

Congress of the United States

Washington, DC 20515

May 17, 2018

Dear Colleague:

We write to express our serious concerns with the FIRST STEP Act, legislation that purports to reform federal prisons but which would in fact be a step backwards.

We have heard from a wide array of stakeholders who strongly oppose this legislation because they believe that: (1) this bill has fundamental flaws; and (2) meaningful criminal justice reform must include sentencing reform. This includes the civil rights community—more than 70 groups, including the Leadership Conference on Civil and Human Rights, the ACLU, the NAACP and NAACP LDF; the federal and community defenders who represent the incarcerated people the bill is designed to help; the Law Enforcement Leaders to Reduce Crime & Incarceration—a bipartisan group of more than 200 current and former law enforcement officials; and the Council of Prison Locals—the union that represents 33,000 federal correctional workers in the Bureau of Prisons (BOP). We have attached letters from these stakeholders for your review.

Civil rights advocates point out that the bill would exclude too many incarcerated people, use risk assessments in an untested manner that would exacerbate racial and socioeconomic disparities, not provide real time off of sentences, and likely not reduce recidivism. These fundamental concerns are not simply that the FIRST STEP Act does not “go far enough,” but instead that the recidivism reduction plan that is the core of the bill could actually worsen the situation in our federal prisons by creating discriminatory non-evidence-based policies.

Recidivism Reduction Plan Based on Flawed and Exclusionary Risk Assessment System

The bill’s recidivism reduction plan would require BOP to create a new risk assessment system to determine time credits, an approach which is novel and untested. State correctional systems typically award time credits based on performance and/or disciplinary record, not a risk assessment. Research shows that risk assessments often do not accurately predict risk and can produce results that are biased against people of color—particularly African Americans. Risk assessments rely heavily on static factors, including criminal history and age at the time of the offense; and dynamic factors, including work history and educational achievement, that tend to correlate with socioeconomic class and race. This disparate impact will be exacerbated because numerous categories of individuals will be precluded from earning time credits for recidivism reduction programming, including all undocumented immigrants and those convicted of certain nonviolent immigration offenses, exclusions that will disproportionately impact Hispanics.

The bill’s credit system would focus recidivism reduction programming incentives on low- and minimum-risk individuals, when research shows recidivism reduction must be aimed at high-risk persons in order to be most effective. The FIRST STEP Act would allow medium or high risk people to “cash in” credits, but only after the warden determines, among other findings, that the

inmate would not be a danger, has made a good faith effort to reduce “recidivism risk”, and is “unlikely to recidivate.” These provisions set an unreasonably high bar and give far too much discretion to the Trump Administration’s BOP.

Further, the bill would give low- and minimum-risk incarcerated people priority for BOP prison work programs, while BOP currently does not consider the risk level of those applying for work programs. Federal Prison Industries (FPI) has reduced recidivism more than any other BOP program—according to BOP, those who participate in FPI work programs are 24 percent less likely to recidivate for as long as 12 years following release and are 14 percent more likely than non-participants to be employed 12 months after release. BOP concluded that these programs have an even greater positive impact on young people of color, who are statistically at greater risk of recidivism. There is a great demand to participate in FPI, which currently has a waitlist of more than 25,000 people. As a result, aiming for at least 75 percent of eligible low- and minimum-risk incarcerated people to participate in prison work for at least 20 hours per week, as the FIRST STEP Act would require, will necessarily restrict access to FPI for medium- and high-risk individuals. This provision alone would greatly undermine the effectiveness of BOP’s most successful recidivism reduction program.

Reforms like these are not a modest step forward. Rather, they establish new BOP policies that will institutionalize discrimination and likely fail to reduce recidivism.

The Time Credit is Not Real Time off of a Sentence

Earlier prison reform bills would not have allowed incarcerated people to use earned credits to be released, but instead to be placed in a halfway house, home confinement, or on community supervision. The FIRST STEP Act actually takes a step backwards by removing the option for community supervision. Moreover, it is likely that many prisoners would be unable to use their credits because the Trump Administration has reduced support for halfway houses that already had lengthy waiting lists.

Inadequate Funding and Staffing Will Prevent Effective Implementation

BOP correctional officers have emphasized that dire staffing and funding shortages make implementation of the bill’s recidivism reduction plan untenable. The bill authorizes only \$50 million in funding per year for five years. This authorization level, even if actually appropriated, will not adequately support expanded programming, especially at a time when Attorney General Jeff Sessions is already dramatically cutting BOP budget and staff and increasing the prison population. The Trump Administration’s federal prison budget for Fiscal Year 2019 anticipates a 3.4 percent increase in the federal prison population at the same time it eliminates 1,100 BOP positions at a cost of \$136 million. Federal correctional officers have called decreasing staff levels while increasing the prison population a “recipe for disaster.”

In fact, these BOP staffing shortages have already negatively impacted existing recidivism reduction programs. BOP now routinely relies on a practice known as “augmentation,” in which non-security staff such as secretaries, teachers, and nurses are assigned custody responsibilities. This takes staff away from their assigned duties, reducing access to programming, recreation, and education initiatives. For example, the BOP residential drug abuse program (RDAP) which

provides a one-year sentence reduction to those who complete the program, currently faces a 5,000 person wait list due to limited resources.

Too Much Discretion to Attorney General Sessions

We cannot ignore the fact that the FIRST STEP Act would be implemented by Attorney General Sessions, a vocal opponent of prison reform, and that the legislation gives him significant discretion. For example, the new risk assessment system would be created and overseen by the Attorney General. The bill also allows the Attorney General to “use existing risk and needs assessment tools as appropriate,” giving him the option of using the BOP’s current security classification system, which is not designed to determine recidivism risk and heavily relies on static factors.

Facilitating Privatization

We are also deeply concerned that this bill could facilitate the privatization of federal prison programming at a time when the Trump Administration is working closely with the private prison industry. Then-Deputy Attorney General Sally Yates issued a memo in August 2016 to begin phasing out BOP’s use of private prisons. Ms. Yates cited a DOJ Inspector General report that found private facilities do not maintain the same level of safety and security as BOP-run facilities. Despite this evidence, Attorney General Sessions issued a memo in February 2017 that directed BOP to “return to its previous approach.” The FIRST STEP Act provides that BOP shall enter into partnerships with private organizations to deliver programming under policies developed by the Attorney General. This could effectively privatize public functions and allow private entities to unduly profit from incarceration.

Impact of Positive Provisions Overstated

While we support some provisions of this bill, we are concerned that their positive impact is being overstated and in any case does not outweigh the negative impact of the recidivism reduction system that is the central purpose of the bill. For example, we have long supported a “good time credit” fix to accurately reflect congressional intent by allowing prisoners to earn 54 days of credit per year, rather than 47 days. However, we have heard some proponents of the FIRST STEP Act inaccurately claim that this provision would allow 4,000 people to be released immediately.

We asked BOP about the impact of the provision and they told us “about a decade ago when the BOP population was higher, we conducted an estimate that indicated a GTC [good time credit] fix would result in a reduction, within a year, of approximately 4,000 federal inmates in custody” (emphasis added). In other words, of the approximately 41,000 inmates who are released from BOP custody every year, some number less than 4,000 would be released a few days, weeks, or possibly months early in the bill’s first year. While we strongly support the early release of inmates who have earned good time credits, it is important to understand that the real impact of this provision is considerably smaller than the bill’s proponents claim.

Prison Reform Will Fail Without Sentencing Reform

We have supported prison reform legislation with some of the deficiencies outlined above as part of broader criminal justice reform legislation that includes critical reforms to federal sentencing laws. We have done so only because it was necessary to secure sufficient support for sentencing

reform in a Republican-controlled Congress. However, we are unwilling to support flawed prison reform legislation that does not include sentencing reform.

Moreover, we believe that prison reform will fail if we do not address the mandatory minimum sentences that have filled our prisons with individuals convicted of nonviolent offenses. The United States of America holds more prisoners, by far, than any other country in the world. Our federal prison population has grown by over 700 percent since 1980, and federal prison spending has climbed nearly 600 percent. The largest increase in the federal prison population is nonviolent drug offenders, and this problem is made worse by inflexible mandatory minimum sentences. Our federal prisons remain well over capacity, and consume one quarter of the Justice Department's discretionary budget.

Attorney General Sessions has made clear his intent to dramatically increase the prison population through the prosecution of nonviolent drug and immigration offenses. Last year, the Attorney General rescinded the Smart on Crime Initiative, which reserved stiff mandatory minimum sentences for individuals convicted of the most serious offenses, and ordered prosecutors to seek the longest possible sentence even for low-level nonviolent offenses.

Sentencing reform would give federal judges the discretion to determine the appropriate sentence based on the individual circumstances of each case, regardless of the Attorney General's agenda. This would help stop the flood of nonviolent offenders into our federal prisons and these savings would help pay for the increase in programming for prisoners.

Congress should pass the Sentencing Reform and Corrections Act, which has significant bipartisan support in the Senate and broad support from law enforcement, civil rights, and faith leaders. SRCA has 28 bipartisan cosponsors, and this year the Senate Judiciary Committee reported SRCA on a 16-5 vote, a stronger vote than it did in the previous Congress.

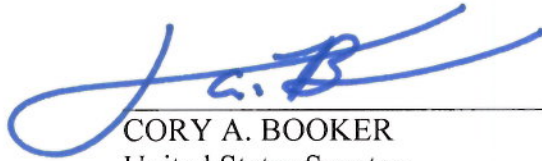
We have heard some argue that Congress should pass prison reform legislation, rather than SRCA, because Attorney General Sessions opposed sentencing reform legislation when he was a Senator. This argument does not withstand scrutiny since then-Senator Sessions also voted against prison reform legislation. More important, as the Attorney General himself has said, it is Congress's job to make laws and the Attorney General's job to enforce the laws. In contrast, Senator Grassley, as Chairman of the Senate Judiciary Committee, has a significant role to play and he has repeatedly said that he will block any criminal justice reform legislation that does not include sentencing reform.

Thank you for considering our views. We look forward to working with you to advance meaningful criminal justice reform legislation that can pass both chambers of Congress and be enacted into law.

Sincerely,



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United States Senator



CORY A. BOOKER
United States Senator



KAMALA D. HARRIS
United States Senator



SHEILA JACKSON LEE
Member of Congress



JOHN LEWIS
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Enclosures