

BRENNAN
CENTER
FOR JUSTICE

May 8, 2018

Hon. Robert Goodlatte
U.S. House of Representatives
2309 Rayburn House Office Building
Washington, D.C. 20515

Hon. Jerry Nadler
U.S. House of Representatives
2109 Rayburn House Office Building
Washington, D.C. 20515

Re: FIRST STEP Act

Dear Chairman Goodlatte and Ranking Member Nadler:

The Brennan Center for Justice is a nonpartisan law and policy institute that seeks to reform, revitalize, and defend the country's systems of democracy and justice. We write today to share our concerns about the FIRST STEP Act, as well as any effort to pass criminal justice reform legislation that does not include a sentencing reform component.

Although the FIRST STEP Act includes several important reforms, and improves on prior legislation, it does not take steps to reduce the number of people entering prison in the first place. Any true reform effort must start with sentencing reform, and we urge you to either revise the bill to add such measures, or commit to advancing the Act only in tandem with a companion, robust sentencing reform bill.

In an earlier letter, we wrote to share similar concerns regarding the Prison Reform and Redemption Act, H.R. 3356 ("PRRA"). At the time, we noted that the PRRA excluded any mention of sentencing reform; that its time credit system would not reduce the length of any federal prisoner's sentence; and that it may fall short of its stated goal of providing meaningful rehabilitative and reentry programming.¹ The Leadership Conference, along with more than 60 other civil rights groups, also wrote to share similar concerns.²

Since the date of our letter, the Committee has chosen to advance the FIRST STEP Act instead of the PRRA. This new legislation adds several notable provisions, including one to ensure that prisoners will be placed close to their families whenever possible,³ and another to guarantee that incarcerated women have access to women's health products, free of charge, during their prison term.⁴ These are real improvements over the original draft of the PRRA.

Regrettably, the FIRST STEP Act does not address our two core concerns. Like the PRRA, the FIRST STEP Act's reentry provisions are not designed to ensure they achieve their stated goals.

Some components may even be interpreted as a step backward: for one, the bill eliminates community supervision as a possible option for prerelease custody.⁵ That change makes it more likely that, as explained in our initial letter, prisoners participating in recidivism-reduction programming will be unable to use earned credits. The Act also in practice reserves opportunities to engage in productive activity, such as work programs, for the lowest-risk prisoners.⁶

We also share the additional concerns raised by the Leadership Conference and other organizations in their letter sent today, including their concern that the Act could amplify existing disparities in the criminal justice system.⁷

More seriously, the FIRST STEP Act continues to lack any sentencing reform component. This omission prevents the FIRST STEP Act from having any discernable impact on mass incarceration. For example, while some inmates may quickly become eligible for transfer to prerelease custody under this Act, no unnecessarily long prison sentence will be shortened.

For the reasons stated in our earlier letter, then, we urge the Committee to either continue working to improve the FIRST STEP Act, by adding sentencing reform provisions, or to commit to advancing this legislation only in tandem with a companion sentencing reform bill. One such vehicle would be the Sentencing Reform and Corrections Act, S. 1917, currently pending in the Senate, where it was reported out of the Judiciary Committee by a bipartisan vote.⁸

The federal prison system currently fails to provide effective reentry and rehabilitation services. Reforms to address that problem, and improve overall conditions of confinement, are necessary, and the FIRST STEP Act marks progress toward that goal.

But we have a once-in-a-generation opportunity to pass comprehensive criminal justice reform. If Congress were to advance the FIRST STEP Act without sentencing reform, it would effectively cede its own leadership on criminal justice reform and let the President and Attorney General set the terms of the debate. This would derail the best chance in years for real criminal justice reform — a tragic loss for racial justice.

We urge your Committees to continue working to improve the FIRST STEP Act, and to advance it only alongside meaningful sentencing reform legislation.

Sincerely,

Inimai M. Chettiar
Director, Justice Program

Ames Grawert
Senior Counsel, Justice Program

cc: Hon. Paul Ryan, Speaker of the House of Representatives
Hon. Nancy Pelosi, Minority Leader of the House of Representatives
Members, House Judiciary Committee

Attachment: Brennan Center letter of April 18, 2018

¹ Brennan Center for Justice, Letter to Congress on the Prison Reform and Redemption Act, Apr. 18, 2018, <http://www.brennancenter.org/analysis/letter-congress-prison-reform-and-redemption-act>.

² Leadership Conference on Civil and Human Rights, Letter of Concern Regarding H.R. 3356, the Prison Reform and Redemption Act, Apr. 13, 2018, <https://civilrights.org/letter-concern-h-r-3356-prison-reform-redemption-act/>.

³ See FIRST STEP Act, H.R. _____, 115th Cong. § 401 (2018).

⁴ FIRST STEP Act § 412.

⁵ FIRST STEP Act § 102(b) (referring only to “home confinement” and “residential reentry center[s]” as possible options for prerelease custody”).

⁶ FIRST STEP Act § 101(a) (requiring the Attorney General to report on progress by the Bureau of Prisons toward a goal of ensuring that “not less than 75 percent of eligible minimum and low risk offenders have the opportunity to participate in prison work programs”).

⁷ The Leadership Conference on Civil and Human Rights to House Judiciary Committee, Vote “No” on the FIRST STEP Act, May 8, 2018, <https://civilrights.org/vote-no-first-step-act/>.

⁸ Senate Judiciary Committee, Results of Executive Business Meeting, Feb. 15, 2018, <https://www.judiciary.senate.gov/imo/media/doc/02-15-18%20Results%20of%20Executive%20Business%20Meeting.pdf>.

BRENNAN
CENTER
FOR JUSTICE

April 18, 2018

Hon. Charles Grassley
U.S. Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Hon. Robert Goodlatte
U.S. House of Representatives
2309 Rayburn House Office Building
Washington, D.C. 20515

Hon. Dianne Feinstein
U.S. Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Hon. Jerry Nadler
U.S. House of Representatives
2109 Rayburn House Office Building
Washington, D.C. 20515

Re: Prison Reform and Redemption Act (H.R. 3356)

Dear Chairman Grassley, Senator Feinstein, Chairman Goodlatte, and Rep. Nadler:

The Brennan Center for Justice is a nonpartisan law and policy institute that seeks to reform, revitalize, and defend the country's systems of democracy and justice. We write today to share our concerns about any effort to pass criminal justice reform legislation that does not include a sentencing reform component.

The Prison Reform and Redemption Act, H.R. 3356 ("PRRA") advances an important goal — improving conditions and services for people in federal prison — but as written, does not take steps to reduce the number of people entering prisons in the first place. Any true criminal justice reform effort must start with sentencing reform, and we urge you to advance such a measure in tandem with the PRRA.

Mass incarceration is today's civil rights struggle, affecting communities of color at far higher rates than their white counterparts. Our nation is one of the world's leading incarcerators, far eclipsing other democracies in the rate at which we imprison our fellow-citizens.¹ Research conclusively demonstrates that our overreliance on prison is unnecessary to preserve public safety, and may even be counterproductive.² The public agrees: in a divided nation, criminal justice reform remains a rare point of agreement, with Republicans and Democrats both supporting solutions that will reduce unnecessary incarceration.³

In 2016, Congress came close to passing the bipartisan Sentencing Reform and Corrections Act (S. 2123). Republicans, Democrats, law enforcement groups, conservatives, and progressives united in an unprecedented effort to reduce overly long federal sentences.⁴ Then-Senator Jeff Sessions adamantly opposed the bill, and successfully derailed its passage. Fortunately, congressional leaders were undeterred. In February, the Senate Judiciary Committee advanced a new version of this bipartisan bill, S. 1917.⁵

Now, however, the White House seeks to advance legislation that would improve conditions for those in prison, but abandon any effort to enact bipartisan sentencing reform. If Congress were to join in this effort, it would effectively cede its own leadership on criminal justice reform and let Jeff Sessions set the terms of the debate. This would derail the best chance in years for real criminal justice reform — a tragic loss for racial justice.

The PRRA has some valuable provisions and addresses an important goal. But we ask that Congress commit to advancing the Sentencing Reform and Corrections Act or other strong sentencing reform if it is going to move forward with prison reform legislation. Similar concerns about legislation focused on such “back-end” reforms were raised by the Leadership Conference on Civil and Human Rights, and more than 60 signatory groups, in letters sent on March 23 and April 13, 2018 (“Leadership Conference Letters”).⁶

Any Criminal Justice Reform Effort Must Start with Sentencing Reform.

Sentencing reform should be the starting point for federal legislation, as the overuse of incarceration remains the most urgent challenge in our justice system.

Starting in the 1980s, Congress passed a series of laws that increased the penalties faced by federal offenders — especially drug offenders — while removing judicial discretion to impose lesser penalties where appropriate.⁷ As a result of this and other efforts, the federal prison population grew by more than 600 percent.⁸ A similar trend played out across the country,⁹ as states increased their own reliance on extreme penalties, in part responding to federal incentives.¹⁰

All told, the cost of operating America’s vast criminal justice system now tops \$270 billion a year.¹¹ Despite this massive growth in incarceration and corresponding expenditure of public resources, Brennan Center research shows that our historic investment in prisons contributed little to the post-1991 crime decline.¹² Longer sentences do little to deter crime.¹³ Worse, our nation’s overreliance on prison locks people out of jobs and the economy long after they have paid their debt to society,¹⁴ costing the American economy billions annually.¹⁵ That burden, in the form of under- and unemployment, falls disproportionately on communities of color.¹⁶

Solving these problems requires changing our laws to reduce the number of people entering prison. Brennan Center research finds that at least 40 percent of American prisoners are incarcerated without a justifiable public safety reason, and could be released without negatively impacting crime rates. Many of these prisoners could be better served by alternative measures such as treatment, probation, or electronic monitoring; others could benefit from shorter sentences more proportional to the crimes they committed.¹⁷

This is more than theoretical. Over the last decade, 35 states successfully reduced both crime and incarceration, many under conservative leadership. States from Texas to Georgia to South Carolina to New York have taken such action.¹⁸

Lawmakers in both parties recognize the centrality of sentencing reform to any attempt to reduce mass incarceration. Just two months ago, the Senate Judiciary Committee voted to advance the Sentencing Reform and Corrections Act,¹⁹ which would cautiously reduce mandatory minimums

in some drug cases. Far from a party-line vote, 16 senators, including 6 Republicans, voted to refer the bill to the full Senate.²⁰

Despite this broad consensus, the PRRA does not include a sentencing reform component, and instead focuses on creating programming for prisoners during their still overly-long incarceration.²¹ Like other “back-end” reform bills focused on conditions of confinement (such as the CORRECTIONS Act, S. 1994), the PRRA falls short of the transformative change needed. While it makes important changes, it sets a starting point for criminal justice reform that is far weaker than the bold changes implemented in even the most conservative states.

The PRRA May Not Improve Prison Conditions As Currently Written.

We also share concerns, raised in the Leadership Conference Letters, that the PRRA may not be structured to achieve its stated goal of reentry reform.²²

First, the PRRA aims to create recidivism-reduction programming for federal prisoners, and encourage its use by awarding participants “time credits.”²³ But these credits do not reduce a prisoner’s sentence. Instead, they allow part of the sentence to be served in a halfway house or other form of “prerelease custody.”²⁴ But the systemic underfunding and underutilization of “prerelease custody” options like halfway houses in the federal system mean that prisoners may not even be able to use their credits once earned.²⁵ Without broader reforms and funding to ensure its success, the PRRA risks making a promise that cannot be kept.

Second, while the text of the bill nods toward extending rehabilitative programming to all prisoners, especially those at the highest risk of recidivating,²⁶ it goes on to include a laundry list of prisoners ineligible for time credits — predominantly violent offenders, for whom this exact type of recidivism-reduction programming would be most effective.²⁷ Taken together, the credits for rehabilitation offered by the PRRA would be unavailable to some, and unusable by others.

Lastly, the PRRA misses an opportunity to expand vocational training or education options for federal prisoners. These solutions have suffered from cuts or other legal barriers, but have been shown to reduce recidivism and improve prisoners’ overall ability to successfully reenter their communities.²⁸ Rather than expanding access to those proven solutions, the bill encourages individual wardens to “enter into partnerships” with third-party organizations to deliver these key services — a paper guarantee that comes without funding or further support.²⁹

* * * * *

The federal prison system currently fails to provide effective reentry and rehabilitation services. Reforms to address that problem, and improve overall conditions of confinement, are necessary, and the PRRA is a step in that direction. But making such reforms a central legislative goal, rather than part of a comprehensive package that includes sentencing reform, unnecessarily limits the range of achievable reform at a key juncture.

Americans of all political affiliations agree on the urgent need to repair our justice system. This vision is shared by community organizers, law enforcement leaders, activists, business executives, social scientists, people of faith — and by a majority of your House and Senate colleagues.

We urge your Committees to advance the Sentencing Reform and Corrections Act and to strengthen the PRRA.

Sincerely,

Inimai M. Chettiar
Director, Justice Program

Ames Grawert
Senior Counsel, Justice Program

cc: Hon. Mitch McConnell, Senate Majority Leader
Hon. Charles Schumer, Senate Minority Leader
Hon. Paul Ryan, Speaker of the House of Representatives
Hon. Nancy Pelosi, Minority Leader of the House of Representatives
Members, Senate Judiciary Committee
Members, House Judiciary Committee

¹ James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, 15, https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf. Katie Sanders, “Fact Checking John Legend’s Claim That We Live in the Most Incarcerated Country in the World,” *Politifact*, February 23, 2015, <http://www.politifact.com/punditfact/statements/2015/feb/23/john-legend/fact-checking-john-legends-claim-we-live-most-inca/>.

² James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf. Oliver Roeder et al., *What Caused the Crime Decline?*, Brennan Center for Justice, 2015, <https://www.brennancenter.org/publication/what-caused-crime-decline>.

³ American Civil Liberties Union, “91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds,” November, 2017, <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>.

⁴ Law Enforcement Leaders to Reduce Crime and Incarceration to Senators Grassley and Feinstein, Letter in Support of the Sentencing Reform and Corrections Act, February 6, 2017, <http://lawenforcementleaders.org/wp-content/uploads/2017/02/Law-Enforcement-Letters-for-Sentencing-Legislation.pdf>. Mark Holden, Koch Industries Vice President to Senators Grassley and Leahy, Letter in Support of the Sentencing Reform and Corrections Act, October 14, 2015, <https://www.judiciary.senate.gov/imo/media/doc/2015-10-14%20Koch%20Industries%20to%20Judiciary%20-%20Sentencing%20Reform%20and%20Corrections%20Act.pdf>.

⁵ Senate Judiciary Committee, Results of Executive Business Meeting, February 15, 2018, <https://www.judiciary.senate.gov/imo/media/doc/02-15-18%20Results%20of%20Executive%20Business%20Meeting.pdf>.

⁶ See The Leadership Conference on Civil and Human Rights to House Judiciary Committee, Letter Opposed to Prison Reform and Redemption Act, April 13, 2018, <https://civilrights.org/letter-concern-h-r-3356-prison-reform-redemption-act/>; see also The Leadership Conference on Civil and Human Rights to Senators McConnell and Schumer, Letter Opposed to the CORRECTIONS Act, March 23, 2018, <https://civilrights.org/civil-human-rights-groups-senate-prison-reform-must-include-sentencing-provisions/>.

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- ⁷ American Bar Association Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates*, 2004, 26-28, https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf.
- ⁸ Federal Bureau of Prisons, Statistics, “Past Inmate Population Totals,” last modified April 12, 2018, accessed April 17, 2018, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops.
- ⁹ Margaret Cahalan, *Historical Corrections Statistics in the United States, 1850-1984*, United States Department of Justice, Bureau of Justice Statistics, 1986, <https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf>. E. Ann Carson, *Prisoners in 2016*, United States Department of Justice, Bureau of Justice Statistics, 2018, <https://www.bjs.gov/content/pub/pdf/p16.pdf>.
- ¹⁰ Lauren-Brooke Eisen and Inimai Chettiar, *The Reverse Mass Incarceration Act*, Brennan Center for Justice, 2015, <https://www.brennancenter.org/publication/reverse-mass-incarceration-act>.
- ¹¹ Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative, 2017, <https://www.prisonpolicy.org/reports/money.html>.
- ¹² Oliver Roeder et al., *What Caused the Crime Decline?*, Brennan Center for Justice, 2015, <https://www.brennancenter.org/publication/what-caused-crime-decline>.
- ¹³ James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf.
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- ¹⁶ Devah Pager, *The Mark of a Criminal record*, *American Journal of Sociology*, 108 (2003): 937-75, https://scholar.harvard.edu/files/pager/files/pager_ajs.pdf.
- ¹⁷ James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf.
- ¹⁸ Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 22, https://www.brennancenter.org/sites/default/files/publications/Criminal_Justice_An_Election_Agenda_for_Candidates_Activists_and_Legislators%20.pdf. Lauren-Brooke Eisen and James Cullen, *Update: Changes in State Imprisonment*, June, 2017, <https://www.brennancenter.org/press-release/new-analysis-states-lowered-crime-and-incarceration-rates-simultaneously>. Pew Charitable Trusts, *State Reforms Reverse Decades of Incarceration Growth*, 2017, <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth>.
- ¹⁹ CORRECTIONS Act of 2017, S.1994, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1994>.
- ²⁰ Senate Judiciary Committee, Results of Executive Business Meeting, February 15, 2018, <https://www.judiciary.senate.gov/imo/media/doc/02-15-18%20Results%20of%20Executive%20Business%20Meeting.pdf>.
- ²¹ See Prison Reform and Redemption Act of 2017, H.R. 3356, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/3356/text?r=21%23toc-HE31C47319D2E4283A210BB3B32B4B1CE>.

²² The Leadership Conference on Civil and Human Rights to House Judiciary Committee, Letter Opposed to Prison Reform and Redemption Act, April 13, 2018, <https://civilrights.org/letter-concern-h-r-3356-prison-reform-redemption-act/>.

²³ H.R. 3356, 115th Cong. § 102(e)(2).

²⁴ H.R. 3356, 115th Cong. § 106(5).

²⁵ The Leadership Conference on Civil and Human Rights to House Judiciary Committee, Letter Opposed to Prison Reform and Redemption Act, April 13, 2018, <https://civilrights.org/letter-concern-h-r-3356-prison-reform-redemption-act/>.

²⁶ H.R. 3356, 115th Cong. § 102(c).

²⁷ H.R. 3356, 115th Cong. § 102(e)(2)(C); Families Against Mandatory Minimums, “Prison Reform and Redemption Act — 115th Congress, H.R. 3356 (Collins),” 2018, <http://famm.org/wp-content/uploads/2017/08/Collins-PRRA-Summary-115th.pdf>.

²⁸ Lois M. Davis et. al, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND Corporation, 2013, https://www.rand.org/pubs/research_reports/RR266.html. Sari Horwitz, “U.S. Official Says Prison System’s Best Reentry Program Cut ‘Dramatically,’” *Washington Post*, October 29, 2015, https://www.washingtonpost.com/world/national-security/deputy-attorney-general-prison-systems-best-re-entry-program-has-dramatically-shrunk/2015/10/29/8d96713a-7e66-11e5-beba-927fd8634498_story.html?utm_term=.98be56ec1228. 20 U.S.C. § 1070a(b)(6) (making Pell Grants unavailable to federal prisoners).

²⁹ H.R. 3356, 115th Cong. § 105(a).