



December 17, 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: THE ACLU AND THE LEADERSHIP CONFERENCE SUPPORT S.756, and URGE YOU to VOTE YES ON CLOTURE and NO ON ALL AMENDMENTS

Dear Majority Leader McConnell and Minority Leader Schumer,

On behalf of the American Civil Liberties Union (ACLU) and The Leadership Conference on Civil and Human Rights, **we write to urge you to vote YES on cloture for S. 756, the FIRST STEP Act, and NO on all amendments.** This legislation is a next step towards desperately needed federal criminal justice reform, but for all its benefits, much more needs to be done. The inclusion of concrete sentencing reforms in the new and improved Senate version of the FIRST STEP Act is a modest improvement, but many people will be left in prison to serve long draconian sentences because some provisions of the legislation are not retroactive. The revised FIRST STEP Act, however, is not without problems. The bill continues to exclude individuals from benefiting from some provisions based solely on their prior offenses, namely citizenship and immigration status, as well as certain prior drug convictions and their “risk score” as determined by a discriminatory risk assessment system. While these concerns remain a priority for our organizations and we will advocate for improvements in the future, ultimately the improvements to the federal sentencing scheme will have a net positive impact on the lives of some of the people harmed by our broken justice system and we urge you to **vote YES on cloture and vote NO on all amendments to the bill. The ACLU and The Leadership Conference will include your votes on our updated voting scorecards for the 115th Congress.**

Over the past four to five decades, U.S. criminal justice policies have driven an increase in incarceration rates that is unprecedented in this country and unmatched elsewhere in the world. Our country has over 20 percentⁱ of the world’s incarcerated individuals, despite having less than five percentⁱⁱ of the world’s population. In 2015, the U.S. Justice Department’s Bureau of Justice Statistics estimated that 6.7 million personsⁱⁱⁱ were involved in the adult correctional systems in this country and almost 2.2 million^{iv} were in prisons or jail. More than 180,000^v of these people are in federal prison, almost half of whom are there for drug offenses.^{vi}

The most recent data indicate that the United States spends almost \$81 billion per year^{vii} on corrections systems – prisons, jails, parole, and probation – and this figure does not include the costs of policing and court systems. 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.^{viii} It costs more than \$36,000 a

year to house just one federal inmate, almost four times the average yearly cost of tuition at a public university.^{ix}

While the dollar amounts are astounding, the toll that our U.S. criminal justice policies have taken on black and brown communities across the nation goes far beyond the enormous amount of money that is spent. This country's extraordinary incarceration rates impose much greater costs than simply the fiscal expenditures necessary to incarcerate over 20 percent of the world's prisoners. 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. The Senate version of the FIRST STEP Act makes some modest improvements to the current federal system.

- I. **Sentencing Reform Changes to House-passed FIRST STEP Act** – Sentencing reform is the key to slowing down the flow of people going into our prisons. This makes sentencing reform pivotal to addressing mass incarceration, prison overcrowding, and the exorbitant costs of incarceration. As a result of our coalition's advocacy, the new FIRST STEP Act added some important sentencing reform provisions from SRCA, which will aid us in tackling these issues on the federal level.^x These important changes in federal law will result in fewer people being subjected to harsh mandatory minimums.

Expands the Existing Safety Valve. The revised bill expands eligibility for the existing safety valve under 18 U.S.C 3553(f)^{xi} from one to four criminal history points if a person does not have prior 2-point convictions for crimes of violence or drug trafficking offenses and prior 3-point convictions. Under the expanded safety valve, judges will have discretion to make a person eligible for the safety valve in cases where the seriousness of his or her criminal history is over-represented, or it is unlikely he or she would commit other crimes. This crucial expansion of the safety valve will reduce sentences for an estimated 2,100 people per year.^{xii}

Retroactive Application of Fair Sentencing Act (FSA). The new version of FIRST STEP Act would retroactively apply the statutory changes of the Fair Sentencing Act of 2010 (FSA), which reduced the disparity in sentence lengths between crack and powder cocaine. This change in the law will allow people who were sentenced under the harsh and discriminatory 100 to 1 crack to powder cocaine ratio to be resentenced under the 2010 law.^{xiii} This long overdue improvement would allow over 2,600 people the chance to be resentenced.^{xiv}

Reforms the Unfair Two-Strikes and Three-Strikes Laws. The new version of FIRST STEP would reduce the impact of certain mandatory minimums. It would reduce the mandatory life sentence for a third drug felony to a mandatory minimum sentence of 25 years and reduce the 20-year mandatory minimum for a second drug felony to 15 years.

Eliminates 924(c) "stacking". The revised bill would also amend 18 U.S.C. 924(c), which currently allows "stacking," or consecutive sentences for gun charges stemming from a single incident committed during a drug crime or a crime of violence. The legislation would require a prior gun conviction to be final before a person could be subject to an enhanced sentence for

possession of a firearm. This provision in federal law has resulted in very long and unjust sentences.^{xv}

- II. Prison Reform Changes to House-passed FIRST STEP Act, H.R. 3356** – The revised bill also made some strides in improving some of the problematic prison reform provisions. The new bill strengthened oversight over the new risk assessment system, limited the discretion of the attorney general, and increased funding for prison programming, among other things. The bill now does the following:

Establishes an Independent Review Committee. The revised bill establishes an Independent Review Committee (IRC) of outside experts to assist the Attorney General in the development of the risk and needs assessment system. The National Institute of Justice would select a nonpartisan, nonprofit organization with expertise in risk and needs assessments to host the IRC. This added guardrail will help to ensure the risk and needs assessment system is evidence-based and potentially help to mitigate any harms.

Permits Early Community Release and Loosens Restrictions on Home Confinement. The House-passed FIRST STEP Act limited the use of earned credits to time in prerelease custody (halfway house or home confinement). The revised bill would expand the use of earned credits to supervised release in the community. The bill also would permit individuals in home confinement to participate in family-related activities that facilitate the prisoner’s successful reentry.

Increased Funding for Prison Reforms. The revised bill would authorize \$75 million annually, a 50 percent increase over the House-passed bill’s \$50 million annual authorization.

Limits Discretion to Deny Early Release. The revised bill strikes language giving the BOP Director and/or the prison warden broad discretion to deny release to individuals who meet all eligibility criteria.

Mandates BOP Capacity. The revised bill mandates that BOP ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners. This helps to address concerns that individuals would be unable to use their earned credits because of waiting lists for prerelease custody.

Effectively Ends Federal Juvenile Solitary Confinement. The revised bill significantly restricts juvenile solitary confinement, which can cause substantial psychological damage.

Reauthorizes Second Chance Act. The revised bill reauthorizes the Second Chance Act, which provides federal funding for drug treatment, vocational training, and other reentry and recidivism programming.

While these revisions to the bill were critical to garnering our support, we must acknowledge that some of the more concerning aspects of the House-passed version of the FIRST STEP Act remain.

- III. Outstanding Concerns Regarding the FIRST STEP Act** – The bill continues to exclude too many people from earning time credits, including those convicted of immigration-related offenses. It does not retroactively apply its sentencing reform provisions to people convicted of anything other than crack convictions, continues to allow for-profit companies to benefit off of incarceration, fails to address parole for juveniles serving life sentences in federal prison, and expands electronic monitoring.

Fails to Include Retroactivity for Enhanced Mandatory Minimum Sentences for Prior Drug Offenses & 924(c) “stacking.” The bill does not include retroactivity for its sentencing reforms besides the long-awaited retroactivity for the Fair Sentencing Act of 2010. This minimizes the overall impact substantially. Retroactivity is a vital part of any meaningful sentencing reform. Not only does it ensure that the changes we make to our criminal justice system benefit the people most impacted by it, but it’s also one of the essential policy changes to reduce mass incarceration. The federal prison population has fallen by over 38,000^{xvi} since 2013 thanks in large part to retroactive application of sentencing guidelines approved by the U.S. Sentencing Commission.^{xvii} More than 3,000 people will be left in prison without retroactive application of the “three strikes” law and the change to the 924 (c) provisions in the FIRST STEP Act.^{xviii}

Excludes Too Many Federal Prisoners from New Earned Time Credits. The bill continues to exclude many federal prisoners from earning time credits and excludes many federal prisoners from being able to “cash in” the credits they earn. The long list of exclusions in the bill sweep in, for example, those convicted of certain immigration offenses and drug offenses.^{xix} Because immigration and drug offenses account for 53.3 percent of the total federal prison population, many people could be excluded from utilizing the time credits they earned after completing programming.^{xx} The continued exclusion of immigrants from the many benefits of the bill simply based on immigration status is deeply troubling. The Senate version of FIRST STEP maintains a categorical exclusion of people convicted of certain immigration offenses from earning time credits under the bill. The new version of the bill also bars individuals from using the time credits they have earned if they have a final order of removal. More than 12,000 people are currently in federal prison for immigration offenses and are disproportionately people of color.^{xxi} Thus, a very large number of people in federal prison would not reap the benefits proposed in this bill and a disproportionate number of those excluded would be people of color. Denying early-release credits to certain people also reduces their incentive to complete the rehabilitative programs and contradicts the goal of increasing public safety. Any reforms enacted by Congress should impact a significant number of people in federal prison and reduce racial disparities or they will have little effect on the fiscal and human costs of incarceration.

Allows Private Prison Companies to Profit. The bill also maintains concerning provisions that could privatize government functions and allow the Attorney General excessive discretion. FIRST STEP provides that in order to expand programming, BOP shall enter into partnerships with private organizations and companies under policies developed by the Attorney General, “subject to appropriations.” This could result in the further privatization of what should be public functions and would allow private entities to unduly profit from incarceration.

Relies on Discriminatory Risk Assessment System. The bill continues to give the Bureau of Prisons and the Attorney General too much discretion in the design, implementation, and review of the tool, including the ability for the BOP to use an existing tool. It also continues to misuse terminology (i.e. recidivism risk vs. risk categories), inappropriately ties risk categories to earned time credits, and fails to properly safeguard against unwarranted racial disparities.

Fails to Include Parole for Juveniles, Sealing and Expungement. Under SRCA, judges would have discretion to reduce juvenile life without parole sentences after 20 years. It would also permit some juveniles to seal or expunge non-violent convictions from their record. The FIRST STEP Act does not address these important bipartisan provisions.

IV. Vote NO on All Amendments

The ACLU and The Leadership Conference oppose the Cotton-Kennedy amendments to the FIRST STEP Act, and all other amendments. The Cotton-Kennedy amendment #4109 (Div. I, II, and III) serves no other purpose but to undermine the bipartisan support for the revised FIRST STEP Act and ultimately attempts to kill the bill. Division 1 of amendment #4109 to mandate victim notification and publicizing rearrests data sounds innocuous, but is unnecessary under current law, would risk retraumatizing victims, violates privacy standards, and compromises the reentry process. Division 2 of amendment #4109 would burden prison wardens with the responsibility for victim notifications of release and solicit and review victims' statements prior to a person's transition to community corrections. Again, this additional responsibility is burdensome for a system already overtaxed and current law permits victims to receive notifications of release if they so choose.

Finally, Division 3 of amendment #4109 creates a new list of unnecessary exclusions to the earned-time credit program – there are already a number of exclusions, and any additions further weaken the bill's impact. The core of the prison reform bill promoted by conservatives rests on the theory that the new risk and needs assessment system in the bill will effectively determine those individuals who have successfully reduced their recidivism "risk," are classified as minimum or low risk to public safety, and are thus eligible to use their earned time credits toward early release to community corrections. In our view, if you support the risk and needs assessment system, which is a core piece of the bill, then you should oppose any additional exclusions based solely on the type of offense. **A vote in favor of any of these amendments is ultimately a vote against the bill, and we will score your votes in our updated scorecards for the 115th Congress.**

V. Conclusion

Bringing fairness and dignity to our justice system is one of the most important civil and human rights issues of our time. The revised version of the FIRST STEP Act is a modest, but important move towards achieving some meaningful reform to the criminal legal system. While the bill continues to have its problems, and we will fight to address those in the future, it does include concrete sentencing reforms that would impact people's lives. **For these reasons, we urge you to vote YES on cloture and vote NO on all amendments to the bill.**

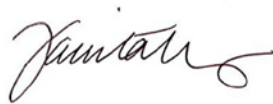
Ultimately, the First Step Act is not the end – it is just the next in a series of efforts over the past 10 years to achieve important federal criminal justice reform. Congress must take many more steps to undo the harms of the tough on crime policies of the 80’s and 90’s – to create a system that is just and equitable, significantly reduces the number of people unnecessarily entering the system, eliminates racial disparities, and creates opportunities for second chances.

If you have any additional questions, please feel free to contact Jesselyn McCurdy, Deputy Director, ACLU Washington Legislative Office, at jmccurdy@aclu.org or (202) 675-2307 or Sakira Cook, Program Director, Justice Reform, The Leadership Conference, at cook@civilrights.org or (202) 263-2894.

Sincerely,




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cc: Members of the U.S. Senate; Members of the U.S. House of Representatives

ⁱ See U.S. and World Population Clock, United States Census Bureau, <https://www.census.gov/popclock/> (last accessed Dec. 10, 2018).

ⁱⁱ See Roy Walmsley, World Prison Project, *World Prison Population List, 12th Edition* (June 11, 2018), http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

ⁱⁱⁱ Danielle Kaeble & Lauren Glaze, Bureau of Justice Statistics, *Correctional Populations in the United States, 2015* (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

^{iv} Danielle Kaeble & Lauren Glaze, Bureau of Justice Statistics, *Correctional Populations in the United States, 2015* (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

^v See Federal Bureau of Prisons, Statistics, *Population Statistics*. Last updated Dec. 13, 2018, https://www.bop.gov/about/statistics/population_statistics.jsp.

^{vi} See Federal Bureau of Prisons, Statistics, *Offenses*. Last updated Nov. 24, 2018, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

^{vii} See Tracy Kyckelhahn, Bureau of Justice Statistics, *Justice Expenditure and Employment Extracts, 2012*, Preliminary Tbl. 1 (2015), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239> (showing FY 2012 state and federal corrections expenditure was \$80,791,046,000).

^{viii} Nancy LaVigne & Julie Samuels, The Urban Institute, *The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions* at 1-2 (Dec. 2012) [hereinafter LaVigne Urban Institute Report], <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>.

^{ix} Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016).

^x LaVigne, Urban Institute Report at 5; Nathan James, Cong. Research Serv., R42937, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* at 9 (Jan. 22, 2013) [hereinafter CRS Report]; Kamala Mallik-Kane, Barbara Parthasarathy, & William Adams, The Urban Institute, *Examining Growth in the Federal Prison Population, 1998-2010*, at 4-5 (Dec. 11, 2012), https://www.urban.org/research/publication/examining-growth-federal-prison-population-1998-2010/view/full_report; U.S. Sentencing Commission, *Special Report To The Congress: Mandatory Minimum Penalties In The Criminal Justice System* (Aug. 1991), https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

^{xi} A “safety valve” is an exception to mandatory minimum sentencing laws. A safety valve allows a judge to sentence a person below the mandatory minimum term if certain conditions are met. Safety valves can be broad or narrow, applying to many or few crimes (e.g., drug crimes only) or types of offenders (e.g., nonviolent offenders). See 18 U.S.C. 3553(f) (2010)

^{xii} See Letter from Glenn Schmitt, Dir. of Res. and Data, U.S. Sentencing Commission, to Janani Shakaran, Pol’y Analyst, Congressional Budget Office, regarding the Sentencing Reform and Corrections Act of 2017, United States Sentencing Commission (March 19, 2018), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf

^{xiii} Although the ACLU supported the Fair Sentencing Act of 2010, we would ultimate support a change in law that would treat crack and powder cocaine equally; 1 to 1 ratio.

^{xiv} See Letter from Glenn Schmitt, Dir. of Res. and Data, U.S. Sentencing Commission, to Janani Shakaran, Pol’y Analyst, Congressional Budget Office, regarding the Sentencing Reform and Corrections Act of 2017, United States Sentencing Commission (March 19, 2018), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf.

^{xv} However, prior convictions “under State law for a crime of violence that contains an element of the offense the carrying, brandishing or use of firearm” can count as a prior conviction under 18 U.S.C. 924(c). See Section 104.

^{xvi} See Federal Bureau of Prisons, Statistics, *Population Statistics*. Last Updated Dec. 13, 2018, https://www.bop.gov/about/statistics/population_statistics.jsp.

^{xvii} See United States Sentencing Commission, *U.S. Sentencing Commission 2014 Drug Guidelines Amendment Retroactivity Data Report* (August 2018), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20180829-Drug-Retro-Analysis.pdf>.

^{xviii} See Letter from Glenn Schmitt, Dir. of Res. and Data, U.S. Sentencing Commission, to Janani Shakaran, Pol’y Analyst, Congressional Budget Office, regarding the Sentencing Reform and Corrections Act of 2017, United States Sentencing Commission (March 19, 2018), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf.

^{xix} See FIRST STEP Act. 115th Cong. § 13632(d)(4)(D)(xlii), (xliii), (2018).

^{xx} See Federal Bureau of Prisons, Statistics, *Offenses*. Last updated Nov. 24, 2018, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

^{xxi} See Federal Bureau of Prisons, Statistics, *Offenses*. Last Updated Nov. 24, 2018, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp; E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2016* (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.