⁷ *Id.*; See also Andrew Denney, *With Online Bail Payments, City Hall Aims to Curtail Unnecessary Jail Stays*, N.Y.L.J. (Nov. 3, 2016), <http://www.newyorklawjournal.com/home/id=1202771445690/With-Online-Bail-Payments-City-Hall-Aims-to-Curtail-Unnecessary-Jail-Stays>.

⁸⁸ Mayor de Blasio Announces Online Bail Payment, Helping to Reduce Unnecessary Jail Time, *supra* note 86.

⁸⁹ Press Release, New York City Council, Speaker Melissa Mark-Viverito to Introduce Department of Correction Reform Package (Sept. 12, 2016), <http://council.nyc.gov/html/pr/091216pr-b.shtml>.

⁹⁰ The Liberty Fund, supported by \$1.4 million allocated in the City's FY 2017 budget, expects to assist nearly 1,000 people annually and will join two other existing bail funds operating citywide. Samar Khurshid, *City Council Bail Fund Continues Slow Path to Reality*, Gotham Gazette (Dec. 3, 2016), <http://www.gothamgazette.com/city/6650-city-council-bail-fund-continues-slow-path-to-reality>. See also Alysa Santo, *Bail Reformers Aren't Waiting for Bail Reform*, The Marshall Project (Aug. 23, 2016), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform#.zBcuoJIWZ>.

⁹¹ Press Release, Office of the Mayor, Mayor de Blasio Calls for Change in State Law to Better Ensure Dangerous Defendants are Detained (Oct. 23, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/750-15/mayor-de-blasio-calls-change-state-law-better-ensure-dangerous-defendants-detained>.

⁹² New York City Bar, *Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee* (July 2013), <http://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf>.

⁹³ The present statute allows a sentence to be set aside upon the ground that it was unauthorized, illegally imposed, or otherwise invalid as a matter of law. The Task Force is currently working on proposed language to be added as CPL 440.20(5) that it hopes to submit to State legislators early this session.

⁹⁴ Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. Times (Dec. 4, 2016), <http://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>.

⁹⁵ Michael Schwirtz et al., *Governor Cuomo Orders Investigation of Racial Bias in N.Y. State Prisons*, N.Y. Times (Dec. 5, 2016), <http://www.nytimes.com/2016/12/05/nyregion/governor-cuomo-orders-investigation-of-racial-bias-in-ny-state-prisons.html>.

⁹⁶ See Press Release, Office of the Governor, Governor Cuomo Announces Proposal of New Regulations to Ensure Consideration of Risk and Rehabilitation During Parole Decisions (Oct. 18, 2016), <http://www.governor.ny.gov/news/governor-cuomo-announces-proposal-new-regulations-ensure-consideration-risk-and-rehabilitation>; Joel Stashenko, *Parole Reform Groups Say Proposed New Rules Don't Go Far Enough*, N.Y.L.J. (Dec. 13, 2016), <http://www.newyorklawjournal.com/id=1202774594531/Parole-Reform-Groups-Say-Proposed-New-Rules-Dont-Go-Far-Enough?>.

⁹⁷ Press Release, Office of the Governor, Governor Cuomo Calls on Legislature to Raise the Age of Criminal Responsibility This Session (May 28, 2015), <https://www.governor.ny.gov/news/governor->

[cuomo-calls-legislature-raise-age-criminal-responsibility-session](#). Governor Cuomo renewed his call for New York to raise the age of criminal responsibility in his State of the State address delivered in New York City on January 9, 2017. See Press Release, Office of the Governor, Governor Cuomo Presents the 12th Proposal of the 2017 State of the State Agenda: Launching the “New York Promise” Agenda to Advance Social Justice and Affirm New York’s Progressive Values (Jan. 9, 2017), <https://www.governor.ny.gov/news/governor-cuomo-presents-12th-proposal-2017-state-state-agenda-launching-new-york-promise-agenda>. Governor Cuomo has also said that he will use his executive pardon power to relieve individuals who were convicted of crimes at ages 16 and 17, and have lived crime-free for ten years from the ongoing stigmatization of a criminal conviction. Press Release, Office of the Governor, Governor Cuomo Offers Executive Pardons to New Yorkers Convicted of Crimes at Ages 16 and 17 (Dec. 21, 2015), <https://www.governor.ny.gov/news/governor-cuomo-offers-executive-pardons-new-yorkers-convicted-crimes-ages-16-and-17>. We applaud Governor Cuomo for living up to this promise and granting conditional pardons to 101 individuals on December 30, 2016, and urge him to extend this initiative to even more individuals in 2017. Matthew Hamilton, *Cuomo Pardons 101 New Yorkers Convicted as Minors*, Times Union (Dec. 30, 2016), <http://blog.timesunion.com/capitol/archives/270666/cuomo-pardons-101-new-yorkers-convicted-as-minors/>. Governor Cuomo has, in addition, taken action to improve the conditions of juvenile confinement through the issuance of an executive order to separate teens from adult prisoners in State facilities. Press Release, Office of the Governor, Governor Cuomo Signs Executive Order to Separate Teens from Adult Prisoners (Dec. 22, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-separate-teens-adult-prisoners>.

⁹⁸ See e.g., Mark Hay, *Why Is New York Still Prosecuting 16-Year-Olds as Adults?*, Gothamist (Nov. 3, 2016), http://gothamist.com/2016/11/03/new_york_raise_the_age.php; Raise the Age New York, *Get the Facts*, <http://raisetheagency.com/get-the-facts>.

⁹⁹ See *Mass Incarceration: Seizing the Moment for Reform*, *supra* note 20, at 6.

¹⁰⁰ For a detailed description of the hardships that expungement might alleviate, see *Doe v. United States*, 110 F.Supp.3d 448 (E.D.N.Y. 2015). Although that case was reversed by the Second Circuit on jurisdictional grounds, 883 F.3d 192 (2d Cir. 2016), the Court noted that Congress may well want to consider the merits of giving courts jurisdiction to expunge records of conviction. See also Loretta E. Lynch, Attorney General, Remarks at National Reentry Week Event in Philadelphia (Apr. 25, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event>. “[T]oo often,” the Attorney General said, “the way that our society treats Americans who have come into contact with the criminal justice system ... turns too many terms of incarceration into what is effectively a life sentence.”

¹⁰¹ *Mass Incarceration: Seizing the Moment for Reform*, *supra* note 20.

¹⁰² New York City Commission on Human Rights, *Fair Chance Act* (last accessed Jan. 4, 2017), <http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page>. See also Bryce Covert, *New York City’s Ambitious Ban-The-Box-Law Is Already Transforming Lives*, Think Progress (Apr. 20, 2016), <https://thinkprogress.org/new-york-citys-ambitious-ban-the-box-law-is-already-transforming-lives-332a4e08d641#>; Lauren Evans, *NYC Employers Can No Longer Immediately Discriminate Against Applicants With Criminal Records*, Gothamist (June 30, 2015), http://gothamist.com/2015/06/30/fair_chance_bill.php.

¹⁰³ New York City Commission on Human Rights, *Fair Chance Act*, *supra*.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Compare Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, Univ. of Michigan Law & Econ. Research Paper No. 16-012 (June 14, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795; and Jennifer L. Doleac & Benjamin

Hanseny, *Does “Ban the Box” Help or Hurt Low-skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* (October 2016), http://jenniferdoleac.com/wp-content/uploads/2015/03/Doleac_Hansen_BanTheBox.pdf; with Maurice Emsellem & Beth Avery, National Employment Law Project, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies* (Aug. 2016), <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profiling-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf>.

¹⁰⁷ Press Release, State University of New York, SUNY Board Votes to “Ban the Box” Following Student Assembly Recommendation, Campus Visits (Sept. 14, 2016), <https://www.suny.edu/suny-news/press-releases/september-2016/9-14-16-ban-the-box/suny-board-votes-to-ban-the-box-following-sa-recommendation-campus-visits.html>.

¹⁰⁸ In *Doe v. United States*, 168 F.Supp.3d 427 (E.D.N.Y. 2016), Judge Gleeson issued a “certificate of rehabilitation” to a woman he had sentenced 13 years earlier, certifying that she has been rehabilitated. He stated “I believe a certificate of rehabilitation can significantly alleviate the collateral effects of a criminal record by emitting a powerful signal that the same system that found a person deserving of punishment has now found that individual fit to fully rejoin the community.” *Id.* at 442.

¹⁰⁹ Among the criticisms of the existing certificates is that many courts are disinclined to certify rehabilitation as early as sentencing and that employers and others are not willing to rely on them. See Collateral Consequences Resource Center, *New York Certificates Fall Short in Practice*, (Feb. 29, 2016), <http://ccresourcecenter.org/2016/02/29/new-york-certificates-of-relief-fall-short-in-practice/>. Judge Gleeson’s *Doe* opinion, *supra* note 100, discusses the process for applying for these certificates.



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
NATIONAL INFRASTRUCTURE**

EXECUTIVE SUMMARY

- Require Quantitative and Qualitative Assessments as a Condition to Federal Funding
- Support the Creation of “Bankable” Revenue Streams through Availability Payments and Similar Programs
- Leverage, Improve and Accelerate Existing Federal Programs to Support Innovative Infrastructure Projects

INTRODUCTION

Members of the New York City Bar Association's Transportation Committee, Construction Law Committee and Project Finance Committee include lawyers representing a broad cross-section of participants in the infrastructure market, including federal, state and local public agencies, economic development institutions, public transit authorities, private equity investors, project sponsors and developers, lenders, construction and engineering firms and project operators. Our members have years of experience advising clients on all aspects of project development and implementation, utilizing both public and private investment.

The critical need for substantial investment to upgrade America's aging infrastructure has been well documented in recent years. In March 2013, the American Society of Civil Engineers issued a report giving America's infrastructure a D+ grade and estimating that the United States needed \$3.6 trillion in new infrastructure spending by the year 2020, but that current levels of spending would leave a shortfall of \$1.6 trillion.¹ Similarly, the Center for an Urban Future issued a lengthy report in March 2014 which estimated a minimum cost of \$47.3 billion to repair and replace existing infrastructure in New York City alone.²

We welcome the Administration's strong commitment to infrastructure investment as a catalyst for economic growth and its stated ambition of mobilizing a trillion dollars of new investment in infrastructure. We take it as self-evident that achieving this goal will require a significantly increased commitment of both public and private investment. In these

¹ Available at <http://www.infrastructurereportcard.org/a/documents/2013-Report-Card.pdf> (all websites last visited Feb. 21, 2017).

² “Caution Ahead: Overdue Investments for New York's Aging Infrastructure”, Center for an Urban Future, March 2014, available at <https://nycfuture.org/pdf/Caution-Ahead.pdf>.

recommendations, we do not propose to wade into the debate about the appropriate amount and specific forms of public investment – these are complex political questions that are beyond the scope of our discussion. Yet, each type of financing option entails fundamental considerations in order to be successful.

There are ways to maximize both direct-funding and indirect-funding programs that already exist, as we explain below. There has been a greater desire, however, frequently stated both by members of the Administration and among members of Congress from both parties, to mobilize increased amounts of private sector investment in America’s infrastructure.³ Increased public investment, whether through appropriations or tax exemptions/credits, is necessary but not alone sufficient to mobilize increased private sector investment. In order to further motivate private-sector investment, infrastructure projects must be designed to address the legitimate expectations of market participants in terms of risk allocation and investment returns, and the legal and regulatory framework in which infrastructure transactions operate must allow for this.

In her Senate confirmation hearings, then Transportation Secretary-designate Elaine Chao acknowledged the existing legal and regulatory impediments to public-private partnerships (“P3s”), and the need to remove them. Our recommendations below identify some of these impediments, and suggest practical steps that can be taken by the Federal government to help overcome them. Our recommendations are based on practical lessons learned from our members’ years of experience representing clients on the successful implementation of infrastructure projects, many involving innovative combinations of public and private sector investment. If the Administration finds our thoughts to be helpful, we would be pleased to provide requested additional assistance.

1. Require Quantitative and Qualitative Assessments as a Condition to Federal Funding

a. Condition and Demand Analyses as Foundation for Planning to Generate Specific Projects

Whether the federal government invests directly in federal-level infrastructure projects, or provides subsidies to state and local governments for locally financed and delivered infrastructure projects (whether grants or tax exemptions), the same underlying principles should apply. The initial focus should extend farther back into program-planning analyses, rather than

³ In November 2013, Sens. Mark Warner (D-Va.) and Roy Blunt (R-Mo.) announced a bipartisan proposal to create a national infrastructure funding bank which would have sought to use \$10 billion in initial funding to generate as much as \$300 billion in new transportation projects, according to estimates circulated by Sen. Warner’s office. Though the infrastructure funding bill was co-sponsored by Sens. Lindsey Graham (R-S.C.), Kirsten Gillibrand (D-N.Y.), Dean Heller (R-Nev.), Amy Klobuchar (D-Minn.), Roger Wicker (R-Miss.), Claire McCaskill (D-Mo.), and Mark Kirk (R-Ill.), the proposed legislation was not adopted by Congress.

Previous bills to establish a national infrastructure bank were introduced in the Senate in 2007 and the House in 2009, but did not progress in the legislative process. The 2007 and 2009 bills envisaged a bank modeled on the Federal Deposit Insurance Corporation and Pension Benefit Guaranty Corporation, respectively. Other countries and the European Union have established infrastructure banks or funds, and China has established the multilateral Asian Infrastructure Investment Bank, which counts among its members several major Western European economies.

focus on "shovel ready" projects. In order to assure the most efficient and effective use of any increased amount of public funds for capital projects, the administration can leverage existing federal infrastructure programs, including grant programs, to review condition assessments of current national infrastructure systems and networks of infrastructure systems, and develop corresponding need assessments for their preservation, rehabilitation, reconstruction and expansion. It should then link condition and needs assessments to economic and service-demand forecasts in order to prioritize specific projects that emerge from quantitatively-based planning processes. We believe, for example, that the build-out of a high-speed rail system between Richmond, Virginia, and Portland, Maine, the addition of new rail tunnels and the reconstruction of the current 107-year-old rail tunnels connecting Manhattan to New Jersey, would emerge from quantitative systems analyses described above as high priority projects.

b. Cost Efficiency Analysis of Public-Private Partnerships with Combined Financing and Service Delivery Packages for Specific Projects

Construction-related public infrastructure projects involve two essential elements: (1) financing and (2) service delivery.

i. *Financing*

Various types of financing exist to pay the costs of construction and operation of infrastructure (e.g., highways and bridges). On one end of the spectrum is a public owner's direct funding. More typically, the federal government will subsidize the project by providing grant funds, or by affording tax-exempt status to the borrowing of money through the issuance of bonds. These types of financing are referred to as publicly-financed design-build-operate-and-maintain (DBOM) projects, and, when involving grant funds or borrowed money, constitute an indirect type of P3.

On the other end of the spectrum, a public owner uses private investment by raising private capital to finance the initial construction, typically pursuant to the public owner's long-term conveyance of the underlying property and financed asset through a franchise/concession agreement or long-term lease. In exchange for assuming some or all of the financial risk in building and operating the new infrastructure upon completion, the private investors are entitled to all or part of the new asset's revenue stream for the duration of the franchise/concession or long-term lease, usually achieved from user fees such as tolls. This type of project is referred to as privately-financed design-build-finance-operate-and-maintain (DBFOM), and is what is more commonly known as a P3.

DBFOM projects typically attract private investors when infrastructure projects offer solid prospects of future revenue streams to offset financial risks that the private investors assume in building and operating the projects. For example, if a major airport is upgraded through a DBFOM with a 40/60% split between government and private interests, respectively, the public may be relieved of 60% of the financial risks in upgrading the airport, but the private interests may acquire a larger ownership stake in the airport than the public. Proposals for upgrading infrastructure inevitably involve a tradeoff between benefit to the public and benefit to

private interests which may have an opportunity to profit from performance of new infrastructure projects (depending on how the projects are financed and structured).

ii. *Service Delivery*

There are different methods by which to deliver to the public the facilities and services financed. Project services can be “segmented,” *i.e.*, the public owner enters into separate contracts with different entities to provide the different services, *e.g.*, a design professional contracts to provide the design whereas a general contractor or construction manager contracts to build the chosen design. When project services are “combined,” the public owner makes integrated decisions about design, construction and long-term operations and maintenance from the initiation of a project that can, in some instances lead to a single contract with a single entity, which is thought to permit optimum efficiency.⁴ DBFOM P3 transactions are considered “combined” service delivery methods.

iii. *Evaluating Successful P3s Monetarily*

It is critical to identify—and avoid—underfunding in anticipation of future apportionments or bailouts. As project options have emerged from program-planning efforts, it has been standard practice to evaluate and compare options prior to authorizing projects by applying a net present-value analysis. With the availability of DBOM and DBFOM service delivery methods, both of which expressly include life-cycle operations and maintenance costs, it is possible to apply a more rigorous “Value for Money” (“VfM”) analysis. A VfM analysis compares the financial impacts of a P3 project against those from the traditional direct public-funding alternative. VfM analyses can include non-financial risk factors and the ability to establish effective project governance protocols. Such analyses must also include foregone revenues from utilized tax exemptions or incentives—or tax expenditures. (To be sure, if tax credits are offered to private interests as a means of offsetting some of the cost of new infrastructure projects, the public is initially relieved of having to pay the cost of these projects. Yet, the cost of the tax credits is nevertheless a trade-off which the public will pay through a reduction of tax revenues which would have been otherwise available to pay for government programs.)

c. Evaluation within the Context of a Broad Cost-Benefit Model

It would be helpful to perform the quantitative program and cost efficiency evaluations described above in the context of broader quantitative and qualitative analyses that take the following into consideration:

- **Economic contributions from completed projects.** Construction projects not only provide direct employment opportunities during construction, but they also support employment and economic growth upon completion and over their useful

⁴ John Miller, “Life Cycle Delivery of Public Infrastructure: Precedents and Opportunities for the Commonwealth” (Boston: Pioneer Institute 2008), White Paper, No. 44, p. 9, Figure 6, available for download at http://pioneerinstitute.org/better_government/life-cycle-delivery-of-public-infrastructure/.

lives. Investment decision criteria need to include the costs and benefits that accrue to the various affected economies—national, state and local.

- **Technological innovations.** P3 projects can also leverage improvements in technology such as modern materials, smart technologies, autonomous vehicle developments, modern tunneling capabilities, safety enhancements and security considerations.
- **Environmental impacts.** P3 project design can minimize deleterious environmental impacts while promoting increased efficiencies in future energy consumption; certain P3 projects themselves can produce efficient sources of energy or promote the development of energy-efficient technologies.

2. Support the Creation of “Bankable” Revenue Streams through Availability Payments and Similar Programs

In order to stimulate privately-financed infrastructure projects, it is important to recognize that private sector investors must earn a market-based return on their investments, and therefore will only invest in projects that generate quality revenue streams. As a result, private sector investment in infrastructure has historically been limited to those areas where tolls or other user fees have been prevalent, such as toll roads, airports, seaports, rail, power plants, pipelines and to some extent water and wastewater treatment. Even in these areas, public resistance to tolls and other user fees has limited the ability of the private sector to invest. Many other types of infrastructure projects, including some of the most sorely needed types, such as road, bridge or sewer rehabilitation, are not traditionally revenue-generating and have, as a result, attracted little private investment.

It is our experience that once robust revenue streams are available, the private sector can conceive of quality infrastructure projects and can obtain private sector financing to construct, operate and maintain them. “Availability payments,” where the governmental partner provides a revenue stream through periodic payments over time, linked to the private sector partner’s satisfactory provision of infrastructure meeting contractually-agreed construction and operating standards, are a method of creating quality revenue streams for infrastructure projects that have been utilized with considerable success to foster P3s. Under an “availability payment” P3 transaction, the private-sector partner can often be induced to assume most of the (or even the entire) risk and burden of financing construction and operations while the public sector partner’s obligation to make payments is not only deferred over a period of time but more importantly is conditional on the private sector partner’s satisfactory delivery and ongoing operations and maintenance of the infrastructure itself. This structure not only enables the private sector to finance construction (and creates proper incentives for the private sector partner to take operating costs over the entire contract’s life into account when designing the project), but it also presents a very desirable allocation of risk and reward from the perspective of the public sector partner.

3. Leverage, Improve and Accelerate Existing Federal Funding Programs to Support Innovative Infrastructure Projects

The most rapid deployment of public funds would likely be achieved by continuing the tax-exemption bond debt, Build-America-Bonds (or similar programs) and federal grant programs such as the TIGER Discretionary Grant Program for Innovation and Project Delivery Transportation and loan programs such as the Infrastructure Finance and Innovation Act (TIFIA) loan program. These programs should therefore be enhanced and expanded for most rapid effect, regardless of whether additional programs such as a tax credit for infrastructure investments or a “National Infrastructure Fund” or “National Infrastructure Bank” are contemplated.

We recommend some ideas to enhance these types of programs in a cost-neutral manner.

a. Streamline the Environmental Review Process

The bold scale of the new administration’s proposed investment plan warrants the adoption of special approaches to expedite project realization and achieve reasonable completion timelines tied to adequate funding arrangements. A DBFOM VfM analysis can help support and document these objectives.

In that regard, accelerated environmental review that does not shortcut regulatory imperatives is vital. Allowing certain project activities to proceed while environmental review is underway, such as advanced project engineering and design, may provide an important means of speeding project completion, especially where safety and security considerations may be paramount.

The National Environmental Policy Act (“NEPA”) review process is designed to serve as an expedited check to ensure that critical environmental issues are not overlooked. At times, however, it has become vulnerable to misuse by those seeking to block or alter a project because their positions were not adopted during the initial planning process, thereby impeding prompt starts and reasonable completion of worthy projects.

While measures to prevent the review process arrangements from becoming automatic “rubber stamps” to project approval should be included in the enabling legislation, there should be sufficient freedom to allow, in appropriate cases, project review to overlap contemporaneously with the initiation of preliminary project activities. Streamlining measures permitted in highway projects by amendments enacted by MAP21 in 2012 could be extended to transit projects. For example, as already allowed for highway projects under 23 U.S.C. §108(c)(1), transit authorities and state transportation agencies should be allowed to purchase property prior to completion of environmental reviews without affecting subsequent approvals required for the project or forfeiting federal reimbursement when the transit project is approved for federal funding after completion of the NEPA process.

There are likely a number of additional opportunities to streamline the NEPA process for certain types of infrastructure projects and the City Bar would be happy to assist the

Administration in engaging the appropriate stakeholders to evaluate and make recommendations on these opportunities.

b. Reform Federal Grant Programs to Maximize Efficiencies and Reduce Costs at State and Local Government Level

The types of infrastructure surveyed and graded by the American Society of Civil Engineers are predominantly those owned and operated by state and local governments because they represent the majority of American infrastructure.⁵ Operationally, state and local governments are best placed to know their infrastructure and building needs to serve their jurisdictions, as well as what the related tax base can support (principal and interest on bonds comes out of the annual expense budget funded by taxes).

Much of state and local infrastructure is funded by tax-exempt debt. Tax-exemptions are indirect benefits, which historically have enjoyed bipartisan support. Continuing tax-exempt status for the debt used by states and localities can help assure a greater likelihood of success for this Administration's infrastructure program. In contrast, eliminating the tax exemption would likely reduce the amount of debt that could be issued due to the higher interest rates, which in turn would burden the localities' annual expense budgets, thereby impeding long-term capital planning and "state of good repair" activities which are crucial.

Yet, typically during discussions of federal tax reform, as is happening now, policymakers consider reducing or eliminating the tax exemption of state and local debt because the exemption represents a tax expenditure - or a cost to the federal government in terms of lost revenue. Retaining tax-exempt debt therefore prompts budget analysts to search for budget neutrality.

We believe that a source of budget neutrality is readily available to the federal Office of Management and Budget (OMB). It is in the federal interest, when it is making grant evaluations and awards, to ensure that the portion of project financing that is federally funded is spent as efficiently and as effectively as possible. Now that a menu of service delivery options exists in the industry to match project needs, we suggest that OMB look to the mechanisms in existing grant programs that require the grantees to use innovative service delivery methods and demonstrate the cost efficiency of their chosen delivery method. For instance, "Design-Build," which is a modern service-delivery methodology, is an inherently integrated part of any variety of P3 transactions. Not all states, however, have fully adopted modern service-delivery methodologies such as Design-Build.⁶

Upon its review of the criteria in existing grant programs requiring demonstrations of efficiency, this Administration should revise its criteria for federal grant programs supporting

⁵ See Miller, *supra*; see also W. Ronald Hudson, Ralph Haas, Waheed Uddin, *Infrastructure Management: Integrating Design, Construction, Maintenance, Rehabilitation and Renovation* (New York: McGraw-Hill 1997), pp. 8-12.

⁶ See *i.e.*, "21st Century Construction, 20th Century Construction Law: An Update", New York City Bar Association Construction Law Committee, Feb. 2014, available at <http://www2.nycbar.org/pdf/report/uploads/20072665-21stCenturyConstruction20thCenturyLawUpdated.pdf>.

infrastructure at the state and local government level. Applicants should be required, as a condition for eligibility, to quantitatively demonstrate why their chosen service delivery method is the most cost-effective, focusing on both initial costs and lifecycle costs. Increasing the efficiency of infrastructure-related grant programs in this manner would assure that under the new Administration, federal funds to support infrastructure across the country will be spent as efficiently as possible, and provide a level of "savings" to offset the tax expenditure. Meanwhile, doing so would permit states and localities to retain their flexibility in administering purely local capital projects that in the aggregate form essential components of the nation's infrastructure.

Evaluating potential infrastructure projects in accordance with the above recommendations should help solidify the success of this Administration's plans.

John S. Kiernan
President, New York City Bar Association

Sanford E. Balick
Chair, Transportation Committee

Ernest W. Chung
Chair, Project Finance Committee

Virginia K. Trunkes
Chair, Construction Law Committee

Additional Committee Contributors:

Andrew Dell'Olio
Ronald Klempner
Terri Matthews
George K. Miller
Gary L. Rubin

February 2017



JOHN S. KIERNAN
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
jkiernan@nycbar.org

January 5, 2017

President-elect Donald J. Trump
Presidential Transition Headquarters
1800 F Street, NW, Room G117
Washington, DC 20270-0117

Re: Environmental and Energy Policy

Dear President-elect Trump,

The New York City Bar Association (the “City Bar”) has a long history of supporting environmental laws and regulations that strike a balance between environmental values and economic interests. The strong federal laws that have been in place for the last half century strike that balance and have allowed for sustained economic growth while achieving dramatic improvement in the condition of our air, water, oceans and natural resources.

I am writing on behalf of the City Bar to urge you to preserve the hard-won progress that has been made over the years in protecting and improving America’s environment. We believe that the federal-state partnership created by the Clean Air Act, Clean Water Act and other bedrock environmental laws is essential to maintaining that progress. That federal-state framework has provided clear direction and consistency in the environmental requirements imposed across the country, creating the predictability required for business to operate efficiently. Since these benefits would not be possible without a well-funded and properly staffed U.S. Environmental Protection Agency (“USEPA”), we respectfully request that you reject any suggestion to deprive that critical agency of the resources it needs to operate effectively. To do so risks turning back the clock to a time when a patchwork of conflicting state requirements were in place, and our air, water and land resources were dumping grounds for pollution.


For the last decade the City Bar also has supported governmental efforts – at the federal, state and local levels -- to address the threat of climate change. We are encouraged by your recent pledge to keep an open mind with respect to the climate crisis, but at the same time are concerned that your nominees for Secretary of the Department of Energy and USEPA Administrator have expressed

doubt as to the severity of the problem. The City Bar – like the vast majority of climate scientists and Fortune 100 companies – recognizes that unchecked climate change poses a clear and present danger – not only to our environment but also to the fundamental social and economic stability of modern society. As President-elect, you now have access to a deep well of scientific expertise, and can draw conclusions based upon facts that are unaffected by political preconceptions. We hope that you will do so, and take on a leadership role in addressing this looming threat, both by reducing our domestic Greenhouse Gas emissions and by helping the developing world adapt to the impacts of climate change, impacts that, unless addressed, will increasingly threaten our own national interests and security.

With a full review of the facts, we expect that you also will recognize the economic benefits that can be gained by continuing existing policies -- and launching new programs – to encourage the development of renewable sources of power generation and the promotion of energy efficiency in transportation, industry and buildings. Thousands of new manufacturing, construction and technical jobs can be generated with programs that promote the continued expansion of the now-thriving solar, wind and energy efficiency industries, and we encourage you to expand, rather than undercut those policies.

Until recently, environmental protection and the promotion of renewable energy have been supported on both sides of the aisle. Recognizing that some previous Republican administrations have been times of immense environmental progress, we hope that yours will go down in history as the one that broke through the partisan logjam on climate action, and tackled that problem with the courage needed to preserve the well-being of the next generation of Americans.

Respectfully,



John S. Kiernan

President of the New York City Bar Association

cc:

Vice President-elect Mike Pence

Donald F. McGahn II, Esq., Incoming White House Counsel

Reince Priebus, Esq., Incoming White House Chief of Staff

Scott Pruitt, Esq., Nominee for EPA Administrator

Hon. Chris Collins, Transition Team Executive Committee

Hon. Charles Schumer

Hon. Kirsten Gillibrand

New York State Delegation, U.S. House of Representatives

Michael Mahoney, City Bar Environmental Law Committee

Gail Suchman, City Bar International Environmental Law Committee

Anil Kalhan, City Bar International Committee on Human Rights

Daniel Rosenblum, City Bar Energy Committee

Stephen Kass, City Bar Special Task Force for Climate Change Adaptation Law



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
INFORMATION TECHNOLOGY AND CYBER LAW**

The Information Technology and Cyber Law Committee of the New York City Bar Association is honored to provide our recommendations relating to the subject matter of our committee for the Trump Administration’s consideration.

I. CYBERSECURITY: ESTABLISHING NORMS

a. Establishing Cybersecurity Norms

We urge the new administration to continue to enhance United States governmental efforts to participate in and advance worldwide cybersecurity. In particular, we urge you to work with private stakeholders to develop norms of cybersecurity. These stakeholders include private providers of networks and internet functionality, financial institutions, hardware manufacturers, software providers, and other developers and providers of Information Communication Technology (“ICT”). These various stakeholders around the globe have extensive experience in dealing with cyberattacks and often bear the brunt of attacks by state and/or criminal actors. As the speed of change in cyberspace—including cyberwarfare, cyberespionage and cybercrime—vastly outstrips the speed of most governmental institutions to identify and counter such threats, it is important that cybernorms be developed in coordination with those who have firsthand and varied experience in this realm.

b. Consequences for Cybercrimes

In addition to developing norms for detection and prevention, norms must also be developed concerning punishment for engaging in cyberwarfare and other cybercrimes. In so doing, we urge the administration to carefully consider the impact of private stakeholders’ ability to strike back with their own cyberattacks in real time. Such countermeasures may seem expedient, appear confined to the particular concerned entities and might exact a toll from the initial cyberattacker that includes a disincentive for the cyberattacker to strike that particular target in the future. On the other hand, mistaken attribution could escalate an already tense internet space teeming with cyberattacks, and could devolve into cyberwars between otherwise “respectable” internet citizens.

c. Overreach

While efficiency and effectiveness requires that public, private and government sectors all work in coordination, law enforcement and other government agencies should not be authorized to plant “backdoors” or other surreptitious means of access into private companies, networks and devices. Such activities limit trust between the private and public spheres and inhibit the establishment of norms of conduct.

Recommendations:

1. Cybersecurity concerns and the establishment of norms of conduct might be addressed globally by trusted institutions that transcend any particular government or private interests. The Centers for Disease Control and Prevention (“CDC”) may serve as a good model. Such a group can monitor and facilitate the sharing of information concerning denial of service attacks, botnets, malware, hacking and other evolving forms of cyberwarfare. This would strengthen the ability of all actors to resist such attacks. A global model similar to the CDC would maximize efficiencies and ensure that government agencies, private enterprise and other stakeholders have access to relevant information in a timely and efficient manner. However, one significant challenge with respect to cybersecurity that does not arise in the public health context is that some participants in such a forum might also be responsible for the very cyberhacking activities that the forum was intended to combat.
2. We also urge further study of the risk factors that might escalate a cyberskirmish into a war in the physical world. A well-placed cyberattack would have the potential to impact infrastructure or take lives every bit as effectively as traditional weapons of warfare.

II. INFRASTRUCTURE

a. Cybersecurity as part of Physical Infrastructure

Physical infrastructure is increasingly dependent on technology and, therefore, on the security of those technological functions. As such, investment in the country’s infrastructure must include cybersecurity infrastructure. All aspects of our lives are increasingly dependent on technology, including transit and many facets of transportation, drinking water, waste management, schools, energy, commerce and communication. Indeed, the U.S. Department of Homeland Security’s website lists various sectors which require infrastructure upgrades and maintenance, including the Information Technology Sector.¹ Strengthening U.S. cybersecurity infrastructure is critical to maintaining our power grids, communications bases and transportation hubs.

¹ See <https://www.dhs.gov/information-technology-sector> and <https://www.dhs.gov/critical-infrastructure-sectors> (last visited Feb. 13, 2017).

Recommendation:

1. Include cybersecurity infrastructure in all infrastructure plans and allocations because this investment is crucial to national security and to the continued functioning and development of our towns, cities and communities.

b. Economy, Education and Infrastructure

To support a thriving economy and economic growth, both domestically and internationally, the U.S. must promote a robust workforce ready for the 21st century.

i. Broadband Regulation

For the U.S. workforce to remain competitive, the federal government must work toward minimizing barriers to broadband service, expanding access to broadband connectivity for schools and public libraries, and promoting educational opportunities centered on technological literacy.

Literacy should remain an objective at both the local and federal level. To this end, there must be robust investment in urban and rural broadband across the nation. The rollout of rural broadband should include clear benchmarks and timeframes. Municipal infrastructure projects and upgrades must take into account the importance of accessibility in the areas of education, high-speed broadband inclusion and digital literacy.

The federal government must balance spectrum allocations and sharing in such a way that this important resource serves the public while promoting private sector innovation. Spectrum (the radio frequency by which wireless communication travels) is a scant and precious resource. The Federal Communications Commission manages spectrum through licensing systems granted to non-federal users. There is concern over spectrum shortages, interference, and mergers that would lock in control of large blocks of spectrum with one or two corporations. Any policy proposal by which spectrum is “shared” between government and commercial use, licensed and unlicensed use, or innovative solutions must be guided by the goal of achieving maximum access for all citizens without limiting the type of content delivered to consumers.

For example, “zero-rating” models do not charge consumers for data usage for certain content when the creators or suppliers of that content have paid the channels/carriers. Therefore, in these models the content appears “free” to the consumer, but the content creator is actually paying for consumers to view that content with or without the consumers’ knowledge. Proposals to free up previously-owned government spectrum for the wireless industry should only be considered if the plans promote access to each and every consumer regardless of income while also supporting the newest innovation in the marketplace. Innovation is critical to a strong economy and improved life conditions. However, public spectrum must not be used solely for private gain, and control over this public resource must not be granted to a small handful of companies.

The increasing number of users of the Internet, both across the United States and around the world, and the ubiquity of technology in all aspects of modern life should translate to a model of government support that promotes connectivity and does not leave a single user behind, regardless of geographical or financial limitations. To remain competitive globally, consumers require access to multiple sources of diverse and high-quality information. This is an area in which both the public interest and private sector agree. A strong Internet is supported by diverse content and expanded connectivity.

ii. Economic Motivation

The future of the U.S. economy will depend on a robust and flexible approach to regulating “accessibility” by promoting open Internet policies.

The sharing economy, for example, is in its nascent stages but already has generated considerable revenue. In order to continue to expand this sector of the economy, we urge the federal government to regulate cautiously and prudently, and in a manner that supports innovation and promotes entrepreneurship.

Moreover, to keep abreast of and ahead in the global marketplace, the U.S. should focus on developing and providing educational programs, including adult educational programs, centered on digital literacy in order to equip the workforce with the necessary skills to keep pace with technological advancements.

Furthermore, to maximize our strength, skills and knowledge base in the digital age, we must promote a diverse workforce, and attract and retain high-skilled workers from all backgrounds.

Recommendations:

1. Investment in the “raw materials” of technology infrastructure will be the key to America’s continued leadership in the digital global economy. These raw materials include: ubiquitous broadband availability; well-planned cyberarchitecture, *viz.* traditional infrastructure that uses technology to protect and maintain its integrity and continued functioning in the face of cyberthreats; and training and retraining citizens in the use of varied and sophisticated forms of technology.
2. Update laws and regulations to encourage technological growth, investment in various aspects of technology, and ease of use and access by all citizens. Revisions of U.S. laws that concern infrastructure, both traditional and technological, must also consider the use and control of data, e-commerce and the global economy.

III. PRIVACY LAWS

Privacy laws in the U.S. are disparate, sector-based and not easily reconciled with the laws of other jurisdictions, including the European Union, Argentina and Israel among others. This makes it difficult for businesses to comply with the laws of various jurisdictions and can stymie efficient world trade, particularly as the world grows increasingly dependent on technology, data and cross border commerce.

U.S. businesses and other entities will benefit from a review of what the multitudes of privacy related laws are meant to protect and how data can be efficiently managed.

a. The Privacy Act

Forty-two years ago, the United States enacted the Privacy Act of 1974 (Pub.L. 93-579, 88 Stat. 1896, 5 U.S.C. §552a) (the “Privacy Act”). The law governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals (“PII”) by the federal government.

The initial draft of the Privacy Act was based on a report of an advisory committee of the Department for Health, Education and Welfare (“HEW”). The report stated that individuals have a right to participate in how their personal information is used and to whom it is disclosed. According to the HEW report, that right is provided through fair information practices. Those initial five principles inspired the Organization for Economic Cooperation and Development (“OECD”).

In 1980, the OECD built upon those principles and created a set of eight principles commonly referred to as the Fair Information Practices (FIPs).² The OECD issued guidelines on the protection of privacy which have been adopted by all OECD members and forms the basis of many privacy protection laws across the globe. However, in jurisdictions such as the E.U., FIPs and personal data protection laws are not limited to governmental agencies or to specific sectors. Instead, E.U. data protection laws apply to all entities in the private and government sectors which handle personal information or personal data. The E.U. and several other jurisdictions accord broad protections to individuals’ personal information with comprehensive laws which are updated in an effort to keep pace with technology.

Recommendation

1. Update the Privacy Act by extending its application, consistent with First Amendment requirements, beyond government to the public and private sectors and with an eye towards compatibility with data privacy and protection laws around the world.

² Pam Dixon, “A Brief Introduction to Fair Information Practices”, World Privacy Forum, Updated Dec. 19, 2007, available at <https://www.worldprivacyforum.org/2008/01/report-a-brief-introduction-to-fair-information-practices/> (last visited February 13, 2017).

b. National Data Breach Notification Law

An entity that uses, transmits or stores certain personal information must do a variety of things when that entity has a breach: assess the situation, contain the harm/breach, notify authorities and, depending on the type and extent of information concerned, notify the affected individuals. A breach or incident is generally defined as unauthorized access to an individual's personal information or the possibility of such access.

The precise definition of the personal information, who needs to be notified, within what time-frame and other measures are all determined by individual state laws—forty-seven of them. In addition, there are four other jurisdictions with their own breach notification laws: Guam, Puerto Rico, the U.S. Virgin Islands and Washington, D.C.

This state by state assessment and determination is costly and burdensome to the affected entity and can have a detrimental impact on the affected individuals.

Recommendation

1. It is not possible to completely secure data or prevent data breaches. However, a uniform breach notification law which clearly defines personal information, sets forth whether or not that information needs to be protected and, if so, how, and sets forth which definitive authority(ies) to notify, will go a long way towards setting clear standards and better protecting personal information.

c. Globally Compatible Privacy Laws

It is natural that sovereign nations will enact laws appropriate to their country without regard to other nations' laws. However, in world where technology touches every aspect of life and technology by its very nature is borderless, the lack of regard to coexistence with extraterritorial laws related to technology is short-sighted and may have a detrimental impact on business and economic growth. The regulation and protection of personally identifying information ("PII") is one of these areas well worth examining.

The difference between the European approach to personal data and the U.S. approach to PII is stark. The E.U. considers an individual's right in and to their own personal data a fundamental right, while the U.S. treats much of the same personal data as a commodity. These differences have impacted commerce as demonstrated by the invalidation of the Safe Harbor mechanism³ and the scramble to enact its replacement, the Privacy Shield.⁴ The impact on trans-Atlantic commerce is likely to increase after May 2018 when the E.U.'s General Data Protection Regulation ("GDPR") goes into effect. This rigorous data protection law will have far-reaching

³ "Safe Harbor" was a mechanism devised by the U.S. Department of Commerce and E. U. regulators in 2000 to enable the transfer of personal data from the E.U. to the U.S. which is deemed an adequate jurisdiction for purposes of data protection. Safe Harbor was invalidated by the E.U. Court of Justice in October 2015.

⁴ "Privacy Shield" is a preliminarily acceptable way to legally transfer personal data from the E.U. to the U.S.; however, it is currently under legal challenge in the E.U.

economic consequences for any U.S. company which markets to the E.U. or conducts business there.

Technology companies are some of the largest entities collecting, using, handling and storing personal data. Many of the world's largest technology companies are U.S. businesses (e.g. Apple, Microsoft, Facebook, Amazon, Google, IBM, etc.). For its own business interests and in the interest of its citizens, the U.S. will be well-served to take the lead on data protection/data privacy laws to ensure that they are compatible with data protection/privacy laws around the world.

Within the United States itself, there is mounting concern over the lack of a cohesive legal framework governing data collection and protection practices of various entities, including telecommunications and internet services companies, retail merchants, marketing firms, data collectors and, U.S. and State government agencies. Ever-increasing incidents of data breaches aggravate the concern.

Recommendation

1. Enact personal data usage laws which respect, consistent with First Amendment requirements, individuals' rights to their personal data and which apply to all States and across all sectors—public, private and government. This will facilitate compliance and U.S. participation in world trade while upholding the American traditions of freedom and respect for individual privacy.

IV. ELECTRONIC COMMUNICATIONS PRIVACY ACT

a. ECPA Update

The Electronic Communications Privacy Act of 1986 (ECPA) is entering its third decade. The law was originally enacted to support restrictions on government “wire-taps” and it was extended to require warrants in order for government and law enforcement to access this type of communication. However, as technology has advanced, the ECPA, particularly Title II, the Stored Communications Act, has been minimally updated. Whether the protections for stored communication and the content of electronic messages should receive the same stringent warrant requirements as those for wire-tapping remains an open question.

Email became a dominant communication mode over the last two decades, but ECPA does not “neatly” apply to email and other types of instant communication, particularly since much email and text communication is currently stored on cloud servers around the world. ECPA needs an overhaul on several levels and for a variety of reasons.

A recent case illustrates one aspect of the needed reform. In *Microsoft v. United States*,⁵ the Second Circuit Court of Appeals held that ECPA in general (and section 2703, the Stored

⁵ *In the Matter of a Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corporation*, No. 14-cv-2985 (2nd Cir. July 14, 2016) (*pet. for rehearing en banc filed Oct. 14, 2016*).

Communications Act, in particular) does not apply to data held by an email service provider outside the United States at the time of service, even where the data remains effectively under the control of an American company. In this instance, the U.S. government did not obtain the content of the emails it sought under the ECPA.

According to briefs filed in the case, large email service providers like Google receive over 600 ECPA/SCA subpoenas every month from federal law enforcement authorities seeking information from approximately 1,500 accounts. Many, if not most, of these subpoenas are accompanied by gag orders under ECPA § 2705(b). Thus, for electronic communications service providers, a growing tension exists between the demands of their customers (who want maximum privacy) and the demands of law enforcement authorities (who want maximum disclosure with minimal delay). In addition, such companies must dedicate resources, financial and human, to respond to the ever-increasing requests.

One alternative when the sought-after data is stored outside of the U.S. is the cumbersome process of Mutual Legal Assistance Treaties (“MLAT”).⁶ This would only apply if the data is stored in a country with whom the U.S. has a MLAT.

Recommendations

ECPA reforms should provide greater search and seizure protections to private electronic communications while ensuring the government retains the ability to obtain such communications with proper judicial review. A key issue in this sensitive area is reciprocity: whatever the U.S. asks of service providers, it can expect other nations to ask as well. Any changes to the ECPA will also have an effect on global commerce. The U.S. must be current in its legal treatment and policy understanding of privacy and communications.

1. Amend Title II of ECPA (the Stored Communications Act) to expressly apply regardless of the location of the data and keeping the reciprocity point in mind. At this time, there are at least three pending bills that would change the current situation.⁷ Without expressing a preference for any of the bills, we recommend legislative measures that provide for a district court to modify ECPA subpoenas or warrants if compliance would be unreasonable or oppressive (*see, e.g.*, Fed. R. Crim. P. 17) if such legislation includes: (a) senior-level approval within the Department of Justice, (b) Congressional reauthorization after a limited number of ECPA subpoenas, warrants, and gag-orders, (c) a pre-application attempt to determine the nationality or location of account holders, (d) a presumptive warrant requirement for private email accounts, and (e) an appropriation to facilitate international cooperation with respect

⁶ MLATs allow signatory states to request one another’s assistance with ongoing criminal investigations, including issuance and execution of search warrants. *See* U.S. Dep’t of State, 7 Foreign Affairs Manual § 962.1 (2013) at <https://fam.state.gov/FAM/07FAM/07FAM0960.html> (last visited Feb. 13, 2017). The United States is a party to a MLAT with each member of the European Union.

⁷ *See, e.g.*, the Law Enforcement Access to Data Stored Abroad Act (“LEADS Act”); the Email Privacy Act; and the International Communications Privacy Act.

to compelling the prompt disclosure of electronic communications for law enforcement purposes.

2. Reform the ECPA to include stricter protection to e-mail, text and other messaging content and protect the privacy of U.S. personal communication.
3. Uphold the ECPA warrant requirement with an overarching stringent warrant requirement to access the content of 21st century forms of communication; emails, text, instant messaging and those yet to be implemented.
4. Renegotiate MLATs to establish clear and efficient procedures and definitions (regarding e.g., data location) for bilateral cooperation in this field, consistent with the updated statutory framework.

V. COMPELLING ASSISTANCE TO LAW ENFORCEMENT

In the wake of the San Bernardino shooting on December 2, 2015, the government demanded that Apple provide “reasonable technical assistance” to the FBI by writing software to unlock a shooter’s iPhone. This brought the question of whether the government could force companies to create backdoors into their technology to the forefront of public debate.

On February 16, 2016, a federal magistrate judge ordered Apple to help unlock the iPhone.⁸ After a failed month-long, behind-the-scenes negotiation between Apple and the government seeking a deal to unlock the phone, Apple opposed the order. Ultimately, the FBI paid a contractor some \$1.3 million to bypass the security feature at issue and access the device, obviating the need for a hearing on the matter.

Although that particular situation was resolved, government demands for private technical assistance constitute a recurring constitutional issue ripe for legislation. Forcing companies to write code or create a backdoor that allows the government to access individual’s personal devices raises Fourth amendment privacy concerns as well as questions about the scope of government authority under the All Writs Act of 1789, which the government has relied on in seeking similar orders against Apple and other companies. In February 2016, a federal magistrate judge in the Eastern District of New York refused to grant such an order, stating that Congress has created no statutory authority that specifically speaks to the question of whether the government could compel a company such as Apple to bypass the security on one of its devices, and that in the context of this lack of express statutory authority, it is unclear whether the All Writs Act applies.⁹ As such, until there is a clear course of action, we recommend that the administration direct federal authorities to restrict use of the All Writs Act for these purposes.

⁸ See *Order of Magistrate Judge Sheri Pym of the U.S. District Court for the Central District of California*, available at <https://assets.documentcloud.org/documents/2714001/SB-Shooter-Order-Compelling-Apple-Asst-iPhone.pdf> (last visited Feb. 13, 2017).

⁹ *In Re Order Requiring Apple, Inc. To Assist In The Execution Of A Search Warrant Issued By This Court*. 15-MC-1902 (E.D.N.Y. Feb. 29, 2016).

We urge the administration to work with Congress on this issue to develop a workable legal framework that balances the free speech and privacy rights of Americans protected by the First and Fourth amendment with interests of law enforcement to access devices which contain much more than law enforcement may otherwise be entitled to review. New legislation should weigh the priorities, values, sensibilities, and rights of all concerned: law enforcement, private enterprise and private citizens.

John S. Kiernan
President, New York City Bar Association

Joseph V. DeMarco
Co-Chair, Information Technology and Cyber Law Committee

Maia T. Spilman
Co-Chair, Information Technology and Cyber Law Committee

February 2017



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
NATIONAL SECURITY POLICIES**

The New York City Bar Association (the “City Bar”), writes to express our deepest concerns about reports of policies that your Administration is considering with regard to the national security policies of the United States, in particular as they relate to the detention and interrogation of individuals thought to be involved in Islamist terrorism. Since its establishment in 1870, the City Bar has worked to advance and defend the rule of law. Over the past fifteen years in particular, the City Bar has issued thoroughly researched and thoughtfully reasoned reports and letters to promote America’s long-term security in part through respect for lawful and humane policies.

The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability. Since 9/11, certain U.S. policies for the detention, treatment, and trial of persons suspected of membership in, or support of, al Qaeda, the Taliban or associated groups have violated our traditions of fair process and respect for human dignity and the rule of law. Many of those practices were subsequently abandoned by the Bush Administration and all of them were explicitly rejected by your predecessor. According to widely publicized reports, suggestions have been made within your Administration that you employ and even expand some or all of these practices, although we understand that Secretary of Defense Mattis and CIA Director Pompeo have expressed opposition to that course of action. We were encouraged to hear you state that you will defer to Messrs. Mattis and Pompeo and, for the reasons discussed below, we urge that you continue to reject opposite suggestions as not only contrary to the rule of law and our nation’s most cherished values but to our national security interests. In that spirit, we offer these concrete suggestions for ensuring the rule of law and bolstering our national security. These proposals have been developed by the City Bar’s Task Force on National Security and the Rule of Law, which oversees and coordinates the City Bar’s work on issues pertaining to civil liberties and national security.

DETENTION

We urge you to close the detention facility at Guantanamo Bay, not to increase its population. Since 9/11, certain U.S. detention policies have disregarded the norms and values enshrined in our Constitution and have drawn wide public opprobrium upon our nation, ultimately undermining our nation’s security. The operation at Guantanamo Bay has earned condemnation from our allies and continues to serve as a recruiting tool for forces hostile to the

United States even as it remains an increasingly expensive drain on the public fisc in a time of austerity and budget discipline. Grim experience tells us that this facility weakens the United States. Its costs – in terms of money, reputation and motivating enemies of the United States – far outweigh any benefits derived from isolating a few men thought to wish us harm and who could be incapacitated in the United States consistent with our security interests.

For those detainees who have engaged in criminal conduct, we urge your Administration to move forward with prosecutions where in the professional judgment of Department of Justice prosecutors, the admissible evidence would support a prosecution. We urge your administration to continue to observe the strong presumption in favor of civilian-court prosecutions, and we believe the NDAA prohibition on transfer to the U.S. for prosecutions in U.S. courts is profoundly misguided.¹ The one Guantanamo detainee who to date has been transferred to New York for prosecution, Ahmed Ghailani, was convicted in 2010 for his role in the 1998 East Africa embassy bombings, and is now serving a sentence of life without possibility of parole at the “Supermax” prison in Florence, Colorado.² The legitimacy of Ghailani’s conviction and sentence are unquestioned. Despite fears raised at the time, there were no disruptions or problems at the courthouse in lower Manhattan during his trial. Contrast this record with that of the Military Commissions, which have for years been bogged down in pre-trial hearings due to their irregular nature and other flaws.

We urge you in the strongest possible terms to reject any proposal to reopen the so-called “CIA Black Sites” or otherwise hide detainees as contemplated in your draft Executive Order.³ Moreover, it is essential that Guantanamo detainees continue to have reasonable access to counsel and to the federal courts to test the legality and circumstances of their detention. Such access is mandated by the Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which affirmed the constitutional rights of Guantanamo detainees to petition Article III courts for a writ of habeas corpus. We urge your administration to continue compliance with the law governing access to counsel and the courts. Our criminal justice system is a source of tremendous strength for the United States. Secret and other irregular systems undermine these key institutions and ultimately national security as well.

TREATMENT OF DETAINEES

We urge you to ensure that the United States treats all detainees humanely and in accordance with obligations we have voluntarily and sensibly assumed under domestic and international law. During the course of your campaign and more recently, you suggested that you

¹ Public Law 114-92, National Defense Authorization Act for Fiscal Year 2016, Section 1031 (“Prohibition on use of funds for transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba, to the United States.”)

² See U.S. Att’y’s Office for the S. Dist. of N.Y., Ahmed Khalfan Ghailani Found Guilty in Manhattan Fed. Court of Conspiring in the 1998 Destruction of United States Embassies in E. Africa Resulting in Death (Nov. 17, 2010), available at <http://www.fbi.gov/newyork/press-releases/2010/nyfo111710a.htm>; Transcript of Sentencing at 71, United States v. Ghailani, S10 98 Cr. 1023 (LAK) (No. 1098).

³ Draft Executive Order: Detention and Interrogation of Enemy Combatants, available at <http://apps.washingtonpost.com/g/documents/national/read-the-draft-of-the-executive-order-on-cia-black-sites/2288/>.

would consider supporting, as effective tools, the use of interrogation techniques such as waterboarding, and worse. We emphatically warn against the use of such practices on the grounds that they are unethical, immoral, and above all unlawful. These practices amount to torture and cruel, inhuman and degrading (CID) treatment and are prohibited by both domestic and international law. The Detainee Treatment Act of 2005 bans torture and CID and mandates DOD interrogation in accordance with Army Field Manual. The Supreme Court has also consistently held that punishments involving the use of torture are unconstitutional as a violation of the Fifth and Eighth Amendments. The use of torture and CID treatment is proscribed without exception⁴ by the U.N. Convention against Torture (UNCAT), to which the United States is a party. The provisions of UNCAT are executed and incorporated into U.S. law by 18 U.S.C. § 2340, criminalizing the use of torture and CID treatment. Heads of state who authorize and engage in the use of torture during an armed conflict may also be prosecuted as war criminals under the federal War Crimes Act and 1949 Geneva Conventions.

We had been relieved to hear CIA Director Mike Pompeo clearly renounce waterboarding as torture and absolutely rejecting the idea that he might bring back forms of “enhanced interrogation” not listed in the Army Field Manual during his January 12, 2017 confirmation hearing before the Senate Select Committee on Intelligence.⁵ As you know, he said that he could not imagine your asking him to do so. We hope and trust his faith is borne out by experience. Likewise Senator Jeff Sessions clearly stated that waterboarding is torture and therefore illegal at his own confirmation hearing before the Judiciary Committee. Again, we agree and stress the importance of respecting this position, and support your recent statement that you would do so. To revoke Executive Order 13941 would send an unambiguous signal to the world that we intend to violate domestic and international law obligations in our interrogations.

There is a strong, bipartisan consensus that “enhanced interrogation” techniques are unlawful and immoral.⁶ It is critical that the United States observes clear, bright lines against torture. The international community looks to the United States for leadership, and the failure to uphold our domestic and international obligations to prohibit and prevent torture only serves to

⁴ UNCAT art. 2(2): “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

⁵ See <https://www.c-span.org/video/?c4645261/rep-pompeo-will-torture>.

⁶ See Detainee Treatment Act of 2005 (cosponsored by many Republicans and passed in the Senate by a 90-9 vote); Marc Santora, *McCain’s Stance on Torture Becomes Riveting Issue in Campaign*, N.Y. Times, Nov. 16, 2007, available at <http://www.nytimes.com/2007/11/16/us/politics/16mccain.html?pagewanted=all>; *McCain says torture did not lead to bin Laden*, NBC News, May 12, 2011, available at http://www.msnbc.msn.com/id/43007276/ns/politicsmore_politics/t/mccain-says-torture-did-not-lead-bin-laden; *Q&A: Lindsey Graham on Torture*, Newsweek, Sept. 17, 2006, available at <http://www.newsweek.com/qa-lindsey-graham-torture-109769>.

See McCain-Feinstein Amendment to the 2016 National Defense Authorization Act, available at <https://www.congress.gov/congressional-record/2015/06/09/senate-section/article/S3905-2> (requiring International Committee of the Red Cross access to detainees in US custody/control in armed conflict and limiting the techniques that can be used against any detainee in US custody or effective control to those set forth in *Army Field Manual* 2-22.3). And see Senate Select Committee on Intelligence, *Committee’s Study of the Central Intelligence Agency’s Detention and Interrogation Program, Executive Summary* (declassification revisions Dec. 3, 2014), available at http://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf.

erode the same international legal norms that apply to foreign nations. This in turn emboldens our enemies to violate these laws themselves, putting our own service members at increased risk and undermining our counterterrorism efforts. Use of these techniques also would jeopardize our ability to work with intelligence agencies of other nations that will not cooperate with nature that engage in torture and CID. We urge you to reject any moves to restoring use of these harsh measures and to reinforce the message that the United States strictly adheres to interrogation techniques that are lawful, humane, and effective.

CONCLUSIONS

Your decisions over the following months will have profound and long-term effects on U.S. national security and on our liberties at home. Moreover, our service members in the field rely for their safety on the restraints on interrogation and detention imposed by this rule of law system; unwinding it would put them at grave risk. A strong rule of law system has always played an essential role as bulwark against threats foreign and domestic. When we strengthen it and adhere to its principles, we prosper as a people.

John S. Kiernan
President, New York City Bar Association

Mark R. Shulman
Chair, Task Force on National Security and the Rule of Law

January 2017



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION
REGARDING ANIMAL WELFARE**

The New York City Bar Association (“City Bar”) Committee on Animal Law (“Committee”) welcomes the opportunity to submit recommendations for you to consider as you continue to develop your Administration’s objectives.

The City Bar is a private, non-profit organization of more than 24,000 attorneys, judges and law professors and is one of the oldest bar associations in the United States. The Committee regularly addresses legal issues involving non-human animals on local, state, national, and international levels.

I. INTRODUCTION

This report summarizes positions that the City Bar has recently taken on Federal bills and in letters written to federal agencies. We hope that the Administration will adopt our recommendations on the specific issues discussed herein and, in regard to animal-related issues not mentioned in this letter, require executive agencies to give serious consideration to the interests of non-human animals whenever human activities have the potential to affect their lives.

II. COMMITTEE POSITIONS AND RECOMMENDATIONS

a. Require the USDA to Promulgate Regulations Concerning the Humane Treatment of Birds Under the Animal Welfare Act

We urge you to direct the United States Department of Agriculture (USDA) to promptly issue regulations concerning the transportation, purchase, sale, housing, handling, humane care, and treatment of birds covered by the Animal Welfare Act (AWA) (7 U.S.C. §§ 2131- 2159) and to enforce the AWA with respect to birds. The USDA’s failure to issue regulations covering birds for over 12 years affects roughly 5 million birds that are sold as pets at the wholesale level, transported in commerce, or used for exhibition, research, teaching, testing, or experimentation purposes.¹ The Committee wrote the USDA about this issue in April 2016, and the USDA has not yet responded.²

¹ USDA, APHIS Fact Sheet 2 (Aug. 2011), *available at* https://www.aphis.usda.gov/publications/animal_welfare/2011/FS_QArmb.pdf. (All websites last visited Feb. 12, 2017.)

² Letter from Lori Barrett, Chair, City Bar Animal Law Committee to Thomas J. Vilsack, Secretary, USDA, regarding AWA Regulations for Birds (Apr. 6, 2016), *at* <http://www2.nycbar.org/pdf/report/uploads/20073070-LetterurgingUSDA-humanetreatmentofbirdsunderAnimalWelfareActANIMALS4.6.16.pdf>.

The USDA's failure to issue regulations covering birds has led to confusion by researchers, universities, and animal welfare organizations, causing many to believe that the AWA does not cover birds.³ And there have been several well-publicized allegations of cruelty and neglect against bird dealers and exhibitors in the past decade that may have been avoided had the USDA acted. For example, in 2008, an undercover investigation of a pet dealer that supplies birds to a large, well-known pet store found that birds were treated inhumanely and were deprived of veterinary care;⁴ in 2010, another private investigation of a pet dealer exposed an employee roughly handling small birds;⁵ and there are documented instances of birds suffering and dying in zoos.⁶ The birds in these cases were animals covered by AWA.

It has been 12 years since the USDA began the rulemaking process to amend the Animal Welfare Regulations (9 CFR §§ 1.1 - 4.11) to provide bird-specific standards of care, yet it has still not proposed amendments. In 2002, Congress amended the AWA's definition of "animal" to expressly include birds, except such birds that are bred for use in research and poultry birds used or intended for use as food or fiber, or used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. In 2004, the USDA amended the definition of "animal" in the Animal Welfare Regulations to reflect the AWA's new definition and released an advanced notice of proposed rulemaking. The comment period for the advanced notice of proposed rulemaking ended on November 1, 2004, and the USDA has still not proposed or promulgated regulations covering birds.

The USDA has erroneously claimed that bird-specific regulations are a condition precedent to enforcing the AWA with respect to birds.⁷ Although the Committee agrees that bird-specific standards of care are important, until they are issued, the USDA can enforce the AWA with respect to birds under Subpart F of Part 3 of the Animal Welfare Regulations entitled "Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals."

³ For example, the National Association for Biomedical Research's website (*at* <http://www.nabr.org/biomedical-research/oversight/animal-welfare-act>) incorrectly says that the "definition of animals covered by the AWA excludes rats, mice, and birds used in research." Carleton College's website (*at* <https://apps.carleton.edu/curricular/psyc/AnimalCare/faculty/review>) says, "Currently, rats and birds (and mice) are exempt from review by the USDA because they are not protected by the AWA."

⁴ Letter from Dephna Nahminovitch, Director, Cruelty Investigations Department, PETA, to Philip L. Francis, Chair and CEO, Petsmart Inc. (Jan 23, 2008), *available at* http://media.corporate-ir.net/media_files/irol/93/93506/2_11_Scan001.PDF.

⁵ PETA, *Sun Pet Undercover Investigation*, *at* <https://youtu.be/bHU9T70YFJU>.

⁶ Michelle Kretzer, PETA, *PETA Sues USDA for Years of Bird Neglect* (June 27, 2013), *available at* <http://www.peta.org/blog/peta-sues-usda-years-bird-neglect>.

⁷ Animal Welfare; Regulations and Standards for Birds, Rats, and Mice, 69 Fed. Reg. 31537 (proposed June 4, 2004), *available at* <https://federalregister.gov/a/04-12692>; *see also* USDA, Animal and Plant Health Inspection Service webpage, *Animal Welfare Act* (last modified Oct. 3, 2016) ("Birds are covered under the AWA but the regulatory standards have not yet been established.")

b. Support the Animal Welfare in Agricultural Research Endeavors Act

We ask you to support the Animal Welfare in Agricultural Research Endeavors Act (the AWARE Act),⁸ a law that would help protect some farmed animals in the care of the federal government from inhumane treatment.

In 2015, the *New York Times* published an exposé revealing that many animals housed at a Federal research facility, the U.S. Meat Animal Research Center (MARC), were subjected to neglect, illness, premature death, and painful and fatal experiments.⁹ Some of the experiments at MARC included those designed “to increase the number of twin births in cows and expand the litter size of pigs, without consideration of animal health impacts, and trying to breed ‘easy care’ lambs that are born in open fields without human assistance.”¹⁰ In other experiments, “pregnant ewes were injected with so much of the male hormone testosterone that it began to deform their babies’ genitals, making urination difficult.”¹¹ Additionally, due to lack of appropriate care, 625 animals died from mastitis, a treatable infection of the udder; at least 6,500 animals have starved to death;¹² and “[u]nknown numbers have died from negligence such as easily treatable infections, exposure to bad weather, or attacks by predators.”¹³

The AWARE Act would amend the Animal Welfare Act (“AWA”) (7 U.S.C. §§ 2131-2159) to ensure that, for farm animals, certain minimum standards of humane care are adhered to in any federal research facility “having laboratory animal facilities.” Specifically, the proposed legislation would amend 7 U.S.C. section 2144: first, by expanding the reach of the AWA protections and requirements regarding humane care to include “any federal research facility . . . having laboratory animal facilities,” and second, by removing the exclusions for farm animals used in agricultural research at those federal facilities. The AWARE act would not cover non-federal research facilities.

The AWARE Act addresses an arbitrary distinction in the current AWA, which treats farm animals in research facilities (currently excluded from protection under the AWA) differently from non-farm animals at research facilities (which are covered under the AWA), even though they all are capable of experiencing pain and suffering to the same extent and degree. Furthermore, under the AWA, whether an animal is a “farm animal” depends not just on its species but also on its intended use, such as for food or fiber, and, therefore, the same type of animal may be subject to the protections of the AWA in certain contexts but not others. Currently, federal research facilities conducting non-agricultural research on farm animals are

⁸ S.388 and H.R. 746 (114th Congress). These bills have not yet been reintroduced.

⁹ Michael Moss, *U.S. Research Lab Lets Livestock Suffer in Quest for Profit*, N.Y. TIMES (Jan. 29, 2015), available at <http://www.nytimes.com/2015/01/20/dining/animal-welfare-at-risk-in-experiments-for-meat-industry.html>.

¹⁰ 161 CONG. REC. E170 (Feb. 5, 2015) (statement of Rep. Blumenauer), available at <http://www.gpo.gov/fdsys/pkg/CREC-2015-02-05/html/CREC-2015-02-05-pt1-PgE170-4.htm>.

¹¹ Moss, *supra* note 8.

¹² Moss, *supra* note 8.

¹³ Blumenauer, *supra* note 9.

required to comply with the AWA, while federal research facilities conducting agricultural research on farm animals are not so required. Such inconsistencies are arbitrary and irrational.

Since the *New York Times* expose, the USDA has taken some action, but it is insufficient and we believe that the AWARE Act is needed to better ensure that animals be treated humanely going forward. The USDA established the Agricultural Research Service (ARS) Animal Handling and Welfare Review Panel (ARS-AHWRP), and directed it to conduct a review of MARC and evaluate its animal care and use program. ARS-AHWRP conducted a pre-announced, three-day site visit and found that there was “no evidence of poor animal handling, animal abuse, or inadequate veterinary care”¹⁴ contrary to the evidence uncovered by the *New York Times*. ARS-AHWRP also provided recommendations, which MARC claims to have addressed.¹⁵ There were several critical responses to the ARS-AHWRP investigation and report by organizations such as the New England Anti-Vivisection Society (NEAVS),¹⁶ Animal Legal Defense Fund (ALDF),¹⁷ American Anti-Vivisection Society (AAVS),¹⁸ Animal Welfare Institute (AWI),¹⁹ Animal Defenders International (ADI),²⁰ and the Humane Society of the United States (HSUS).²¹ As noted by NEAVS, the ARS-AHWRP report did not rely on any review of MARC’s past research practices, interviews with employees regarding the allegations in the article, internal records indicating past neglect and abuse, mortality statistics in research protocols, or personnel records.²² Therefore, despite MARC’s stated compliance with the ARS-AHWRP recommendations, we think that legislation is necessary to ensure the American public that animals in federal research facilities will be treated humanely going forward.

¹⁴ ARS-AHWRP, USDA, Findings and Recommendations on the Animal Care and Well-Being at the U.S. Meat Animal Research Center to the Secretary of Agriculture and the REE Under Secretary 11 (Mar. 9, 2015), available at https://www.ree.usda.gov/ree/news/USMARC_AWHR_Panel_Report_PrePublic_Hearing_030602015.pdf.

¹⁵ Nicholas Bergin, *Meat Animal Research Center says it has addressed animal care concerns*, LINCOLN JOURNAL STAR (June 1, 2015), available at http://journalstar.com/business/agriculture/meat-animal-research-center-says-it-has-addressed-animal-care/article_da4f96d8-4383-55da-b40b-af27719bf827.html.

¹⁶ Letter from Jaclyn Leeds, Esq. and Theodora Capaldo, Ed.D., New England Anti-Vivisection Society, to USDA (Mar. 13, 2015), available at <https://www.ree.usda.gov/ree/news/NEAVS.pdf>.

¹⁷ Letter from Kelsey Eberly, Esq. Animal Legal Defense Fund, to USDA (Mar. 18, 2015), available at <https://www.ree.usda.gov/ree/news/2015-03-18-ALDF-MARC-Comment.pdf>.

¹⁸ Letter from Vicki Katrinak, Senior Policy Analyst of the American Anti-Vivisection Society, to USDA (Mar. 18, 2015), available at <https://www.ree.usda.gov/ree/news/AAVS-comments-to-USDA-re-US-MARC.pdf>.

¹⁹ Letter from Christopher J. Heyde, Deputy Director, Government and Legal Affairs of the Animal Welfare Institute, to USDA (Mar. 18, 2015), available at <https://www.ree.usda.gov/ree/news/AWIComments.pdf>.

²⁰ Letter From Christina Scaringe, General Counsel, Animal Defenders International, to USDA (Mar. 18, 2015), available at <https://www.ree.usda.gov/ree/news/ADI-response-to-UMARC-Panel-Report.pdf>.

²¹ Letter From Kathleen Conlee, Vice President, Animal Research Issues of the Humane Society of the United States to USDA (Mar. 18, 2015), available at <https://www.ree.usda.gov/ree/news/HSUS.pdf>.

²² Letter from Jaclyn Leeds, Esq. and Theodora Capaldo, Ed.D., *supra* note 16, at 3-4.

c. Improve the USDA’s Enforcement Relating to Licensing Dealers and Exhibitors

The Committee asks you to direct the USDA to decline to renew and to suspend or revoke the licenses of those dealers or exhibitors that are guilty of repeated violations of the AWA or who fail to cure cited violations of the AWA. Far too often, the USDA has renewed the licenses of dealers or exhibitors that have repeatedly violated the AWA. This results in animal suffering and discourages licensees’ compliance with the AWA because they can merely pay fines as a cost of doing business without correcting serious, continuing violations as a condition of keeping their licenses. The Committee wrote to the USDA about this issue on July 31, 2015.²³

The AWA directs the USDA not to grant licenses “until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary.”²⁴ It appears, however, that under current practices the application for an initial license is the first and last time the USDA makes a meaningful inquiry into the conditions and lawfulness of the operations of an exhibitor or dealer. Applicants for license renewal must certify that they are in compliance with the law, but the USDA’s review of renewal applications does not appear to implement substantive standards or include an inquiry into the compliance history of applicants. One court has even characterized the USDA’s license renewal practice as “an automatic, ‘rubberstamping’ type transaction.”²⁵ This failure to meaningfully assess whether applicants for license renewal have complied with the AWA works against the clear intent of the AWA and its public policy goals of keeping both humans and animals safe.

The USDA has not vigorously exercised its powers to suspend and revoke licenses as a means of addressing AWA violations. The USDA may suspend or revoke a dealer’s license based on a single AWA violation, even if it is not willful, where the agency has “reason to believe” that a violation has occurred or learns of a past or prospective “threatened physical harm to animals.”²⁶ These penalties are an essential but underutilized deterrent to licensees who might otherwise violate the AWA, including the large number of exhibitors who have a history of citations for non-compliance with the AWA.

Another essential—but underutilized—enforcement mechanism at the USDA’s disposal is the authority to confiscate from licensees animals “found to be suffering as a result of a failure to comply with any provision of [the AWA].”²⁷ Congress enacted the AWA in part to protect the public’s interest in ensuring “that animals intended . . . for exhibition purposes . . . are provided humane care and treatment.”²⁸ However, the USDA appears to exercise its confiscation power only infrequently.

²³ Letter from Christine Mott, Chair of the City Bar Animal Law Committee, to Thomas J. Vilsack, Secretary, USDA (July 31, 2015), available at <http://www2.nycbar.org/pdf/report/uploads/20072948-USDAAWAEnforcementAnimalReportFINAL7.31.15.pdf>.

²⁴ 7 U.S.C. § 2133; *see also* 9 C.F.R. § 2.2(b).

²⁵ *Ray v. Vilsack*, No. 5:12-CV-212-BO (E.D.N.C. Oct. 7, 2013).

²⁶ 9 C.F.R. §§ 2.1(e), 4.10.

²⁷ 7 U.S.C. § 2146(a); *accord* 9 C.F.R. § 2.2129(a).

²⁸ 7 U.S.C. § 2131(1).

The Committee has recommended that the USDA establish objective standards for the implementation of these enforcement mechanisms. For example, the USDA might consider revoking the license of anyone who would not be eligible for an initial license and remains noncompliant for a period of time. We have also recommended unannounced inspections of traveling circuses and other animal exhibitions, particularly during times when animals are being handled or trained, to identify appropriate occasions for confiscation of animals. We ask you to support these recommendations and we hope that you will direct the USDA to undertake greater measures to enforce the AWA against animal dealers and exhibitors who violate the law.

d. Horse Soring Rule

The Committee urges you to support the USDA's horse soring rule.²⁹ The rule would prohibit soring, which is the intentional infliction of pain to a horse's legs or hooves in order to force the horse to perform an artificial, exaggerated gait that is valued in certain show horse competitions and exhibitions. Soring involves applying chemical agents (such as kerosene) to a horse's leg and then applying bracelet-like chains or rollers to rub against the leg, causing intense pain.³⁰ Soring continues to be a widespread practice.³¹ The Horse Protection Act (HPA) was enacted in 1970 to prohibit the showing, sale, or transportation of sored horses, but many horses continue to be subjected to the painful practice of soring because soring itself is not yet prohibited.

We further recommend that the funding for enforcing the HPA be increased, as the authorized funding maximum has not been increased in nearly four decades and additional funding is required for the effective enforcement of the HPA.

e. Support the Pet and Women Safety Act

We ask you to support the Pet and Women Safety Act,³² amending certain sections of the Violence Against Women Act, 18 USC §§ 2241 *et seq.* ("VAWA"), to extend protection and support for the pets³³ of victims of domestic violence, sexual assault, stalking and dating violence.³⁴

²⁹ The Committee's report concerning the PAST Act, a bill that addresses horse soring, is available at <http://www2.nycbar.org/pdf/report/uploads/20072903-ActtoPreventAllSoringTactics.pdf>.

³⁰ *See, e.g.*, THE AMERICAN VETERINARY MEDICAL ASSOCIATION, HORSE SORING AND THE PAST ACT AND H.R. 1518 & S. 1406, 1 (May 2015) ("Despite enactment of the HPA, soring has continued in the South and is widely practiced by trainers, owners and farriers. It is used on horses entered in local 'fun' shows, as well as in large competitions."), available at <https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Documents/Soring-Bookiet-March-2014.pdf>.

³¹ *Id.* at 4.

³² H.R. 1258 (114th Congress). The bill has not yet been reintroduced.

³³ The term "pet" as used in the proposed legislation is defined to mean "a domesticated animal, such as a dog, cat, bird, rodent, fish, turtle, horse, or other animal that is kept for pleasure rather than for commercial purposes."

³⁴ The City Bar's report co-authored by the Animal Law Committee, Children and the Law Committee, and Domestic Violence Committee that supports the bill is available at <http://www2.nycbar.org/pdf/report/uploads/20072862-PetandWomenSafetyAct.pdf>.

Research demonstrates that perpetrators of domestic violence and child abuse often use animals as a tool to control and harm victims. Perpetrators may threaten or abuse a victim's pet to take away one of the victim's sources of comfort, or to terrorize or intimidate the victim by suggesting that whatever harm they cause the animal, they are equally capable of causing to the victim.³⁵ Up to 48% of domestic violence victims have delayed leaving a dangerous situation or have returned to their abuser because they feared for their pets' safety.³⁶ Even when domestic violence victims seek shelter services, 71% of such victims who were pet owners have reported that abusers had threatened, harmed, or killed their pet.³⁷

In recognition of the link between animal cruelty and family violence, nearly half of all states have implemented laws including animals in orders of protection.³⁸ However, only 70 co-sheltering programs exist nationwide for victims of domestic violence and their pets, and only one such program—the Urban Resource Institute's PALS Program (People and Animals Living Safely)—exists in New York City.³⁹

The proposed legislation would amend VAWA to prohibit threats and acts of violence against a victim's pet by: (1) prohibiting conduct that places a person in reasonable fear of the death of, or serious bodily injury to, that person's pet; (2) prohibiting interstate violations of protective orders for pets; (3) including restitution for veterinary services relating to physical care for the victim's pet; and (4) establishing an emergency and transitional pet shelter and housing assistance grant program under which the Secretary of Agriculture, acting with the Department of Justice, the Secretary of Housing and Urban Development, and the Secretary of Health and Human Services, shall grant awards to eligible entities to carry out programs to provide assistance to victims of domestic violence with pets.

In light of the serious needs of domestic violence victims with pets, and the general lack of state and local support services for such persons and their pets, in addition to supporting this bill, we recommend that your Administration explore the expansion of federal protections, programs, and resources for family violence victims with pets to ensure that all victims of domestic violence—including those with pets—have access to sheltering and support for their family.

³⁵ Cynthia Hodges, *The Link Between Animal Cruelty and Violence Toward People*, 2007, available at <https://www.animallaw.info/article/link-cruelty-animals-and-violence-towards-people>.

³⁶ Sherry Ramsey, et al., *Protecting Domestic Violence Victims by Protecting their Pets*, TODAY: A PUBLICATION OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 16 (Spring 2010), available at <http://www.ahimsahouse.org/sites/default/files/spring2010feature.pdf>; Frank R. Ascione, et al., *Battered pets and domestic violence: Animal abuse reported by women Experiencing intimate violence and by non-abused women*, VIOLENCE AGAINST WOMEN 354 (Apr. 2007), available at <https://goo.gl/tb4wci>.

³⁷ Frank R. Ascione, et al., *Animal Welfare and Domestic Violence* (Apr. 25, 1997), available at http://www.vachss.com/guest_dispatches/ascione_2.html.

³⁸ See e.g., justification memo for NYS Assembly Bill No. 10767-2006/Senate Bill No. 7691-2006, codified at NY FAM CT §842 (i) (noting that “often abusers, in an effort to control and threaten their partners, harm or kill their pets”).

³⁹ See URI People and Animals Living Safely (URIPALS), Urban Resource Institute, available at <http://urinyc.org/domestic-violence/pals/>.

III. CONCLUSION

The City Bar appreciates your consideration of our Committee's recommendations. We believe that our recommendations, if adopted, would advance animal welfare, environmental protection, public health, and consumer protection.

John S. Kiernan
President, New York City Bar Association

Lori Barrett
Chair, Animal Law Committee

February 2017



NEW YORK
CITY BAR

JOHN S. KIERNAN
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
jkiernan@nycbar.org

April 28, 2017

Hon. Paul Ryan
Speaker
U.S. House of Representatives
H-232, The Capitol
Washington, DC 20515

Hon. Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204, The Capitol
Washington, DC 20515

Hon. Mitch McConnell
Majority Leader
U.S. Senate
317 Russell Senate Office Building
Washington, DC 20510

Hon. Charles Schumer
Minority Leader
U.S. Senate
322 Hart Senate Office Building
Washington, DC 20510

Dear Speaker Ryan, Representative Pelosi, Senator McConnell, and Senator Schumer:

I write on behalf of the New York City Bar Association to convey our concerns with regard to the Trump administration's handling of human rights issues and international engagement during its first one hundred days in office. The approach taken by the new administration raises questions about the future protection of rights at home and abroad which, in turn, may contribute to international instability and threaten domestic security. We urge you and your colleagues to take concrete actions to promote human rights, to uphold the highest standards of human dignity in the laws and policies of the United States, and to demand the same of executive branch officials.

The Association is an independent nongovernmental organization of over 24,000 lawyers, judges, law professors, and government officials in the United States and over fifty other countries. Throughout its 145-year history, the Association has consistently maintained that respect for the rule of law is essential in all jurisdictions, and has a long history of investigating and reporting on human rights concerns around the world, including within the United States, through the work of its International Human Rights Committee.

For decades, the executive branch has been subject to congressional directives that require the promotion of human rights to be a "principal goal" of U.S. foreign policy.¹ Especially in light of that longstanding congressional mandate, we are troubled

¹ As Congress mandated by statute in 1974:

by the Trump administration’s notable lack of engagement thus far with respect to human rights principles, international institutions, and diplomacy—all of which are bedrock sources of U.S. moral authority on the world stage.

For example, like other observers, we were concerned by Secretary of State Rex Tillerson’s decision not to participate in the launch of the State Department’s *Country Reports on Human Rights Practices*, which Congress has required the State Department to prepare annually.² By choosing instead to have the report’s release merely accompanied by a phone call between reporters and a senior administration official who spoke on condition of anonymity, the administration signaled disinterest—or worse, disregard—for norms to which prior administrations have adhered for decades. The State Department’s annual human rights report has long demonstrated that the details of human rights abuses around the world are monitored by both government officials and civil society in the United States and are of central importance to U.S. foreign policy. As Secretary of State Condoleezza Rice stated when she announced the publication of the State Department’s human rights report in March 2008:

In every region of the world, men and women are working peacefully, and often at great risk to themselves and their families, to secure human rights and fundamental freedoms, to follow their consciences and speak their minds without fear, to choose those who would govern them and to hold their leaders accountable and to achieve equal justice under the law. . . . We gather today to support them and it is our hope that this Human Rights Report will highlight the obstacles that still stand in their way, so that they

The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

22 U.S.C. § 2304(a)(1); *see also* 22 U.S.C. § 2151n(a) (prohibiting economic assistance to countries engaged “in a consistent pattern of gross violations of internationally recognized rights . . . unless such assistance will directly benefit the needy people in such country”); 22 U.S.C. § 262d (requiring the government, “in connection with its voice and vote” in various international financial institutions, to “advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in . . . a pattern of gross violations of internationally recognized human rights”).

² 28 U.S.C. § 2304(b); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2016 (2017), <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm>; *see* Carol Morello, *Rex Tillerson Skips State Department’s Annual Announcement on Human Rights, Alarming Advocates*, WASH. POST (Mar. 3, 2017), https://www.washingtonpost.com/world/national-security/rex-tillerson-skips-state-departments-annual-announcement-on-human-rights-alarming-advocates/2017/03/03/7fbf8584-002d-11e7-8f41-ea6ed597e4ca_story.html.

may bear the mantle of justice . . . at less risk to themselves and to their families.³

Especially for these human rights defenders—who often look to the United States for both moral and practical support—Secretary Tillerson’s silence was deafening. Taken together with an accumulating list of sympathetic comments by Trump administration officials about authoritarian leaders with well-documented and extensive records of human rights violations, the administration is sending signals the United States should not send about the level of priority it attaches to human rights violations around the world.⁴

We are also concerned by reports that the Trump administration might abandon U.S. membership on the U.N. Human Rights Council, the highest profile human rights body within the U.N. system, and that it might seek to withdraw the United States from important multilateral treaties.⁵ Moreover, the administration’s decision not to participate in three important U.S.-related hearings conducted in March by the Inter-American Commission on Human Rights, which addressed human rights concerns arising from the Trump administration’s executive orders banning immigration from six predominantly Muslim countries and other U.S. immigration enforcement policies, threatens to undermine the important work of an institution that has long played a crucial role in formally investigating human rights violations throughout our hemisphere.⁶

³ Condoleezza Rice, Secretary of State, Remarks on The State Department’s 2007 Country Reports on Human Rights Practices (Mar. 11, 2008), <https://2001-2009.state.gov/secretary/rm/2008/03/102103.htm>.

⁴ Christian Caryl, *Donald Trump’s Foreign Policy Is Already Undercutting Human Rights Around the World*, WASH. POST (Mar. 8, 2017), <https://www.washingtonpost.com/news/democracy-post/wp/2017/03/08/donald-trumps-foreign-policy-is-already-undercutting-human-rights-around-the-world/>; see also David E. Sanger & Eric Schmitt, *Rex Tillerson to Lift Human Rights Conditions on Arms Sale to Bahrain*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/world/middleeast/rex-tillerson-bahrain-weapons-sales.html> (noting that dropping of human rights conditions on arms sales to Bahrain “is bound to be read by Saudi Arabia and other states in the region as a sign that the new administration plans to ease its demands to protect and respect political dissidents and protesters”).

⁵ Colum Lynch and John Hudson, *Tillerson to U.N. Rights Council: Reform or We’re Leaving*, FOREIGN POLICY (Mar. 14, 2017), <http://foreignpolicy.com/2017/03/14/tillerson-to-u-n-rights-council-reform-or-were-leaving/>; Max Fisher, *Trump Prepares Orders Aiming at Global Funding and Treaties*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html>; see also Somini Sengupta, *Nikki Haley Calls United Nations Human Rights Council ‘So Corrupt’*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/world/nikki-haley-un-human-rights-council-corrupt.html> (discussing Ambassador Haley’s casual accusation, “without offering evidence,” that the Human Rights Council is “so corrupt”).

⁶ Elise Foley, *Trump Administration Is a No-Show at Hearings on Human Rights*, HUFFINGTON POST (Mar. 22, 2017), http://www.huffingtonpost.com/entry/trump-administration-iachr_us_58d17201e4b0be71dcf8b27b; Andrés Oppenheimer, *U.S. Shot Itself in the Foot By Skipping Hearings at Human Rights Commission*, MIAMI HERALD (Mar. 22, 2017), <http://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article140107773.html> (noting that skipping the IACHR hearings “sets a terrible precedent, because it amounts to giving a green light to authoritarian populist regimes to do the same”).

In this context, we oppose the proposed cuts to U.S. financial assistance to international organizations and other international spending outlined in the Trump administration's recent budget request for fiscal year 2018. The proposed budget urges drastic cuts to spending on diplomacy, foreign assistance, and other international programs—including a 28 percent budget reduction for the State Department and U.S. Agency for International Development and a 35 percent budget reduction for Treasury International Programs.⁷ Cutting across multiple agencies, the administration reportedly plans to eliminate over 50 percent of U.S. funding to support United Nations programs. This would be at odds with statements made to the Senate by the new U.S. Ambassador to the United Nations, Nikki Haley, during her confirmation hearing, confirming that she supports engagement with the United Nations and would oppose a “slash-and-burn” approach to U.N. funding. The administration's proposed reductions, which amount to billions of dollars, would be devastating to human rights promotion, humanitarian aid projects, peacekeeping, and health initiatives around the world.⁸

We are heartened by the objections to these proposals raised by both Democratic and Republican members of Congress, including Senators Mitch McConnell, Lindsey Graham and Marco Rubio and Representatives Rodney Frelinghuysen, Mac Thornberry, Harold Rogers, and Ed Royce.⁹ As Senator Rubio has stated, U.S. foreign assistance is “critical to our national security,”¹⁰ and as Representative Royce notes, slashing spending on international affairs “could damage efforts to combat terrorism, save lives, and create

⁷ Off. of Mgmt. & Budget, *America First: A Budget Blueprint to Make America Great Again*, at 33, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

⁸ Colum Lynch, *White House Seeks to Cut Billions in Funding for United Nations*, FOREIGN POLICY (Mar. 13, 2017), <http://foreignpolicy.com/2017/03/13/white-house-seeks-to-cut-billions-in-funding-for-united-nations/>; Colum Lynch, *White House Hobbles Nikki Haley Before Her First Day at the U.N.*, FOREIGN POLICY (Jan. 26, 2017), <http://foreignpolicy.com/2017/01/26/white-house-hobbles-nikki-haley-before-her-first-day-at-the-u-n/>.

⁹ Anne Gearan, *Possible Budget Cuts to State Dept., Foreign Aid Draw Bipartisan Opposition*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/world/national-security/possible-budget-cuts-to-state-dept-foreign-aid-draw-bipartisan-opposition/2017/02/28/46ab5004-fdfb-11e6-8f41-ea6ed597e4ca_story.html; Eli Yokley, *McConnell Pours Cold Water on Trump Plan to Cut State Dept. Funding*, MORNING CONSULT (Feb. 28, 2017), <https://morningconsult.com/2017/02/28/mcconnell-pours-cold-water-trumps-plan-slash-state-dept-funding>; John Bresnahan & Sarah Ferris, *Key House Republican Balks at Trump's Budget Cuts*, POLITICO (Feb. 28, 2017), <http://www.politico.com/story/2017/02/republicans-budget-cuts-trump-frelinghuysen-235513>; Rebecca Kheel, *House Chairman Won't Rule Out Spending More Than Trump's Defense Budget*, THE HILL, (Mar. 1, 2017), <http://thehill.com/policy/defense/321853-armed-services-chairman-talks-for-640b-defense-budget-regardless-of-trump>; Sylvan Lane, *GOP Senator: Trump Budget “Dead on Arrival”*, THE HILL (Feb. 28, 2017), <http://thehill.com/policy/finance/321576-gop-senator-trump-budget-dead-on-arrival>; Kelsey Snell and Karoun Demirjian, *Capitol Hill Republicans Not on Board With Trump Budget*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/powerpost/capitol-hill-republicans-not-on-board-with-trump-budget/2017/03/16/9952d63e-0a6b-11e7-b77c-0047d15a24e0_story.html.

¹⁰ Marco Rubio (@marcorubio), TWITTER (Feb. 28, 2017, 6:27 AM) <https://twitter.com/marcorubio/status/836583503768748033>.

opportunities for American workers.”¹¹ We also concur in the recent letter from over 120 retired three- and four-star generals, including retired Gen. David Petraeus, urging Congress to ensure that resources for diplomacy, development, and rights promotion keep pace with both global threats and international opportunities.¹² As these experienced officers observe, bipartisan legislative initiatives addressing the rights of women and girls, food security, water, and transparency and accountability promote international stability and security. Failing to ensure that these kinds of initiatives are adequately funded threatens to undermine the longstanding commitment of the United States to promote human rights and address the conditions that lead to conflict in societies around the world.

We respectfully urge you, as congressional leaders, to ensure that the United States preserve its stature as a global leader on human rights. Especially since World War II, the United States has been at the forefront of the development of international human rights standards and mechanisms of protection. Maintaining that global position of leadership benefits our country for reasons of morality, security, and economic strength—but also requires the government to take concrete actions to promote and defend human rights, to engage with international institutions, to develop constructive relationships with global partners, and to guarantee the protection and advancement of human rights here at home. In practical terms, global security is threatened when human rights obligations are overlooked.

In the current climate, your support in upholding U.S. leadership on human rights through proactive measures is of paramount importance. First, we urge the Senate to give its advice and consent to ratification of core international human rights treaties that provide a baseline of protections in alignment with existing U.S. law, including the Convention on the Rights of Persons with Disabilities,¹³ the Convention on the Rights of the Child,¹⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁵ Congressional leadership has always played an important role in the formulation and exercise of U.S. foreign policy, and we urge you to continue to play that role by demanding thoughtful engagement by the White House on the international stage.

¹¹ U.S. House of Representatives, Foreign Affairs Committee, Press Release, Chairman Royce Statement on Admin Budget Proposal (Feb. 28, 2017), <https://foreignaffairs.house.gov/press-release/chairman-royce-statement-admin-budget-proposal>.

¹² Letter from Gen (Ret'd). Keith B. Alexander, et al. to Paul Ryan, Nancy Pelosi, Mitch McConnell, and Chuck Schumer (Feb. 27, 2017), http://www.usglc.org/downloads/2017/02/FY18_International_Affairs_Budget_House_Senate.pdf (letter from 121 retired three and four star flag and general officers expressing their “strong conviction that elevating and strengthening diplomacy and development alongside defense are critical to keeping America safe”).

¹³ Convention on the Rights of Persons with Disabilities, *adopted* Dec. 13, 2006, 2515 U.N.T.S. 3 (signed by President Obama on July 30, 2009).

¹⁴ Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed by President Clinton on Feb. 16, 1995).

¹⁵ Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (signed by President Carter on July 17, 1980).

In addition to promoting the human rights of individuals around the world, ratifying these international human rights treaties will affirm the commitment of the United States to the rule of law and strengthen U.S. credibility.

Second, we urge you to conduct robust oversight to ensure that the United States adheres to its own obligations to guarantee human rights. The moral leadership of the United States on human rights around the world is enhanced when human rights protections are guaranteed and promoted at home. Our strength is our tolerance, our diversity, and the protections that are ensured by the U.S. Constitution. Compliance with domestic and international law—norms that are binding on the government of the United States—requires just and humane immigration policies, transparency in governance, adherence to the rule of law, and acceptance of accountability mechanisms.

Finally, we encourage you to support full cooperation and engagement with the United Nations and other international institutions and human rights mechanisms. Such participation not only is consistent with our longstanding values and principles as a country, but also can help the United States best protect its own interests. For example, the Obama administration chose to engage with the International Criminal Court by participating in meetings of the ICC's governing body, the Assembly of State Parties. This engagement allowed the United States to significantly influence proposed amendments to the Rome Statute. The interests of the United States are also enhanced by ensuring sufficient financial support of U.N. institutions and peacekeeping efforts.

Dignity, equality, and fundamental rights are not partisan issues, and we are encouraged by congressional leaders who have demonstrated their willingness to put these values ahead of partisan politics. Congress provides a vital check on executive authority and has an obligation to provide vigorous oversight and to insist that the executive branch protect U.S. interests and adhere to U.S. values and legal commitments.

Like other bar associations around the world, the Association has a strong and longstanding interest in closely monitoring executive, legislative, and judicial actions to ensure adherence to the rule of law and fundamental rights. We anticipate a continuing need for civil society to be vigilant about these values, and we will continue to hold the administration to account for its commitment to the rule of law. As we do so, we look forward to strong and active support from members of Congress.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'John S. Kiernan', with a horizontal line extending to the right.

John S. Kiernan

cc: Hon. Bob Corker
Chair, Committee on Foreign Relations
U.S. Senate
425 Dirksen Senate Office Building
Washington, DC 20510

Hon. Benjamin L. Cardin
Ranking Member, Committee on Foreign Relations
U.S. Senate
509 Hart Senate Office Building
Washington, DC 20510

Hon. Edward R. Royce
Chair, Committee on Foreign Affairs
U.S. House of Representatives
2310 Rayburn House Office Building
Washington, DC 20515

Hon. Eliot L. Engel
Ranking Member, Committee on Foreign Affairs
U.S. House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Hon. Adriano Espaillat
U.S. House of Representatives
1630 Longworth House Office Building
Washington, DC 20515

Hon. Thomas Suozzi
U.S. House of Representatives
226 Cannon House Office Building
Washington, DC 20515

Hon. Gregory W. Meeks
U.S. House of Representatives
2234 Rayburn House Office Building
Washington, DC 20515

Hon. Lee Zeldin
U.S. House of Representatives
1517 Longworth House Office Building
Washington, DC 20515

Hon. Dan Donovan
U.S. House of Representatives
1541 Longworth House Office Building
Washington, DC 20515



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE
TRUMP ADMINISTRATION REGARDING THE
CONSIDERATION OF FOREIGN LAW BY COURTS IN THE UNITED STATES**

Over the last decade, there have been legislative bills introduced in over 20 states seeking in one form or another to limit the use of either Islamic law principles (usually misidentified as “Shariah law”) or foreign or international law generally. The New York City Bar Association (“City Bar”) opposes, as unconstitutional, unwise and unworkable, any efforts to prohibit or impede courts – through legislation or judicial litmus tests - from considering or applying foreign, international¹ or Sharia law. Such efforts have almost universally been the result of poor legal scholarship driven by Islamophobia.

The apex of the effort to ban courts from considering foreign, international or Sharia law was the successful referendum in 2010 in the State of Oklahoma on its “Save Our State Amendment” to its State Constitution. In December 2010, the City Bar’s Committee on Foreign and Comparative Law issued a report, “The Unconstitutionality of Oklahoma Referendum 755 – The ‘Save Our State Amendment’.”² In addition, on May 13, 2011, the City Bar submitted an *amicus curiae* brief to the United States Court of Appeals for the Tenth Circuit in Oklahoma’s appeal of the district’s court’s injunction of the amendment.³ Both the Report and Brief focused on the numerous Clauses of the United States Constitution that the Oklahoma Amendment patently violated. The City Bar’s concerns and arguments with respect to the Oklahoma constitutional amendment are set forth in detail in those documents and apply with equal force to other efforts that might be made to interfere with courts’ application of foreign, international or Sharia law.

¹ A common error in this area is the conflation of “foreign law” with “international law.” As set forth more fully below, the former is the law applicable in one or more non-U.S. jurisdictions, such as French law, Canadian law, EU law, etc. It is by definition NOT binding in American courts; although there have been a number of recent United States Supreme Court decisions, as well as some of lower courts, that have looked to various foreign laws for guidance. By contrast, “international law” is the law between or among nations, and the United States is party to much, but not all, of it. Once an element of international law becomes embodied in a ratified treaty of the United States, it is *ipso facto* the “supreme law” of the United States. Otherwise, it may be binding as “customary law.” The City Bar is therefore not stating that “foreign law” should be binding in American court proceedings, but that it is often the appropriate law to apply to specific transactions and disputes where the choice of law by traditional norms, and Federal and State law, would so indicate.

² Available at <http://www.nycbar.org/pdf/report/uploads/20072027-UnconstitutionalityofOklahomaReferendum755.pdf>.

³ Available at <http://www2.nycbar.org/pdf/report/uploads/20072117-AmicusBriefAwadvZiriauxUSCourtofAppealsTenthCircuit.pdf>.

Courts in this country have long considered, debated and applied foreign law, whether in reference to the interpretation of our Constitution, as selected by contractual parties to govern their contracts or otherwise. Courts have also applied international law in the form of treaties or international conventions to which the United States is a party. There is no evidence that any court has applied any foreign or international law, or any of the rules that constitute “Sharia law,” in derogation of the public policy of this nation or any of its states, except in a few isolated cases where lower court judges have been quickly and fully reversed. This rule that law cannot be applied in violation of our public policies is sufficient protection in these isolated instances.

The overarching principle in our law and in all our courts is to support the freedom to contract and apply non-U.S. law as the parties deem appropriate. Thus, to interfere with the established functioning of the courts is unnecessary and, as discussed below, a dangerous interference with our Constitution and the personal lives and commercial interests of our citizens. Efforts to appoint only judges who will commit to such radical approaches to jurisprudence are also unwise and dangerous.

The Tenth Circuit upheld the preliminary injunction of the Oklahoma constitutional amendment that would have forbidden Oklahoma courts from considering “international law” or “Sharia law” because the amendment likely violated the Establishment Clause of our Constitution. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). Since the decision, efforts have been made to ban courts’ use of foreign or international law without explicit reference to “Sharia law,” presumably in an attempt to avoid violating the Establishment Clause, as well as the Free Exercise and Equal Protection clauses. Certainly, a law that singles out the religious rules and dictates of a particular faith for prohibition violates those provisions of our Constitution. However, even a seemingly even-handed effort to ban consideration of “foreign” or “international” law is disturbing.

First, parties habitually make their contracts subject to foreign law, whether that law is the law of the United Kingdom, Egypt, Japan or any other nation, or the law of states or provinces within other nations. To forbid a court from applying such foreign law frustrates commerce and business and constitutes an interference with contract in violation of Article I, Section 10 of our Constitution. Second, “international law” typically includes international conventions and treaties. Banning courts from using international law, could thus, for example, prohibit a court from considering the U.N. Convention on Contracts for the International Sale of Goods (“CISG”), which could wreck havoc in a case between a U.S. party and one in Mexico who had ordered their affairs and agreements with CISG in mind. In addition, treaties to which the U.S. is a party are part of the supreme law of the nation, as provided in Article VI, Clause 2 of our Constitution, and courts must be able to consider, apply and enforce them. Third, to the extent that “foreign law” includes religious law (even without explicitly referencing it) banning courts’ consideration of foreign law could cause all manner of difficulties. Consider, for example, purchasers of kosher or halal beef, who require in their purchase contracts that parties in the supply chain adhere to the relevant rules. Forbidding a court to consider those rules and whether a seller followed them would frustrate the purpose of the contracts.

It is also very important to our individual and corporate citizens that they be allowed to require that their relationships and contracts are governed by and construed in accordance with our law. Many major financial transactions around the world purport to be governed by the law of the State of New York.⁴ Were our Federal government or states to prohibit the use of foreign law, we can expect wide-spread like-minded retribution.

Further, any efforts to ban consideration of Sharia law explicitly, in addition to the problems outlined above, raises serious vagueness and Due Process Clause issues because “Sharia” is not a body of law so much as a group of rules developed over the centuries that differ from country to country and believer to believer. To forbid courts from considering “Sharia” law is unconstitutionally vague, and it leaves believers uncertain whether and to what extent they can explain their conduct or order their affairs by reference to their religious beliefs. For example, if a person wishes to draft her will in accordance with Islamic principles, a court might be barred from enforcing that will because of a prohibition on using Sharia law.

In conclusion, there is no need to ban courts from considering foreign, international or Sharia law, and to do so violates our Constitution and harms our people in the conduct of their personal lives and commercial activities. Requiring that judges refuse to consider that law is equally unwise.

John S. Kiernan
President, New York City Bar Association

Maria M. Patterson
Chair, Foreign & Comparative Law Committee

January 2017

⁴ New York has even included in its General Obligations Law, at §§5-1401 and 1402, express provisions permitting its courts to interpret and enforce contracts involving at least a certain dollar amount that choose New York law and New York courts to govern those contracts, even if there is no other connection to New York State.



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
U.S. POLICIES AND ACTIONS IN ASIA**

The New York City Bar Association (the “City Bar”) writes to offer its recommendations to the President Trump’s Administration regarding the policies and actions of the United States in Asia. The Asian region, accounting for 60% of the world’s 7.5 billion people and 40% of the global economy, remains the engine of global economic growth.¹ It is a complex and diverse area — incorporating some of the world’s most repressive regimes, and some of its newest and most dynamic democracies. It contains the world’s two most populous countries, and also some of its smallest. Today, and tomorrow, US Government policies and actions in Asia will impact people worldwide.

It is the City Bar’s primary recommendation that the new administration make a commitment to the rule of law and human rights. These should operate as guiding principles for its engagement with the Asian region. These principles must also thread through the incoming administration’s approach to trade, defense, and the pursuit of the national interest. In the following sections, the City Bar outlines areas of concern that it wishes to highlight for the attention of the administration’s attention.

RULE OF LAW

The City Bar welcomes positive rule of law developments in the region over recent years, including the peaceful resolution of border issues between Bangladesh and India, following the decision of the Permanent Court of Arbitration in 2014. The City Bar strongly urges the new U.S. administration to support the use of judicial and treaty-based mechanisms for the resolution of disputes, including those in the South China Sea.

The City Bar notes with concern that efforts to achieve the rule of law in the Asian region are severely threatened by crackdowns on lawyers and activists — most notably in China, Malaysia, and Thailand. Further, we are concerned at the state’s abuse of criminal law relating to state security, such as using charges of sedition in Malaysia and “subversion of state power” in

¹ Christine Lagarde, “Asia’s Advancing Role in the Global Economy,” International Monetary Fund, March 12, 2016, available at <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp031216>; see also “Regional Economic Outlook: Asia and Pacific: Building on Asia’s Strengths during Turbulent Times,” International Monetary Fund, April 2016, available at <http://www.imf.org/external/pubs/ft/reo/2016/apd/eng/areo0516.htm>. (All websites last visited March 3, 2017.)

China to prosecute activists and lawyers engaging in their work as professionals.² As the UN's High Commissioner for Human Rights has stated, “lawyers should never have to suffer prosecution or any other kind of sanctions or intimidation for discharging their professional duties.”³

The City Bar urges the administration to:

1. Promote and support rule of law and treaty-based dispute resolution mechanisms, and the use of tribunals and courts operating under international law; and
2. Condemn attacks and crackdowns on lawyers and activists whose work is instrumental to the rule of law.

HUMAN RIGHTS

The Asian region is a vast and complex area, and its successes and challenges in achieving progress in human rights are too numerous to treat at length in this memorandum. Only sustained commitment and investment in the region will enable the administration to best support the continued growth of human rights in countries across Asia. The City Bar highlights some areas where it believes the U.S. can play an important role in facilitating regional progress on human rights:

1. Condemnation of, and a serious engagement with, the use of extra-judicial killings in the Philippines of up to 6,000 so-called “drug dealers” and “drug users,” without trial or due process of law.⁴ These extra-judicial killings have led to the deaths of numerous completely innocent people, and should be condemned.
2. A concerted strategy to address efforts led by the Chinese government to restrict internet freedom and promote state sovereignty over the internet.⁵ The free flow of information is among America’s core values and its promotion is of vital importance to this country’s interests abroad. The free flow of information promotes transparency in government, efficiency in the markets, and cultural and political

² See *i.e.*, “Mass Crackdown on Chinese Lawyers and Defenders,” Human Rights in China, June 10, 2016, available at <http://www.hrichina.org/en/mass-crackdown-chinese-lawyers-and-defenders>; “Malaysia: Drop charges against lawyer N. Surendran,” Amnesty International, June 29, 2016, available at <https://www.amnesty.org.au/malaysia-drop-charges-surendran-anwar-ibrahim/>; and “Thai military junta steps up crackdown; student activist describes being abducted by hooded soldiers,” Australian Broadcasting Corporation 7.30 Report, March 17, 2016, at <http://www.abc.net.au/7.30/content/2015/s4427197.htm>.

³ “UN Human Rights Chief deeply concerned by China clampdown on lawyers and activists,” UN Office of the High Commissioner for Human Rights, Feb. 16, 2016, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17050&LangID=E>.

⁴ “The president of the Philippines boasts about personally killing drug suspects,” *The Economist*, Dec. 17, 2016, available at <http://www.economist.com/news/asia/21711935-and-rodrigo-duterte-charge-philippine-police-president-philippines-boasts>.

⁵ Shannon Tiezzi, “China Vows No Compromise on 'Cyber Sovereignty,’” *The Diplomat*, Dec. 16, 2015, available at <http://thediplomat.com/2015/12/china-vows-no-compromise-on-cyber-sovereignty/>.

dialogue. The internet, as the primary medium of transmission in our day, should remain open, connected, and vibrant. The City Bar urges the administration to combat efforts to restrict internet freedom and the creation of “sovereign” intranets that cut populations off from the global information ecosystem.

CIVIL SOCIETY

While the City Bar welcomes events such as Myanmar's first openly contested election in 25 years—in November of 2015—the Committee is also concerned at a rise in attacks on civil society and religious minorities in the region.⁶ For example, we note the use of excessive force against protesters exercising their rights to association, assembly and freedom of speech — notably in Papua New Guinea,⁷ Hong Kong⁸ and Myanmar⁹ (for example, the Rohingya).¹⁰

A healthy civil society is integral to the development of human rights and the rule of law in the Asian region. The City Bar encourages the new administration to continue U.S. Government support for civil society actors across the region: financially, politically, and through its support for media organizations which offer a counterpoint to domestic authoritarian government narratives. In this context, the City Bar remains gravely concerned at the rise of laws aimed at restricting civil society actors in their capacity to engage with, and advocate for, issues, notably through the introduction of the foreign NGO law in China.¹¹ We note the appearance of similarly troubling legislation in other parts of the region, most recently in Bangladesh, where, for example, a new law allows an NGO to be suspended or terminated for making derogatory remarks about “constitutional bodies.”¹² We also note with concern the enactment of a law heavily regulating NGOs in Cambodia in 2015,¹³ and the use of licensing to politicize access to funding for NGOs in India, preventing those engaged in “anti-national activities” from accessing

⁶ Patrick Boehler, “A Brief Guide to Myanmar’s Elections,” *The New York Times*, Nov. 5, 2015, available at http://www.nytimes.com/2015/11/06/world/asia/myanmar-election-president-aung-san-suu-kyi-explainer.html?_r=0.

⁷ Editorial: “No call for bloody crackdown in PNG,” *The Age*, June 11, 2016, available at <http://www.theage.com.au/comment/the-age-editorial/no-call-for-bloody-crackdown-in-png-20160531-gp867g.html>.

⁸ Venus Wu and James Pomfret, “Violent protests in Hong Kong as police and activists clash over Beijing crackdown,” *The Sydney Morning Herald*, Nov. 7, 2016, available at <http://www.smh.com.au/world/violent-protests-in-hong-kong-as-police-and-activists-clash-over-beijing-crackdown-20161106-gsjob20.html>.

⁹ “Myanmar: New report finds police used excessive force during crackdown on protesters in Letpadan,” *Harvard Law Today*, Oct. 14, 2015, available at <http://today.law.harvard.edu/myanmar-new-report-finds-police-used-excessive-force-during-crackdown-on-protesters-in-letpadan/>.

¹⁰ “Who are the Rohingya refugees?,” Amnesty International Australia, Dec. 8, 2016, available at <https://www.amnesty.org.au/who-are-the-rohingya-refugees/>.

¹¹ Tom Phillips, “China passes law imposing security controls on foreign NGOs,” *The Guardian*, April 28, 2016, available at <https://www.theguardian.com/world/2016/apr/28/china-passes-law-imposing-security-controls-on-foreign-ngos>.

¹² David Bergman, “Concerns raised over new Bangladesh NGO law,” *Aljazeera*, Oct. 21, 2016, available at <http://www.aljazeera.com/news/2016/10/concerns-raised-bangladesh-ngo-law-161020121856969.html>.

¹³ John Juenemann, “Cambodia’s NGO Law: Legislation with Chinese characteristics,” Center for Strategic and International Studies, June 30, 2015, available at <http://cogitasia.com/cambodias-ngo-law-legislation-with-chinese-characteristics/>.

foreign funds.¹⁴ The administration must continue to lobby and engage governments in the Asian region to abide by their international law commitments to support freedom of association and assembly.¹⁵

John S. Kiernan
President, New York City Bar Association

Angus F. Ni
Chair, Asian Affairs Committee

March 2017

¹⁴ Vidhi Doshi, “India accused of muzzling NGOs by blocking foreign funding,” *The Guardian*, Nov. 24, 2016, available at <https://www.theguardian.com/global-development/2016/nov/24/india-modi-government-accused-muzzling-ngos-by-blocking-foreign-funding>.

¹⁵ *Asia-Pacific Regional Security Assessment 2016*, The International Institute for Strategic Studies, available at <https://www.iiss.org/en/publications/strategic%20dossiers/issues/asia-pacific-regional-security-assessment-2016-2288>.



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO
THE TRUMP ADMINISTRATION REGARDING
THE ISRAELI-PALESTINIAN CONFLICT**

The Trump Administration will face both historic and recent challenges in developing a set of policies to have a transformative impact on the Israeli-Palestinian conflict. The disabling lack of trust between the parties remains a formidable barrier to progress in any direct or even multi-lateral negotiations. Therefore, we recommend the Trump Administration's first step might be to focus on achievable goals that can create an environment of trust and working together from which to build toward more plenary solutions.

In addition, as lawyers, we are particularly concerned on situations in which there is a break-down in the rule of law. Many such situations exist in the Middle East and North Africa region. We focus herein on two situations, one in the West Bank and one in Jerusalem, both of which might appear to be tame in comparison to other situations in the region, but both of which can be remedied by what we believe to be relatively achievable steps.

To that end, we propose consideration of the following:

1. ALTERING THE BOUNDARIES OF THE A, B, C ZONES

With the signing of the Oslo Accords (1993), the West Bank has been divided into three zones, classified in the following way (see Map 1 appended):

- AREA A – Territory that is under full Palestinian administrative and security control. Area A currently comprises about 18% of the West Bank.
- AREA B – Territory that is under Palestinian administrative control but Israeli security control. Area B currently comprises about 22% of the West Bank.
- AREA C – Territory that is under full Israeli administrative and security control. Area C currently comprises about 60% of the West Bank.

In recent years, the organic growth of Palestinian villages in Area B, caused by demographic pressures, has caused them to begin to extend into Area C. However, it is virtually impossible for Palestinians to receive a building permit from Israeli authorities to build in Area C -- only one such building permit was approved in all of 2014 and 2015.¹ Because permits are

¹ US Secretary of State John Kerry Remarks at Brookings Institution Saban Forum, December 4, 2016, *available*

impossible to receive, Palestinians have built structures without authorization. As a result, as many as 11,000 demolition orders threaten the homes of as many as 200,000 Palestinians living in Area C.²

The Economic Cooperation Foundation (“ECF”), a private NGO that has been credited with helping to launch the secret talks that led to the Oslo peace process, has suggested a number of policy proposals to address the concerns about unauthorized Palestinian building within Area C. Most notably is the “1%” plan – which would re-designate 1% of Area C to be Area B – and thus removing the Palestinian structures slated for demolition from their current state of limbo.³ (It should be noted that the Israeli Defense Force (“IDF”) is not proceeding with these demolition orders, understanding the resulting security threat that could follow such wide scale demolitions of Palestinian property). Based on both Israeli law and the Oslo Accords, recognizing these segments of Area C as Area B, or even just transferring housing and zoning authority over them to the Palestinian Authority (“PA”), requires no Israeli legislation and can be accomplished by the unilateral action of the Israeli Prime Minister.⁴ And, notably, since Area B is still under Israeli security control, it should not diminish Israeli security control over the affected areas.

ECF further recommends that new Palestinian zones of civilian police responsibility be established in Area B. According to ECF, for 80% of the Palestinians living in Area B there is no civilian police presence – Israeli or Palestinian – whatsoever. Israel maintains a military presence and control (through the IDF and other security forces), but not police forces in Area B; and Palestinian police and security forces do not enter areas where Israel has security control. Hence another ECF recommendation is to classify portions of Area B for expanded Palestinian policing, which should be feasible given the close cooperation Israel and the PA have demonstrated with regard to security issues elsewhere.

Both these ECF recommendations appear to be small adjustments to the Oslo Accords that can significantly ease the lives of many Palestinians living in the affected areas. Moreover, by clarifying and institutionalizing the legal status of the unapproved buildings in Area C and regularizing the police powers in Area B, the rule of law is fostered even in a geographic area where there is political discord.

2. JERUSALEM – “NO MAN’S LAND”

Another challenge exacerbating current Israeli-Palestinian tensions is the so-called “no man’s land” within East Jerusalem. This primarily refers to the areas within the Qalandiya and Shuafat refugee camps that are technically within the Jerusalem municipal boundaries (part of the Israeli city of Jerusalem with East Jerusalem annexed in 1967). However, while these camps are technically within the Jerusalem municipality, they are, as reflected in Map 2 (appended),

at: <https://www.state.gov/secretary/remarks/2016/12/264824.htm>.

² *Id.*

³ Map 1 actually reflects the transfer of 4% of Area C to Area B. A transfer of 4% is the option preferred by ECF as maximizing the benefit of its plan.

⁴ There is some lack of clarity as to whether this action can be taken without negotiation with the PA.

situated on the Palestinian side of the security barrier erected by Israel to separate the Jewish and Palestinian populations. In practice, this means that Palestinian police and security forces do not enter this area (as the area is under control of Israel); nor do Israeli police or security forces enter these areas, as they are situated on the “wrong” side of the barrier. As a result, gangs, drug use and extremist ideology is on the rise in these areas.⁵

Among the recommendations to alleviate this problem is one put forward by Commanders for Israel’s Security (CIS) – a network of over 235 former heads of the IDF, ShinBet, Mossad and police forces.⁶ The proposal includes the creation of a special civilian administration to address the economic and security challenges in East Jerusalem, including the aforementioned “no man’s lands.” In short, this administrative body would take over 25 Palestinian villages located within the Jerusalem municipal borders, but outside of the security barrier, and would be responsible for a budget independent from the Jerusalem municipality, focused especially on the current economic and security shortcomings in these villages.

This recommendation also touches directly on fostering the rule of law in conflict areas, while allowing the parties to take an incremental step toward building working processes of bilateral problem-solving negotiations.

The New York City Bar Association encourages the Administration to incentivize the Israelis and Palestinians to cooperate on these practical solutions and not to view them (at least publicly) from a political or symbolic perspective. Promoting them as cooperative efforts intended to eliminate lawlessness, reduce unnecessary stressors and improve people’s lives may allow positive developments in a region desperately in need of them.

John S. Kiernan
President, New York City Bar Association

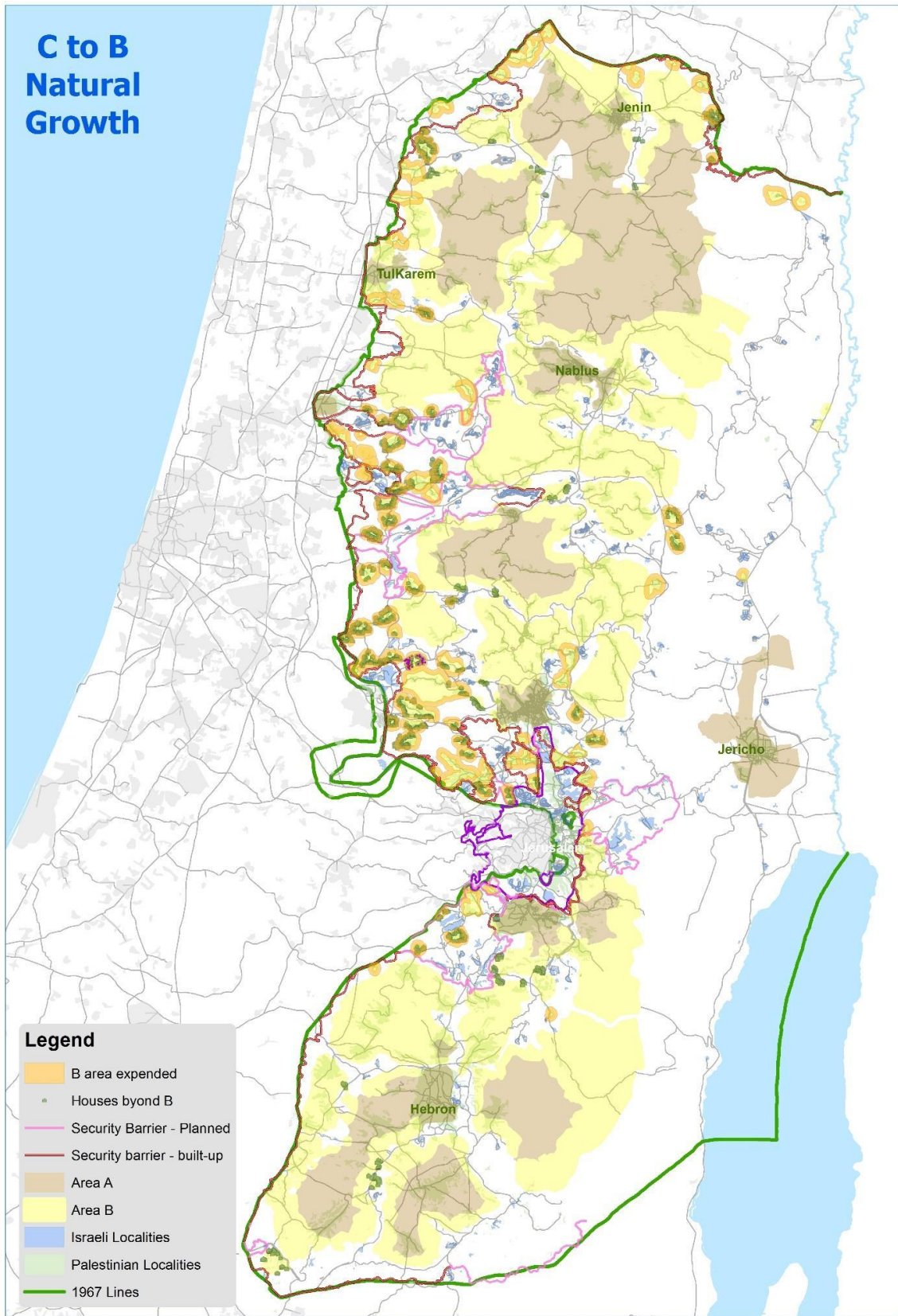
Robert E. Michael
Chair, Middle Eastern and North African Affairs Committee

January 2017

⁵ Kushner, Rachel, “We Are Orphans Here,” New York Times Magazine, December 1, 2016, *available at* <https://www.nytimes.com/2016/12/01/magazine/we-are-orphans-here.html? r=0>.

⁶ Commanders for Israel’s Security, *at* <http://en.cis.org.il/>.

MAP 1



MAP 2

