



October 4, 2017

Comprehensive Criminal Justice Reform Must Include Both Front End and Back End Reform

Dear Member of the House/Senate Judiciary Committee:

On behalf of The Leadership Conference on Civil and Human Rights, the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund, and Human Rights Watch, we write to express our support for the House Judiciary Committee's bipartisan efforts to establish a smarter, fairer criminal justice system from sentencing to reentry.

Over-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 toward low-income communities and communities of color. This nation's use of incarceration is no longer grounded in sound principle or policy. The United States 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 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.² It costs about \$32,000 a year to house just one federal inmate,³ almost three times the average yearly cost of in-state tuition at a public university.⁴

Any reform that Congress enacts must have a significant impact on the number of people entering the federal system and those who are already in federal prison. Federal criminal justice reform cannot be symbolic by only allowing people to leave BOP custody early without reducing sentences in the future and for those currently in prison. Congress must be committed to addressing the impact that both front end and back end policies have on the federal prison system.

The federal prison population has increased from approximately 25,000 in FY1980 to nearly 185,933 today.⁵ The BOP's budget has also doubled over the past decade, reaching its current level of over \$7 billion in the president's FY18 budget request.⁶ Indeed, in 2014, the BOP's budget grew at almost twice the rate of the rest of the Department of Justice.⁷ Despite this growing budget, under current conditions, the system is at over-capacity, jeopardizing the safety of staff and prisoners.⁸

In its 2011 report to Congress, the U.S. Sentencing Commission found that mandatory minimum sentences disproportionately impact communities of color⁹ and that African Americans received relief from mandatory minimum sentences least often, compared with White, Hispanic, and those of other races.¹⁰ In addition to these racial disparities, the commission noted that mandatory minimum sentences are the leading contributor to our burgeoning federal prison population and the increased economic costs to our national budget. These racial disparities persist today, as confirmed by the commission's 2017 report: "An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System."¹¹

Last Congress, we witnessed bipartisan bicameral collaboration to introduce comprehensive legislation with meaningful reforms to the front and back ends of the criminal justice system, the Sentencing Reform



Act of 2016 and The Corrections and Recidivism Reduction Act of 2016. While these bills did not contain all the criminal justice reform policy changes advocates promoted, the bipartisan momentum built over the last few years on this issue marks an important step toward reducing the nation's federal prison population in favor of improving public safety and reducing excessive costs. We must continue the bipartisan work to encourage smarter approaches to crime that reduce mandatory minimums, address sentencing disparities, breakdown oppressive barriers to re-entry for people with records, and provide pathways to early release for elderly individuals and those with good conduct.

It is important to remember that these challenges facing the criminal justice system in the United States continue to exist today. While the priorities of the executive branch may have changed with the current administration, Congress' obligation to address these challenges has not. The nation can no longer afford to ignore the societal and budgetary costs of our growing federal prison population. In order to have a criminal justice system that is fair, targeted, and cost-effective, the entire system must be reformed – both in terms of reducing the number of individuals entering our prisons, as well as with respect to providing opportunities for recidivism reduction programming, improving services for drug treatment, and offering incentives for lawful behavior in prison and upon release.

That is why legislators from across the aisle came together during the last Congress to introduce a strong package of front end and back end reforms, the Sentencing Reform Act of 2015 and The Corrections and Recidivism Reduction Act of 2016. Carefully negotiated over many months with the input of community stakeholders, the Sentencing Reform Act of 2015 and Corrections and Recidivism Reduction Act of 2016 enjoyed wide bipartisan support in Congress, as well as the support of civil rights advocates, fiscal conservatives, and religious groups. This broad coalition recognized that, even though these bills involved a great deal of compromise, to fully address the problems facing the criminal justice system today, we needed to both reduce recidivism through back end reforms *and* dismantle the front-end drivers of incarceration. Across the country, many states have adopted a similar approach and passed legislative packages with both front and back end reforms. Despite fears that these reforms would threaten public safety, most states have enjoyed both lower rates of incarceration and lower rates of crime.¹²

Ultimately, it is imperative to continue inspiring recent bipartisan efforts to address both front end and back end justice system reforms, to have the most impact on prison overcrowding and further cost-saving initiatives. To rectify these issues plaguing our justice system, we ask that you consider the following principles:

Front End Reforms:

- **Restore Proportionality to Drug Sentencing**

Excessive mandatory minimum sentences associated with low level drug offenses have led to an explosion of the federal prison population and an overrepresentation of African Americans in the federal criminal justice system. In fact, amongst those serving life or virtual life sentences in the federal system, the majority (over two-thirds) had been convicted of *nonviolent offenses* and the majority (67.5 percent) are people of color.¹³ About half of those serving life without parole in the federal system had been convicted of a drug crime. Unfortunately, judges are required to mete out excessive sentences at the urging of a prosecutor or based on the quantity of drugs without regard for any extenuating circumstances or analyzing an individual's role in the offense. Restoring federal judicial discretion in drug cases by eliminating mandatory minimum sentences would

ensure that defendants receive punishments that are proportional to the offense they committed and do not ignore culpability.

- **Expand Use of Deferred Adjudication and Expungement of Offenses for Low-Level Offenders**

Congress should expand the Federal First Offender Act, 18 U.S.C. § 3607, to allow judges to defer judgment and sentencing for certain low-level offenders, to avoid incarceration and a conviction record. Upon an individual's successful completion of a term of probation, the charges would be dismissed and the record expunged.

- **Make Retroactive Congressional Reforms to Crack Cocaine Sentencing**

Congress should pass legislation to extend the application of the Fair Sentencing Act of 2010 to people whose conduct was committed prior to enactment of the new law. In 2011, the commission voted unanimously to make part of the guidelines for the crack-cocaine sentencing reductions retroactive, a move that reduced the sentences of about 7,000 people and resulted in a savings of 14,333 bed-years (the equivalent of over \$400 million dollars¹⁴).¹⁵ Nevertheless, over 16,700 people continue to serve time under the 100-to-1 crack cocaine ratio, waiting for relief through retroactivity.¹⁶ Without reform, this egregious injustice will continue.

Back End Reforms:

- **Enhance Elderly Prisoner Early Release Programs**

The average cost of housing elderly prisoners is between two and three times that of younger prisoners. At the same time, aging is correlated with diminishing risk of recidivism. Incarcerating elderly, nonviolent inmates who no longer pose a threat to the community wastes enormous sums of federal resources and these costs will continue to rise as the elderly prison population grows. Forty-one states have already embraced some version of a limited early release program for elderly inmates, and for example, Congress could reauthorize and expand the provision of the Second Chance Act that included a pilot program for the early release of elderly prisoners.

- **Expand Time Credits for Good Behavior**

The federal prison system's method of calculating earned credit reduces a prisoner's sentence to a maximum credit of 47 days per year – below the 54 days intended. This decision results in unnecessary increases in prison sentences at significant cost. By clarifying the statutory language, Congress could save an estimated \$41 million in the first year alone. Congress should also quickly implement a Department of Justice proposal creating a new good time credit that can be earned for successful participation in recidivism-reducing programs, such as education or occupational programming.

As we move forward in the legislative process it is important to note that while reforms to address back end drivers of our prison system are needed, they cannot function as a substitute for front end sentencing reform. Only front-end reforms have the power to significantly stem the tide of incarceration, reduce the exorbitant cost of the prison system, and give redress to those inside who are serving unreasonably long sentences for nonviolent offenses. Any approach that does not include sentencing reform will be insufficient to meet the challenges we face. Our continued progress toward meeting the economic and societal challenges posed by the current system and creating a fair and more just system depends on a comprehensive approach to reform. It is up to Congress to continue to advance front end and back end reform designed to improve both federal sentencing laws and the functioning of the federal prison system.



If you have any questions, please feel free to contact Sakira Cook, Senior Counsel, at cook@civilrights.org or (202) 263-2894. Thank you for your consideration, and we look forward to working with you in the future on this issue.

Sincerely,

Faiz Shakir, National Political Director
American Civil Liberties Union

Vanita Gupta, President & CEO
The Leadership Conference on Civil and Human Rights

Todd A. Cox, Director of Policy
NAACP Legal Defense and Educational Fund

Jasmine L. Tyler, Advocacy Director, US Program
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¹ See Kyckelhahn, Tracey. "Justice Expenditure And Employment Extracts, 2011 – Preliminary." *Bureau of Justice Statistics*. July 1, 2014. Table 1. <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5050>. (showing FY 2010 state and federal corrections expenditure was \$80,678,186,000)

² See La Vigne, Nancy & Samuels, Julie. "The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions." *The Urban Institute*. 1-2. Dec. 11, 2012. <http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf>. [hereinafter *LaVigne Urban Institute Report*]

³ See "Annual Determination of Average Cost of Incarceration." *Federal Bureau of Prisons*. July 19, 2016. 81 Fed. Reg. 46957. <https://www.federalregister.gov/documents/2016/07/19/2016-17040/annual-determination-of-average-cost-of-incarceration>.

⁴ See "What's the Price Tag for a College Education?" *COLLEGEdata*. http://www.collegedata.com/cs/content/content_payarticle_tpl.jhtml?articleId=10064. (citing to College Board

research indicating that the average cost of tuition and fees for the 2016–2017 school year was \$9,650 for state residents at public colleges)

⁵ See “Statistics: Total Federal Inmates.” *Federal Bureau of Prisons*. Sept. 18, 2017.

http://www.bop.gov/about/statistics/population_statistics.jsp.

⁶ See “Federal Prison System (BOP): FY 2018 Budget Request.” *Department of Justice*.

<https://www.justice.gov/jmd/page/file/968276/download>.

⁷ See Horowitz, Michael E. “Top Management and Performance Challenges Facing the Department of Justice 2014.” *Office of the Inspector General*. Nov. 10, 2014. <https://oig.justice.gov/challenges/2014.htm>.

⁸ See Samuels, Charles E. “Testimony on Oversight of the Federal Prison System before the Judiciary Committee of the U.S. House of Representatives Subcommittee on Crime.” Sept. 19, 2013. <https://judiciary.house.gov/wp-content/uploads/2016/02/113-50-82847.pdf>.

⁹ See “Mandatory Minimum Penalties in the Federal Criminal Justice System.” *The U.S. Sentencing Commission*.

Oct. 2011. <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>. (The report determined that Hispanic offenders accounted for 38.3 percent of those convicted with a mandatory minimum, Black offenders 31.5 percent, White offenders 27.4 percent, and “other race” offenders 2.7 percent.)

¹⁰ *Id.*

¹¹ See “An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System.” *The U.S.*

Sentencing Commission. July 2017. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

¹² See “Most States Cut Imprisonment and Crime.” *The Pew Charitable Trusts*. Nov. 10, 2014.

<http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime>.

¹³ See Nellis, Ashley. “Still Life: America’s Increasing Use of Life and Long-Term Sentences.” *The Sentencing Project*. May 3, 2017. <http://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>.

¹⁴ See “Annual Determination of Average Cost of Incarceration.” *The Federal Register*. March 18, 2013.

<https://www.federalregister.gov/documents/2013/03/18/2013-06139/annual-determination-of-average-cost-of-incarceration>. (finding that the fee to cover the average cost of incarceration for Federal inmates in Fiscal Year 2011 was \$28,893.40)

¹⁵ See “Sensible Sentencing Reform: The Fair Sentencing Act of 2010.” *U.S. Sentencing Commission*.

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_FSA_2010.pdf.

¹⁶ See “Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing.” *ACLU*. Oct. 27, 2014. https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.