



July 11, 2018

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable Charles E. Schumer  
Minority Leader  
United States Senate  
Washington, D.C. 20510

**Re: Criminal Justice Reform Must Include Sentencing Reform in the Senate**

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Dear Majority Leader McConnell and Minority Leader Schumer,

On behalf of the American Civil Liberties Union (ACLU), we write to urge the Senate to support comprehensive criminal justice reform legislation which must include reforms to federal sentencing laws. No attempts to improve our criminal justice system will prove effective or meaningful without the sentencing reform that the federal system desperately needs.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than two million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

**Background**

Mass incarceration is an utter failure as a public policy due to its devastating impact on those who become ensnared in the criminal justice system, its failure to produce a proportional increase in public safety, and its disproportionate harm to poor communities and communities of color. This nation's use of incarceration is no longer grounded in sound principle or policy. The U.S. has the highest rate of incarceration of any country in the world, and federal spending on incarceration in 2010 was estimated at \$80 billion.<sup>1</sup>

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<sup>1</sup> See TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2012 — PRELIMINARY TBL. 1 (2015), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239> (showing FY 2012 state and federal corrections expenditure was \$80,791,046,000)

The cost of the federal Bureau of Prisons (BOP) accounts for nearly a third of the Department of Justice's discretionary budget. Federal incarceration has become one of our nation's biggest expenditures, swallowing the budget of federal law enforcement.<sup>2</sup> It costs almost \$32,000 a year to house just one federal inmate, almost four times the average yearly cost of tuition at a public university.<sup>3</sup>

This country's extraordinary incarceration rates impose much greater costs than simply the fiscal expenditures necessary to incarcerate almost 25 percent of the world's prisoners in a country with less than 5 percent of the world's population. Although Americans commit drug offenses at roughly equal rates across race and ethnicity<sup>4</sup>, almost half of the people in federal prisons are serving time for drug sentences. Just as troubling, African Americans make up almost 38% and Hispanics 33% of the Bureau of Prisons (BOP) population, confirming that our criminal justice system disproportionately incarcerates people of color. The true costs of this country's addiction to incarceration must be measured in human lives and particularly the generations of young black and Latino men who serve long prison sentences and are lost to their families and communities.

States across the country have been successful at reducing rates of crime and incarceration when they enact legislation that reform prisons *and* sentencing laws. Prison reform legislation focuses on reforming prisons or the "backend" of the criminal justice system by allow people to participate in reentry and rehabilitation programs and earn time credits. However, failing to eliminate mandatory minimums, reduce the prison population, or address disparate impact on communities of color make for a superficial attempt at criminal justice reform.

### **Prison Reform Does Little to Address Mass Incarceration**

On May 22<sup>nd</sup> the House passed H.R.5682, the FIRST STEP Act, a "backend" only prison reform bill. While there are some potentially promising provisions of the FIRST STEP Act, most could be adopted administratively by the BOP. The FIRST STEP Act aims to fix the statutory "good time" credit calculation by clarifying congressional intent to allow people to earn up to 54 days of credit per year, as opposed to the maximum of 47 days calculated by the BOP. While fixing the "good time" credit calculation is a worthy, positive reform, by itself it does not alleviate the deep problems and lack of meaningful reform found in this bill.

The FIRST STEP Act would also require BOP to place prisoners within 500 driving miles of their home. Although this language is included in the bill, it is currently BOP policy to place people within 500 miles of their residence. H.R.5682 improves BOP's compassionate and elderly release processes for prisoners who are aging in prison and terminally ill. The bill also bans shackling of pregnant women in federal prisons and jails and updates the current law that requires BOP to help people get government identification cards and birth certificates before they leave prison.

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<sup>2</sup> NANCY LAVIGNE & JULIE SAMUELS, THE URBAN INSTITUTE, THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 1-2 (Dec. 2012) [hereinafter LAVIGNE URBAN INSTITUTE REPORT], *available at* <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.

<sup>3</sup> Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016 )

<sup>4</sup> *See, e.g.*, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES (J. TRAVIS AND B. WESTERN, EDs.), THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION at 60-61, 97 (2014).

At the core of the FIRST STEP Act is the ability to access rehabilitation and re-entry programming as well as residential re-entry centers (i.e. halfway houses) and home confinement. However, currently Federal Bureau of Prisons (BOP) does not provide enough of these recidivism reduction programs or have sufficient halfway house capacity for those currently in prisons. Furthermore, BOP more recently reduced the number of residential reentry centers it contracts with to provide halfway house programming. We are concerned that the system FIRST STEP creates does not align with the current realities of the BOP.

The current authorization levels for BOP funding barely even start to address the gross underfunding of the Bureau. For example, the waiting list for the BOP's literacy program is 16,000 names long.<sup>5</sup> That makes even the \$50 million per year authorization for FIRST STEP nowhere near adequate to expand programming to the necessary levels for participants to take advantage of this programming. Without definitive or committed funding, the "prison reform" being pushed would result in empty promises.

Even with proper funding, meaningful prison reform faces other obstacles. On the heels of the resignation of Mark Inch as Director of prisons and public opposition to the legislation by Attorney General Jeff Sessions many are concerned about how the AG will implement prison reform. In addition, officials reported that Sessions is requiring "time-consuming study" before implementation for any legislation seen as "excessively lenient toward inmates."<sup>6</sup> There is every indication that Mr. Sessions would apply this to FIRST STEP Act or other prison reform measures, deferring any immediate positive impact of this bill.

### **Unconventional Use of "Risk Assessments"**

Additional concerns exist with the prison reform only measures. The legislation lacks incentives for those most in need of rehabilitative programming by excluding those deemed "high risk" as well as many with immigration related offenses. The provisions in H.R.5682 for early-release credits are based on successful completion of rehabilitative programs which will not reduce over-incarceration or its costs because it prohibits a large number and variety of prisoners from earning early-release credits based solely on the nature of their federal conviction.

In addition, H.R.5682 would create a risk and needs assessment system in an unconventional manner to determine time credits for early transition to halfway houses or home confinement, which is novel and untested. The risk assessment system is also unlikely to reduce recidivism because it gives time credit incentives for completing rehabilitative programs to people deemed minimum- and low-risk in prison who are least likely to reoffend. The bill does not allow people found to be at medium- and higher-risk of reoffending, and more in need of incentives to complete programs, time credits.

State correctional systems typically award time credits based on performance and/or disciplinary record, not on risk and needs assessment evaluations. According to research, these systems should be used to identify appropriate correctional interventions, not to set the length of prison sentences. Any person who will return to our communities from prison someday should get time credit incentives for completing rehabilitative programs.

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<sup>5</sup>See FY 2019 Performance Budget: Congressional Submission, United States Department of Justice Federal Prison System, *available at* <https://www.justice.gov/jmd/page/file/1034421/download>.

<sup>6</sup>*Id.*

## **Lack of Rehabilitative Programming and Residential Reentry Centers**

The proposed expansion of programming to reduce recidivism in this bill carries no guarantee of additional funding for its implementation and does nothing to provide the residential re-entry center bed space necessary for people in prison to take advantage of their earned time credits. The BOP hardly has the capacity to adequately support programming at its current levels. Without definitive or committed funding, this bill's provisions would be essentially result in empty promises.

In addition, the time credits proposed by the FIRST STEP Act may not actually be employed by the people in prison who have earned them. In fact, BOP has the discretion to use home confinement now, but rarely does. The Congressional Budget Office stated that a similar time credit provision in another version of prison reform legislation would not impact cost because it "seemed that people in prison would not actually be able to take advantage of their earned time credits due to lack of residential re-entry center bed space."<sup>7</sup> For the earned time credits to be meaningful incentives for participants, halfway houses, reentry centers, and home confinement would need to be far more accessible and available than they are currently.

### **Conclusion**

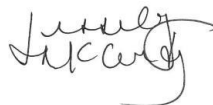
The criteria for criminal justice reform seems to no longer be that it addresses the very real problems in the federal system, but rather more about appearing as if something is being accomplished. Prison reform by itself is insufficient and does not address the serious issues our criminal justice system faces. No meaningful reform to our criminal justice system can be made without addressing how people enter prison and how they can rebuild their lives after.

We therefore encourage Senators to support comprehensive criminal justice reform legislation which must include federal sentencing reform. If you have any additional questions, please feel free to contact Jesselyn McCurdy, Deputy Director at [jmccurdy@aclu.org](mailto:jmccurdy@aclu.org) or (202) 675-2307.

Sincerely,



Faiz Shakir  
National Political Director  
National Political Advocacy Department



Jesselyn McCurdy  
Deputy Director  
Washington Legislative Office

cc: Members of the U.S. Senate

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<sup>7</sup> See Congressional Budget Office, cost estimate for H.R. 759 Recidivism Risk Reduction Act (September 16, 2016) available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr759.pdf>.