

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

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

September 30, 2021

**RE: Brennan Center Support for Bipartisan Sentencing Reform Proposals**

Dear Majority Leader Schumer and Minority Leader McConnell,

We write on behalf of the Brennan Center for Justice to share the Center's strong support for the First Step Implementation Act (S. 1014), the COVID-19 Safer Detention Act (S. 312), and the Prohibiting Punishment of Acquitted Conduct Act (S. 601), which represent crucial steps forward in federal sentencing reform. 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. As part of that mission, we advocate for changes to federal sentencing laws and correctional practices.

Working in concert with allies across the ideological spectrum, we were proud to support the First Step Act of 2018, which made progress towards a more just criminal legal system by reducing mandatory minimums for some federal drug offenses and allowing judges in some nonviolent drug cases to impose lesser sentences than otherwise required.<sup>1</sup> The First Step Act also took overdue action in making the Fair Sentencing Act of 2010 retroactive, allowing for the resentencing of people whose prison terms were originally based on an unjustifiable 100:1 disparity in the sentencing of crack and powder cocaine.<sup>2</sup>

The First Step Act laid a strong foundation for bipartisan federal sentencing reform, and the three bills being considered by the Senate would expand on that vital work. For one, while the First Step Act reduced excessively punitive sentences for some current and future federal drug cases, it failed to apply these same standards retroactively to similar cases. The First Step Implementation Act would resolve this issue by permitting the retroactive reduction of sentences for many individuals who, but for the date of their sentencing, would have been covered by the First Step Act.<sup>3</sup> This is a common-sense change: there is no public safety rationale for punishing people differently based on when they were sentenced.

The First Step Implementation Act would also further expand judges' sentencing discretion in some drug cases, allowing them to impose a prison term beneath mandatory

minimums if there is evidence that a defendant’s criminal history score, according to the U.S. Sentencing Guidelines, “substantially overrepresents the seriousness” of their criminal record or their likelihood of recidivating.<sup>4</sup> According to provisional data provided by the United States Sentencing Commission (U.S.S.C.), approximately 698 people per year, covering roughly 6.5% of those convicted of federal drug crimes carrying a mandatory minimum annually, could be eligible for consideration under this provision. This expansion of the so-called “safety valve” would ensure that judges can better account for the nuances of each case, and would only apply to those who commit offenses after the date this bill becomes law.

In addition to these sentencing reforms, the First Step Implementation Act would permit the sealing and expungement of certain nonviolent juvenile records, ensuring that people do not spend a lifetime with the stigma of a criminal record.<sup>5</sup> This is a vital provision that will help break the connection between incarceration and poverty. According to Brennan Center research, people with felony convictions experience, on average, a 22 percent reduction in annual earnings. For misdemeanor convictions, the figure is smaller — a 16 percent reduction, by our estimate — but still sizable, especially for people living at the edge of poverty.<sup>6</sup> Sealing and expunging these juvenile records would greatly improve economic prospects for many people, especially Black and Latino individuals, who have disproportionately suffered at the hands of our current criminal legal system. This sealing provision would also build on the successes of states as diverse as Utah, Pennsylvania, and Michigan.<sup>7</sup> And, the Act would allow some people who were sentenced for crimes committed as juveniles, and who have served twenty years in prison, to be resentenced and potentially released early. Twenty years is a long time, and our research shows that such extreme sentences are unnecessarily punitive — especially in the case of young people.<sup>8</sup>

Relatedly, the legislation would require the Attorney General to create procedures to ensure the accuracy of criminal records, including establishing a process for people with a conviction record to challenge or correct information that might be inaccurate. As noted above, a criminal record can reduce earnings for decades, or even a lifetime. Inaccuracies in criminal records are also common, and can create a significant barrier to successful reintegration into one’s community.<sup>9</sup>

Next, the COVID-19 Safer Detention Act seeks to address the unprecedented health risks created by the global pandemic.<sup>10</sup> The pandemic illustrated with particular clarity how prisons become hot spots for contagious viruses, as a result of poor living conditions and inadequate healthcare.<sup>11</sup> This bill would address the problem by expanding the use of home confinement for some older people, who are statistically very unlikely to commit a new crime once released.<sup>12</sup> Provisional U.S.S.C. data indicates that thousands could be helped by this provision alone. The bill would also streamline the compassionate release program, especially for certain high-risk individuals, for the duration of the pandemic, potentially saving lives in the process.

The third bill, the Prohibiting Punishment of Acquitted Conduct Act, would bar judges from considering evidence from previous acquittals, except for purposes of mitigating a sentence, at sentencing.<sup>13</sup> This reform would help ensure that people are sanctioned only for what prosecutors can prove in a court of law, consistent with the Fifth and Sixth Amendment guarantees of due process and the right to a jury trial for those accused of committing a crime.

Lastly, we urge Congress to continue to work to advance the EQUAL Act, which would eradicate once and for all the sentencing disparity between crack and powder cocaine.<sup>14</sup> As Justice Sonia Sotomayor recently wrote, “there was no meaningful policy justification for such unequal sentences,” which disproportionately impacted people of color.<sup>15</sup> Like the other legislation we highlight in this letter, the EQUAL Act also enjoys broad bipartisan support.<sup>16</sup>

We urge the Senate to enact the First Step Implementation Act, the COVID-19 Safer Detention Act, and the Prohibiting Punishment of Acquitted Conduct Act, without hesitation or amendment. And as noted above, we urge Congress to continue to advance the EQUAL Act. All four of these bills represent past-due legislation that will ensure more fairness and dignity in the federal criminal legal system, in addition to enjoying bipartisan support.

Now is the time for the Senate to continue the important work of bipartisan criminal justice reform, starting with the legislation outlined above.

Sincerely,



L.B. Eisen  
Director, Justice Program  
Brennan Center for Justice



Ames Grawert  
Senior Counsel & John L. Neu Justice Counsel, Justice Program  
Brennan Center for Justice

cc: Members of the U.S. Senate

## Endnotes

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<sup>1</sup> Ames Grawert and Tim Lau, “How the FIRST STEP Act Became Law – and What Happens Next,” *Brennan Center for Justice* (blog), January 4, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

<sup>2</sup> Ames Grawert, “What is the First Step Act – And What’s Happening With it?,” *Brennan Center for Justice* (blog), June 23, 2020, <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

<sup>3</sup> First Step Implementation Act of 2021, § 101, S. 1014, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/1014/text>.

<sup>4</sup> First Step Implementation Act of 2021, § 102.

<sup>5</sup> First Step Implementation Act of 2021, § 202.

<sup>6</sup> Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Center for Justice, 2020, 15, <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>.

<sup>7</sup> For a brief discussion of other states that have enacted sealing laws, see Ames Grawert, “Parole Reform and ‘Clean Slate’ in New York,” *Brennan Center for Justice* (blog), April 21, 2021, <https://www.brennancenter.org/our-work/research-reports/parole-reform-and-clean-slate-new-york>. For the impacts of such laws, see J.J. Prescott and Sonja B. Starr, “Expungement of Criminal Convictions: An Empirical Study,” *Harvard Law Review* 133, no. 8 (2020): 2460-555, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3167&context=articles>.

<sup>8</sup> James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, <https://www.brennancenter.org/our-work/research-reports/how-many-americans-are-unnecessarily-incarcerated>.

<sup>9</sup> Legal Action Center, *The Problem of Rap Sheet Errors: An Analysis by the Legal Action Center*, 2013, [https://www.lac.org/assets/files/LAC\\_rap\\_sheet\\_report\\_final\\_2013.pdf](https://www.lac.org/assets/files/LAC_rap_sheet_report_final_2013.pdf); see also Michelle Natividad Rodriguez and Maurice Emsellem, National Employment Law Project, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment*, 2011, 7, [https://www.nelp.org/wp-content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).

<sup>10</sup> COVID-19 Safer Detention Act of 2021, S. 312, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/312/text>.

<sup>11</sup> Katie Park, Keri Blakinger, and Claudia Lauer, “A Half-Million People got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?,” *The Marshall Project*, June 30, 2021, <https://www.themarshallproject.org/2021/06/30/a-half-million-people-got-covid-19-in-prison-are-officials-ready-for-the-next-pandemic>; see also generally David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, Vera Institute of Justice, 2014, <https://www.vera.org/publications/on-life-support-public-health-in-the-age-of-mass-incarceration/>.

<sup>12</sup> United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders*, 2017, 22, [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf).

<sup>13</sup> Prohibiting Punishment of Acquitted Conduct Act of 2021, S. 601, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/601>.

<sup>14</sup> EQUAL Act, S. 79, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/79>.

<sup>15</sup> See *Terry v. United States*, 593 U.S. \_\_\_, 141 S. Ct. 1858, 1865 (2021) (Sotomayor, J., concurring).

<sup>16</sup> See C.J. Ciaramella, “House Passes EQUAL Act to Erase Sentencing Disparity Between Crack and Powder Cocaine,” *Reason*, September 28, 2021, <https://reason.com/2021/09/28/house-passes-equal-act-to-erase-sentencing-disparity-between-crack-and-powder-cocaine/> (noting the bill’s passage by a “wide bipartisan vote” of 361-66).