



June 14, 2019

Mr. David Tell
Hudson Institute
1201 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20004

Submitted electronically

Re: Response of the ACLU, Justice Roundtable, and The Leadership Conference to Hudson Institute's Request for Supplemental Information

Dear Mr. Tell,

On behalf of the American Civil Liberties Union, the Justice Roundtable, The Leadership Conference on Civil and Human Rights¹ and the undersigned organizations, we submit this letter regarding our disappointment in the lack of transparency that both the Department of Justice and the Hudson Institute have demonstrated in regards to the development of a Risk and Needs Assessment System as required by The First Step Act of 2018. Many of the undersigned organizations attended the listening sessions hosted by the National Institute of Justice (NIJ) which were held on April 3rd and 5th, 2019 and made public statements consistent with the views set forth in this letter.

On June 4, 2019, we received an inquiry requesting additional recommendations from our organizations regarding risk and needs assessments on behalf of the Independent Review Committee (IRC). This letter serves as a formal response to that inquiry and rearticulates our primary concerns around implementation of The First Step Act, as set forth in the [Statement of the Record](#) that we submitted to the National Institute of Justice on April 12, 2019.

We urge the Hudson Institute to (1) conduct robust engagement and coordinate in person meetings to provide updates and discuss the development, adoption, evaluation and implementation of the Risk and Needs Assessment System; (2) ensure that the Department adheres to the statute and does not use the current BOP security classification system or the Post-Conviction Risk Assessment (PCRA) as a substitute for the independently tested and validated risk and needs assessment tool required; (3) ensure that the new Risk and Needs Assessment System is free of and does not exacerbate any racial, ethnic or gender bias within the system; and (4) immediately direct resources to begin expanding rehabilitative programming in all federal prisons as required by The First Step Act.



The Hudson Institute and the Independent Review Committee Have Not Meaningfully Engaged with Key Stakeholders.

To date, implementing The First Step Act has primarily been a closed-door process. Outside of the two listening sessions the Department of Justice held in April and this email inquiry we have received, the Hudson Institute has not provided updates on the work of the IRC or otherwise engaged stakeholders. We urge you to provide us the opportunity to offer our expertise, input and constructive feedback to the IRC in person, instead of via email. Moreover, as a coalition, we are disappointed that the concerns we raised with respect to stakeholder engagement for the Risk and Needs Assessment system prior to the passage of The First Step Act and thereafter have seemingly been disregarded by the Department and the IRC. Without meaningful conversations, it is difficult for stakeholders to determine the type of information that would be useful to the committee during its evaluation of the current system, and development of a new, risk and needs assessment system. Furthermore, it is important for our organizations to understand the basis upon which the committee will make its recommendations related to the development, adoption, evaluation and implementation of the new system.

The Department Cannot Use an Existing Tool as a Substitute for the Risk and Needs Assessment System Required by the First Step Act.

The use of a Risk and Needs Assessment System to determine who is eligible for programming and services that will allow them to earn time credits in prison is novel and untested. There is no existing tool that does what the First Step Act requires. The current BOP classification system and the PCRA are primarily the result of the behavior and decisions of police officers and prosecutors, rather than the individuals or groups that the data is claiming to describe.² Likewise, one of the PCRA's creators concluded that use of risk assessments for purposes other than to inform risk reduction efforts, such as determining the length of prison sentences, may "exacerbate racial disparities in incarceration."³ Therefore, the Department of Justice and IRC must adhere to The First Step Act and not use the current BOP security classification system or the PCRA as a substitute for the independently tested and validated risk and needs assessment tool that has been mandated.

Risk and Needs Assessment systems bias the results against persons of color where these communities are persistently over-policed across the nation.

The BOP security classification and the PCRA are also not appropriate substitutes for the risk and needs assessment tools required by the First Step Act because they are inherently racially biased. Studies have shown that these tools can produce results that are heavily biased against Black defendants and have a disparate negative impact on Black people because the factors considered and the criminal justice data used by these systems are biased.⁴ Studies also show that Black people are more likely to be misclassified as high risk than White or Hispanic offenders.⁵ The current tools in place were not designed to identify the specific criminogenic needs of incarcerated individuals and heavily rely on static factors that would undermine the effectiveness of the system. The justification for the creation of these tools is to reduce discrimination in criminal justice decision-making, pretrial release decisions, sentencing, and parole.



However, the use of these tools only worsens racial disparities and encourages increased incarceration, both of which are counterproductive to The First Step Act's goal of decreasing mass incarceration.

The Bureau of Prisons must immediately begin providing rehabilitative programming.

The core intent of The First Step Act is to provide rehabilitative and re-entry programming, as well as residential re-entry centers (i.e. halfway houses) and home confinement. The BOP does not currently provide minimally sufficient recidivism reduction programs, nor does it have sufficient halfway house capacity so that those released from prison can successfully transition to the community.⁶ In the end, any positive reform contemplated by The First Step Act is contingent upon sufficient funding to expand and improve evidenced-based recidivism reduction programming, and the availability of halfway house placements and home confinement. We therefore urge BOP to begin rebuilding rehabilitative services immediately.

Conclusion

To provide meaningful input about the development of the Risk and Needs Assessment System, we request a formal meeting with the members of the Independent Review Committee, so that we may better understand the process through which they will arrive at their recommendations for the development, adoption, evaluation and implementation of the new system. Thank you for your attention to these matters. We look forward to hearing from you soon.

If you have any questions, please feel free to contact Jesselyn McCurdy, American Civil Liberties Union Washington Legislative Office, Deputy Director at jmccurdy@aclu.org (202) 675-2307 or Sakira Cook, Leadership Conference on Civil and Human Rights, Program Director, at cook@civilrights.org or (202) 263-2894.

Sincerely,

American Civil Liberties Union
Drug Policy Alliance
Bread for the World
The Justice Roundtable
The Leadership Conference Education Fund
The Leadership Conference on Civil and Human Rights
NAACP Legal Defense and Educational Fund
National Council for Incarcerated and Formerly Incarcerated Women and Girls

cc: Mr. Will Lombardo



¹ The American Civil Liberties Union (ACLU) is a nationwide organization 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. The Justice Roundtable (Justice Roundtable) is a national coalition of legal, civil rights, criminal justice, human rights and faith-based organizations dedicated to advocating for a fairer federal criminal justice system. The Leadership Conference on Civil and Human Rights (The Leadership Conference) is the nation's oldest and largest civil rights coalition representing people of color, women, children, older Americans, people with disabilities, gays and lesbians, major religious organizations, labor unions, and civil and human rights groups. For almost a half century, The Leadership Conference has led the fight for equal opportunity and social justice.

² Vote "No" on The FIRST STEP Act. 2018. <https://civilrights.org/resource/vote-no-first-step-act/>

³ Skeem, Jennifer L. & Lowenkamp, Christopher, "Risk, Race, and Recidivism: Predictive Bias and Disparate Impact", *54 Am. Soc'y of Criminology* 680, 703-05, 2016.

⁴ See, e.g., Skeem, J. & Lowenkamp, C. (2015). Risk, Race & Recidivism: Predictive Bias and Disparate Impact. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339.

⁵ Whiteacre, Kevin. "Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias", *17 Crim. Just. Pol'y Rev.* 330, 2006.; see also Fennessy, Matthew & Huss, Matthew T., "Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity", *40 Crim. Just. & Behav.* 40. Jan. 2013. 53.

⁶ Statement for the Record of The ACLU, Justice Roundtable, and The Leadership Conference in Response to Department of Justice (DOJ) April 3 and 5 Listening Sessions. <https://civilrights.org/resource/statement-for-the-record-of-the-aclu-justice-roundtable-and-the-leadership-conference-in-response-to-department-of-justice-doj-april-3-and-5-listening-sessions/>