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Dear Colleague:

I write in response to a recent letter opposing the FIRST STEP Act (hereinafter, the “opposition letter”). The letter, unfortunately, is riddled with factual inaccuracies and deliberately attempts to undermine the nationwide prison reform effort.

There are numerous civil rights and criminal justice reform organizations, including the National Urban League, Families Against Mandatory Minimums and #cut50 that support the FIRST STEP Act. For your information, their letters are attached. These groups, and many others, are tireless criminal and social justice advocates who have direct ties to individuals that are currently incarcerated. Their work matters. Their voices matter. However, like many other facts that should have been included in the opposition letter, the robust support that exists for prison reform legislation was selectively omitted.

Last week, the House Judiciary Committee advanced H.R. 5682 by a strong bipartisan 25-5 vote. The FIRST STEP Act will: (1) lead to better outcomes for individuals reintegrating back into their communities, (2) expand the capacity of reentry programming to ensure that incarcerated individuals can benefit from counseling, drug treatment, training and education, (3) place additional layers of accountability and oversight within the Federal Bureau of Prisons (BOP), (4) transform the lives of incarcerated men, women and their families, (5) improve public safety, and (6) save taxpayer dollars.

Without any basis in reality, the opposition letter suggests that the risk assessment mechanism is at the core of prison reform. To the contrary, the legislation is anchored in providing direct programming to all inmates, the good time credit fix, banning shackling for pregnant women, improving compassionate release, moving people within 500 driving miles of their families, fixing the prison rape audit system, ensuring that people have photo ID’s when transitioning back into society, and perhaps most importantly, connecting incarcerated individuals with apprenticeships and job training.

False and Misleading Claims Related to the Recidivism Reduction System

Among the litany of falsehoods in the opposition letter, perhaps the most egregious allegation is that the “exclusions list” in the bill precludes inmates from *participating* in reentry activity.

This is unequivocally false. The FIRST STEP Act does not prohibit anyone from participating in recidivism reduction programming.¹

Quite the contrary, pursuant to Section 102 of the FIRST STEP Act, “Priority for participation in recidivism reduction programs **shall be given to medium-risk and high-risk prisoners,**” and **shall** be provided throughout their entire term of incarceration.² Interestingly enough, the Sentencing Reform and Corrections Act (S. 1917 or the “SRCA”) sponsored by the authors of the opposition letter, provides no such priority to the inmates they claim to champion.

The opposition letter’s assertion that the FIRST STEP Act is not evidence-based is also false. Rather, enhancing programs that are proven to lower recidivism is one of the central tenets of the bill. As such, H.R. 5682 references “evidence” or “evidence-based” programming or activity fifty-eight (58) times.

It is also important to note that the deployment of a risk assessment approach was initiated by the BOP under the Obama administration. In April 2016, Attorney General Loretta Lynch’s Department of Justice highlighted the importance of reducing recidivism and assisting inmates in their return to their communities by putting forth a set of five evidence-based principles for reform known as the “Roadmap to Reentry.” According to the proposal, “Upon incarceration, every inmate should be provided an individualized reentry plan tailored to his or her risk of recidivism and programmatic needs. While incarcerated, each inmate should be provided education, employment training, life skills, substance abuse, mental health, and other programs that target their criminogenic needs and maximize their likelihood of success upon release.”³

Similarly, according to an archived BOP website from the previous administration:

“BOP embraces a corrections philosophy that reentry preparation must begin on the first day of incarceration. The first and most important step in reentry planning is obtaining information about an individual inmate’s risk of recidivating and programmatic needs that will inform development of an individualized reentry plan. Social science research indicates each inmate possesses his or her own “criminogenic factors,”[1] such as criminal history, substance abuse, and education level. By identifying these factors as soon as an inmate enters custody, the Bureau can ensure that the individual receives appropriate services and can monitor his or her progress throughout the term of incarceration. In 2016, the Bureau retained an independent social science research organization, American Institutes of Research (AIR), to evaluate BOP’s existing criminogenic assessment tools and to propose improvements. This evaluation, which will be completed in the fall of 2017, will increase the effectiveness of correctional programs by ensuring the right services are delivered to the right inmates, that these programs are aligned to the risk level and unique needs of each individual, and that all services are delivered at the intensity and frequency necessary to reduce the likelihood of recidivism.”⁴

¹ H.R. 5682, 115th Cong. § 101(a) (2018).

² H.R. 5682, 115th Cong. § 102(a) (2018).

³ “ROADMAP TO REENTRY REDUCING RECIDIVISM THROUGH REENTRY REFORMS AT THE FEDERAL BUREAU OF PRISONS,” Department of Justice, April 2016, *available at* <https://www.justice.gov/archives/reentry/file/844356/download>.

⁴ “PRISON REFORM: REDUCING RECIDIVISM BY STRENGTHENING THE FEDERAL BUREAU OF PRISONS,” Department of Justice, *available at* <https://www.justice.gov/archives/prison-reform>.

We share the Obama Administration's commitment to effective, evidence-based recidivism reduction programming in prisons, and an objective reading of the FIRST STEP Act makes that clear.

Alleged Racial Disparity

The claim that the recidivism reduction plan will create discriminatory non-evidence-based policies is also false. We have carefully worked to ensure that racial disparities do not arise from the risk and needs assessment system used by the BOP. First, the Department of Justice is required under the FIRST STEP Act to conduct a review of the risk and needs assessment system to ensure that any unwarranted disparities are identified and addressed. Second, the FIRST STEP Act mandates a biennial Government Accountability Office (GAO) report after the Comptroller General audits the use of the risk and needs assessment system to ensure that any unwarranted racial disparities can be addressed by Congress. Third, the FIRST STEP Act ensures that the risk and needs assessment system as well as the recidivism risk reduction programming are based firmly in methods and practices that are **evidence-based** (and not anchored in racially-tinged stereotypes).

The opposition letter claims that the bill provides low- and minimum-risk incarcerated individuals with priority for work programs. Again, this is a misleading assertion. Since Federal Prison Industries has reduced recidivism more than any other BOP program, it would clearly fit within the definition of "evidence-based recidivism reduction program."⁵ Consequently, priority for work programs should be given to high- and medium-risk inmates whenever appropriate, consistent with the FIRST STEP Act's mandate.

Unlike the FIRST STEP Act, the Senate criminal justice reform bill specifically provides that "a prisoner who has been classified as low risk and without need for recidivism reduction programming shall participate in and successfully complete productive activities, **including prison jobs**, in order to maintain a low-risk classification" (emphasis added).⁶ It further states that "not less than 75 percent of eligible low-risk offenders have the opportunity to participate in a prison work program for not less than 20 hours per week."⁷ In other words, the SRCA will disproportionately benefit low-risk inmates. Accordingly, it is actually the Senate bill sponsored by the authors of the opposition letter that (in their words) "will institutionalize discrimination and likely fail to reduce recidivism."

Access to Prerelease Custody/Earned Time Credits

The FIRST STEP Act provides low- and minimum-risk inmates with access to earned time credits in connection with prerelease custody at the very end of their sentence.⁸ In addition, there is a provision in the bill that permits the warden of a prison to override an inmate's medium- or high-risk classification in order to provide access to home confinement or halfway house

⁵ H.R. 5682, 115th Cong. § 101(a) (2018).

⁶ S. 1917, 115th Cong. § 202(b) (2017).

⁷ S. 1917, 115th Cong. § 205(b) (2017).

⁸ H.R. 5682, 115th Cong. § 101(a) (2018).

detention.⁹ Inexplicably, the opponents of the FIRST STEP Act have chosen to criticize this provision, which provides a previously unavailable pathway to earned time credit.

The opposition letter acknowledges that the override determination is made by the warden, but nevertheless concludes that H.R. 5682 gives too much discretion to the Trump administration. This is purely speculative. By way of example, Louisiana law provides similar discretion to wardens who often exercise this power in an appropriate fashion.¹⁰ The state-level experience was brought to the attention of the opponents during discussions about the FIRST STEP Act. Again, they selectively omitted this detail from the opposition letter.

H.R. 5682 does exactly what the bill's title suggests – it allows inmates to take the first step back into their communities by safely transitioning through prerelease custody. Too often, incarcerated individuals are released without the foundation upon which they may uplift themselves.

By allowing individuals to be placed in home confinement as a result of their earned time credits, the FIRST STEP Act will effectively open halfway homes to those most in need of a safe transition back into their communities. To the extent there is a shortage of halfway house space, as the opposition letter asserts, the expansion of home confinement will help alleviate this problem. That's a good thing.

Mythology Related to Effective Implementation

The opposition letter asserts that H.R. 5682 *only* authorizes \$50 million per year for a five-year period. The irony of this criticism is particularly rich. The so-called criminal justice reform bill championed in the Senate fails to authorize a single dime. The \$250 million authorization in H.R. 5682 is supported by a recent CBO calculation on a previous version of this bill, which found an authorization of \$210 million to be sufficiently robust to cover the cost of implementation.¹¹ Of course, the opposition letter fails to acknowledge that the authorization amount in the FIRST STEP Act exceeds this figure.

Moreover, there are several cost saving measures in the FIRST STEP Act which will also enhance funding. Most importantly, the good time credit fix will result in massive cost savings, which the GAO estimates could equate to approximately \$40 million in the first fiscal year.¹² In addition, H.R. 5682 directs low needs prisoners to serve an increased amount of time in home confinement.¹³ This will free up resources to be reinvested in reentry programs, pursuant to the bill.

⁹ H.R. 5682, 115th Cong. § 102(b)(1)(B) (2018).

¹⁰ LA Rev Stat § 15:571.3

¹¹ "H.R. 759, Recidivism Risk Reduction Act," Congressional Budget Office Cost Estimate, September 16, 2016, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr759.pdf>.

¹² "Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison," Bureau of Prisons, February 2012, available at <https://www.gao.gov/assets/590/588284.pdf>.

¹³ H.R. 5682, 115th Cong. § 402.

Allegedly Excessive Discretion (Attorney General)

The opposition letter makes the patently false argument that the prison reform bill would allow the Attorney General to use BOP's current security classification system as the risk assessment system, and thereby rely on static factors. Indeed, it is for that very reason that the Attorney General *cannot use* the current classification system. The FIRST STEP Act provides that the Department of Justice shall ensure the system is based on dynamic factors that are reasonably expected to change while someone is incarcerated.¹⁴ It also provides that the system shall be evaluated regularly by the GAO to ensure that unwanted racial disparities do not result from the application of the system.¹⁵

Parenthetically, it is important to note that the Senate "reform" bill sponsored by the authors of the opposition letter actually permits the Attorney General to use static risk factors.¹⁶ It states that "In carrying out this subsection, the Attorney General shall coordinate with the United States Probation and Pretrial Services to ensure that the findings of the Presentence Report of each offender are available and considered in the Assessment System."¹⁷ Incorporating an inmate's presentence report into the consideration is undoubtedly a static factor which can produce results that are biased against people of color—particularly African Americans. Do the opponents of the FIRST STEP Act support the use of static factors or oppose it?

The SRCA also fails to include an independent audit mechanism, unlike the FIRST STEP Act. As noted, the FIRST STEP Act provides that every two years after implementation of the system the GAO shall conduct an audit. This audit will evaluate, among other things, whether inmates are being assessed under the risk and needs assessment system with appropriate frequency; offered programs and productive activities as required; employees are receiving appropriate training; work assignments are being offered; and transfers to prerelease custody are being made as soon as inmates are eligible. The criminal justice reform bill in the Senate contains no such guardrails.

Inflammatory Claims About Privatization

The FIRST STEP Act permits the BOP to enter into partnerships with colleges and universities, non-profits and faith-based groups. For the record, the Senate bill championed by the authors of the opposition letter does the same thing.¹⁸ Apparently, this provision is cause for alarm in the House bill and a reason to celebrate the Senate bill. The hypocrisy of the opposition's privatization argument is staggering.

¹⁴ H.R. 5682, 115th Cong. § 101(a) (2018).

¹⁵ H.R. 5682, 115th Cong. § 103.

¹⁶ "(3) USE OF EXISTING RISK AND NEEDS ASSESSMENT TOOLS PERMITTED.—In carrying out this subsection, the Attorney General may use existing risk and needs assessment tools, as appropriate, for the assessment tools required under paragraph (2)." S. 1917, 115th Cong. § 203(a) (2017).

¹⁷ "(4) USE OF PRESENTENCE REPORT.—In carrying out this subsection, the Attorney General shall coordinate with the United States Probation and Pretrial Services to ensure that the findings of the Presentence Report of each offender are available and considered in the Assessment System. S. 1917, 115th Cong. § 203(a) (2017).

¹⁸ S. 1917, 115th Cong. § 202(b) (2017).

False and Misleading Claims about the Good Time Credit Fix

If there were any provisions in the FIRST STEP Act that should garner clear support, it is the good time credit (GTC) fix that will immediately benefit thousands of incarcerated individuals. Yet, this provision is also subject to conjecture in the opposition letter. A GAO report from the 112th Congress, which remains valid and undisputed, concluded that, “BOP provided us estimates in December 2011 showing that if the GCT credit allowance was increased by 7 days, as proposed, BOP could save over \$40 million in the first fiscal year after the policy change from the early release of about 3,900 inmates.”¹⁹

To be clear, the tremendous humanitarian and practical impact of this provision cannot be overstated. Tens of thousands of incarcerated individuals will benefit in the years to come because of the good time credit fix provided in the bill. As a result, formerly incarcerated individuals might experience freedom during birthdays, funerals, graduations, weddings or the birth of a grandchild. The attempt to undercut the significance of the good time credit fix, when the Senate bill fails to include any such relief defies logic.

All or Nothing Approach (While People of Color Languish in Prison)

We have a Republican President. Republicans control the House of Representatives and the Senate. While the Senate authors of the opposition letter support the all or nothing approach, the Majority Leader apparently does not. Those are the facts. For this reason, it is not clear how exactly the opposition proposes to achieve comprehensive criminal justice reform without first considering the bipartisan prison reform legislation pending in the House.

Indeed, it would be difficult, if not impossible, for many in the House to support the all or nothing approach when **the Senate “reform” bill includes new mandatory minimums and enhancements for drug crimes.**

The attempt to kill the FIRST STEP Act will also undermine the following quality of life improvements for currently incarcerated individuals, including, but not limited to:

- Anti-shackling prohibition for pregnant and post-partum inmates
- Photo identification for people leaving prison
- A requirement to move people within 500 driving miles of their families
- A fix to the Prison Rape Elimination Act which will improve how the audits of prison rape incidents are conducted
- Expanded eligibility for Mentally Ill Offender Treatment and Crime Reduction Act Grants which may be used to develop and implement a variety of programs designed to improve outcomes for individuals with mental illness involved in the criminal justice system
- Expanded eligibility for compassionate and elderly release
- Expanded use and eligibility of home confinement

¹⁹ *Supra* note 12.

Conclusion

We are sent to Congress to get things done and work across the aisle whenever possible. Ultimately, it should be our mission to improve the lives of the people we are here to represent. In this regard, the perfect should never be the enemy of the good, particularly when it comes to the least, the lost and the left behind.

That is what the FIRST STEP Act is all about. Accordingly, it is my hope that the authors of the opposition letter will reconsider their position, cast aside partisan ambition and join the House's fight to fix our broken criminal justice system.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Hakeem Jeffries", written over a horizontal line.

HAKEEM JEFFRIES
Member of Congress