



May 21, 2018

The Honorable Paul D. Ryan
Speaker
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

Re: The ACLU Says Vote NO on the H.R.5682, FIRST STEP Act And Will Include this Vote in Our Scorecard

Dear Speaker Ryan and Minority Leader Pelosi:

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On behalf of the American Civil Liberties Union (ACLU), we write to ask you to vote NO on the FIRST STEP Act which is scheduled for a House floor vote on Tuesday, May 22nd. No attempts to improve our criminal justice system will prove effective or meaningful without the sentencing reform that the federal system desperately needs. 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 programing. We are concerned that the system H.R.5682 creates does not align with the current realities of the BOP, thus we ask you to vote NO on H.R.5682. **The ACLU will include your vote on The FIRST STEP Act in our voting scorecard for the 115th Congress.**

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 2 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.

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.¹

States across the country have been successful at reducing rates of crime and incarceration when they enact legislation that reform prisons *and* sentencing laws. H.R.5682 would focus 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.

I. The Bill Excludes Too Many People from Earning Time Credits including those with Immigration Related Offenses.

Any person who will return to our communities from prison someday should get time credit incentives for completing rehabilitative programs. The Act’s provision for early-release credits based on successful completion of rehabilitative programs 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.

For example, prisoners who have been convicted of certain immigration offenses are categorically ineligible to earn time credits under the bill. Among the excluded are most undocumented immigrants and many longtime lawful permanent residents. Over 12,000 people are currently in federal prison for immigration offenses and are disproportionately people of color.² 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 inmates also reduces their incentive to complete the rehabilitative programs, and contradicts the goal of increasing public safety. Finally, any legislation aiming to meaningfully reforming federal prisons should impact as many people as possible while addressing the existing racial disparity within the federal prison system.

II. The FIRST STEP Act Uses Risk Assessment Tools Which Can Exacerbate Racial and Socioeconomic Disparities in an Untested Manner

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. 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.

Furthermore, it gives the Attorney General (AG) and BOP Director far too much discretion to use existing assessment tools to implement the system by allowing the Attorney General

¹ See Tracey Kyckelhahn, “Justice Expenditure and Employment Extracts, 2012 — Preliminary tbl. 1” *Bureau of Justice Statistics*, (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).

²See “Offenses.” *Federal Bureau of Prisons*. Last Updated Apr. 28, 2018, available at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp; Carson, E. Ann. “Prisoners in 2016.” *Bureau of Justice Statistics*. (2018), available at <https://www.bjs.gov/content/pub/pdf/p16.pdf> .

to “use existing risk and needs assessment tools as appropriate.” This could give the AG the option of using the BOP’s security classification system as a proxy for the risk and needs assessment tool they are required to develop within 6 months of enactment. On more than one occasion in meetings with BOP staff, they have recommended using their current security classification tool in the system created by legislation similar to H.R.5682.

The BOP security classification tool is not designed to identify specific criminogenic needs and heavily relies on static factors that would undermine the effectiveness of the system. Risk assessments classify many people as high risk who do not go on to reoffend. In addition, risk assessments often consider static factors such as criminal history, family members’ criminal history and the community in which a person lived before entering the criminal justice system. These factors cannot change while a person is in prison therefore making it near impossible to lower their risk classification in order to receive time credit. Racial disparities that have become defining features of both the federal prison population and this country’s socio-economically disadvantaged neighborhoods could be compounded by racial disparities in the risk assessment tools created under this provision.

III. The FIRST STEP Act Limits Incentives To Those Most in Need of Rehabilitative Programing and Thus Will Not Be Effective in Reducing Recidivism

This bill is also unlikely to reduce recidivism because it gives time credit incentives for completing rehabilitative programs to minimum- and low-risk people 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. Only people in prison deemed minimum- and low-risk can actually use the time credit incentives. This approach is not evidence-based. In addition, it is unclear from the bill whether the risk and needs assessment tool the BOP would adopt would even actually facilitate the movement of people in high risk categories to a lower risk category in which they can use the time credits they would earn.

IV. The FIRST STEP Act Lacks Capability to Implement Effective Prison Reform

The proposed expansion of programing 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 programing at its current levels. Without definitive or committed funding, this bill’s provisions would be essentially result in empty promises. The bill authorizes \$50 million per year for five years for these proposed rehabilitative programs. Even if this funding is actually appropriated, it is not adequate to expand these programs to the levels necessary for all those in BOP custody to participate in programing. Not to mention, in the recent Department of Justice (DOJ) budgets, BOP’s funding has been dramatically slashed.

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.³ With such a large number of people excluded from participating in this programing and with a lack of resources to enable the actual use of time credits earned, this bill offers no effective means of reforming our prisons. 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 now.

V. While There Are Some Potentially Promising Provisions Most Could Be Adopted Administratively By The BOP

The FIRST STEP Act does aim 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. However, the estimation that 4000 individuals would be immediately released as a result is not based on a current BOP estimates of those eligible. This calculation was made over a decade ago based on a higher prison population and estimated a reduction in the prison population **over the course of a year**. 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.

VI. Conclusion

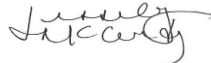
The criteria for criminal justice reform seems to no longer be that it addresses the very real problems in the federal system, but rather more about appearing as if something is being accomplished. Prison reform by itself is insufficient and does not address the serious issues our criminal justice system 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 — and The FIRST STEP Act does neither.

For these reasons, the ACLU urges you to vote “No” on the FIRST STEP Act. If you have any additional questions, please feel free to contact Jesselyn McCurdy, Deputy Director at jmccurdy@aclu.org or (202) 675-2307.

Sincerely,



Faiz Shakir
National Political Director
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Jesselyn McCurdy
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³ 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>.

cc: Members of the House of Representatives