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March 26, 2018

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Chuck Schumer
Senate Minority Leader
322 Hart Senate Office Building
Washington, DC 20510

Cc: Senator Grassley and Senator Feinstein

Re: Concerns about S. 1994, CORRECTIONS Act of 2017 and Prison Reform Only Efforts

Dear Leader McConnell and Leader Schumer:

On behalf of The Leadership Conference on Civil and Human Rights and 61 legal, civil rights, disability rights, criminal justice, human rights, and faith-based organizations, we write to express our concerns specifically about S.1994, the CORRECTIONS Act of 2017, and more generally about our opposition to efforts to pass prison reform (or “back end” reform) legislation without including sentencing reform (or “front end” reform). Across the country, states that have enacted legislation containing both front and back end reforms have reduced rates of incarceration and crime. Any legislation that addresses only back end reforms is doomed to fail in achieving these goals. Without changes to sentencing laws that eliminate mandatory minimums, restore judicial discretion, reduce the national prison population, and mitigate disparate impacts on communities of color, S.1994 alone will have little impact.

Moreover, proposals referred to by the White House and other supporters as “prison reform,” including the CORRECTIONS Act and H.R.3356, the Prison Reform and Redemption Act of 2017, would do little to reform prisons or the federal justice system. S.1994 purports to reduce recidivism by providing earned time credit incentives for people to participate in rehabilitative programming, but many people will not be eligible for these credits based solely on the type of conviction they have. Furthermore, the bill creates a complicated system that uses profile-based algorithmic “risk assessment” evaluations to determine eligibility for these vital programs. Once evaluated, individuals are placed into one of three “risk” categories – high, medium, or low. These categories are supposed to determine the likelihood that an individual will recidivate and identify programming needs to assist with rehabilitation. Under the bill, an incentive structure allows those who are determined to be low risk and some who are deemed moderate to earn time credit toward early release to a halfway house or home confinement. However, individuals who are deemed to be high risk and some who are found to be moderate risk would not be eligible for time credits.

These limitations will result in a significant number of people in federal prison not benefitting from this prison reform approach. The CORRECTIONS Act will not achieve meaningful reform, provides little-to-no incentive for those who need rehabilitation the most, and heavily relies on the development of a new, untested risk assessment tool.

S. 1994 is Unlikely to Achieve Meaningful Prison Reform.

The CORRECTIONS Act will not reduce mass incarceration or its costs, because most people in federal prison will be ineligible from either earning or using early-release credits for successful completion of rehabilitative programming. S.1994 makes a large number of people in prison ineligible from earning any early-release credits based solely on the nature of their federal conviction or their criminal history score. For example, individuals who have two or more federal convictions or convictions for obstruction of justice among other offenses would not qualify to be awarded early release credits. In fact, over half of those in BOP custody (52.6 percent) would be ineligible for the time credits described in S. 1994, because one or more of the disqualifying provisions would apply to them.¹ The bill's exclusions from earning credit would also likely have a disparate impact on racial minorities. The majority of those deemed ineligible, 61.8 percent, would be people of color (Black 36.4 percent, Hispanic 25.4 percent).² In addition, the exclusion of those who are convicted of a federal "crime of violence" would disproportionately exclude Native Americans living on reservations because they are prosecuted in federal court for crimes for which others are prosecuted in state court. Any reforms enacted by Congress should impact a significant number of people in federal prison and reduce racial disparities or they will have little effect on the fiscal and human costs of federal prison.

Moreover, the purported incentives towards rehabilitation are not real or meaningful. S.1994's earned time credits are not real time off a sentence, but more time in a halfway house, home confinement, or community supervision. This is inadequate. Limited space in halfway houses already reduces the amount of time individuals can spend in halfway houses. Recent closures of residential reentry centers have further exacerbated the problem, making it unlikely that people will be able to use all the "time" they earn under the bill. Additionally, home confinement is rarely used by the Bureau of Prisons and there are limits on the amount of community supervision that can be used to make up the difference. For the incentive structure to be real, earned time credits must equate to an actual reduction in sentence to encourage individuals to engage in rehabilitative programming. Such a real incentive structure would result in fiscal savings. For example, if only one in nine individuals earned 60 days of credit in a year, \$100 million in savings would be realized.

Finally, the bill does not include any funding for the recidivism reduction programming it seeks to expand. While the bill does authorize some additional funding,³ there is currently no guarantee that such funding will ever actually be appropriated. Any positive reform contemplated by the CORRECTIONS Act would rely upon recidivism reduction programming in prison and post-release that simply does not exist nor is there sufficient funding to create. The bill, as drafted, is therefore an empty promise, unlikely to achieve meaningful prison reform and unlikely to reduce crime or rates of mass incarceration.

S. 1994 Provides No Incentive to Those Most in Need of Rehabilitative Programming.

One important aspect of the CORRECTIONS Act is that it relies on the future development of an untested profile-based algorithmic risk assessment evaluation. Assessment instruments can be expensive to design, implement, and validate. Any cost savings would not be seen for over a decade, if ever, since it often takes several years to develop such tools. Even after the risk assessment is developed, it will take three or six years to earn one year of early release. Once individuals are evaluated by the risk assessment, S.1994 will not allow people who are classified as “high risk,” and some classified as “moderate risk,” to earn early-release credits. According to the bill, if a person successfully completes rehabilitative programming and is found to be a “low risk,” they could earn 10 days per month of early release credits, and up to five days for “moderate risk” individuals. Individuals determined to be a “high risk,” who have the greatest need for rehabilitation programming, will not receive credits toward early release. These restrictions result in people who need rehabilitation programming the most left unable to access it. Furthermore, giving early release credits to those who are in the least need of rehabilitative programming and none to those most in need of programming is contrary to evidence-based practices and efforts to increase public safety. The bill would give the maximum incentive to those who are classified as low risk when they enter prison, when it is well-established that practices aimed at reducing recidivism should focus scarce resources on the highest risk individuals. Everyone who will come home someday must be able to participate in programming.

In addition, even if a person was deemed eligible to participate and fully completed rehabilitative and reentry programming, the BOP could still deny them the time credits they had earned.⁴ The CORRECTIONS Act gives BOP the authority to unilaterally decide whether an inmate has successfully completed programming, based on a vague standard requiring the inmate to have “realized the criminogenic benefits” of the program. It is unclear how such determinations would be made, and the decision is expressly unreviewable, raising due process concerns.

S. 1994 Uses Risk Assessment Tools in an Unconventional Manner, and These Assessment Tools are Often Unreliable and Exacerbate Racial and Socioeconomic Disparities.

Using a risk assessment system to determine time credits is novel and untested. State correctional systems typically award time credits based on performance and/or disciplinary record, not a risk assessment. Research shows that risk assessments often do not accurately predict risk. One study showed that only 52 percent of those assessed as moderate or high risk by risk assessment tools went on to commit any offense, meaning that almost half of all persons classified as moderate or high risk were actually low risk. Generally, states use risk and needs assessment evaluations to identify programming for people in prison and do not use these tools to award time credits.⁵ For example, in Texas risk and needs assessments are conducted at initial intake to identify an individual’s programming needs. Early release credits are awarded based on conduct and performance in prison, not on risk assessments.⁶ This approach makes more sense because many programs and jobs have been shown to reduce the rate of recidivism, regardless of an inmate’s risk score or the nature of his conviction.⁷

In addition, risk assessments often heavily rely on static factors (those that cannot change) such as criminal history, family members’ criminal history, and the community in which a person lived before

entering the criminal justice system. Dynamic factors (those that can change over time) such as work history, family ties, and pro-social networks are nearly impossible to change while in prison and therefore make it very difficult for a person to lower their risk score during incarceration. Therefore, S.1994 will result in a large number of people in prison unable to earn early release credits from programming by decreasing their risk category. Rehabilitative programs in prison should use a needs-based assessment to identify the criminogenic needs of each individual and develop a program of interventions to address those needs to lower the individual's risk of recidivating.

Finally, relying on a risk assessment tool for earning time credits could amplify racial disparities and perpetuate other injustices in the criminal justice system. Studies have shown that these tools can produce results that are heavily biased against Black defendants and have a disparate negative impact on African Americans.⁸ Risk assessments rely on static factors, including criminal history and age at the time of the offense, and dynamic factors, including work history and educational achievement. Both static and dynamic factors tend to correlate with socioeconomic class and race, and studies show that African Americans are more likely to be misclassified as high risk than White or Hispanic offenders. Therefore, although risk assessments may seem objective or neutral, the data driving many predictive algorithms is profoundly limited and biased. Furthermore, decades of criminology research has shown that such data primarily documents the behavior and decisions of police officers and prosecutors, rather than the individuals or groups that the data is claiming to describe.

S.1994 Omits Key Prison Reforms such as a “Good Time” Credit Fix.

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 that Congress 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 new good time credit that can be earned for successful participation in recidivism-reducing programs, such as education or occupational programming.

Conclusion

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 sentences that are disproportionate to the severity of the offense. 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 establishing 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 Congress is serious about addressing true prison reform, it will pass legislation that would deal with the conditions of confinement such as reducing the use of solitary confinement, providing adequate medical care to prisoners, and addressing exorbitant prison phone rates. If you have any questions, please feel free to contact Sakira Cook, Senior Counsel at The Leadership Conference on Civil and Human Rights, at (202) 263-2894 or cook@civilrights.org, or Jesselyn McCurdy, Deputy Director of the American Civil Liberties Union Washington Legislative Office, at (202) 675-2307 or jmccurdy@aclu.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
AFL-CIO
African American Ministers In Action
American Civil Liberties Union
American-Arab Anti-Discrimination Committee
Asian Pacific American Labor Alliance, AFL-CIO (APALA)
Autistic Self Advocacy Network
Bend the Arc Jewish Action
CAN-DO Foundation
Center for American Progress
Center for Law and Social Policy (CLASP)
Center for Popular Democracy
Center for Responsible Lending
Coalition on Human Needs
Crack Open The Door
CURE (Citizens United for Rehabilitation of Errants)
Drug Policy Alliance
Equal Justice Society
Equal Rights Advocates
Equality California
Faith Action Network - Washington State
Franciscan Action Network
Harm Reduction Coalition
Herd on the Hill
Hip Hop Caucus
Human Rights Watch
Impact Fund
Interfaith Action for Human Rights
JustLeadershipUSA
Law Enforcement Action Partnership
League of United Latin American Citizens (LULAC)
Life for Pot

NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Action Network
National Association of Human Rights Workers
National Association of Social Workers
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Churches
National Employment Law Project
National Fair Housing Alliance
National Hispanic Media Coalition
National Immigration Law Center
National LGBTQ Task Force Action Fund
National Organization for Women
National Urban League
People For the American Way
Prison Policy Initiative
SEIU
StoptheDrugWar.org
Students for Sensible Drug Policy
T'ruah: The Rabbinic Call for Human Rights
The Evangelical Lutheran Church in America
The Prison Arts Coalition
TRANScending Barriers
UnidosUS (formerly the National Council of La Raza)
Union for Reform Judaism
United Church of Christ, Justice and Witness Ministries
Washington Lawyers' Committee for Civil Rights & Urban Affairs
We Got Us Now

¹ See Analysis S. 1994. *United States Sentencing Commission*. Available by request.

² *Ibid.*

³ H.R. 3356, 115th Cong., § 107(a) (2017).

⁴ See H.R. 3356, 115th Cong. § 105(g)(B)(i) (2017).

⁵ See, e.g., Tex. Gov't Code § 498.002 (classifying inmates' "time-earning category" based on factors other than risk assessment); R.I. Gen. Laws § 42-56-24 (determining amount of sentence credit based on factors other than risk assessment); Okla. Stat. § 57-138 (same); N.C. Gen. Stat. § 15A-1340.18 (same); Ohio Rev. Code Ann. § 2967.193 (same)

⁶ See Tex. Gov't Code § 508.152(b-1); Texas Dep't of Criminal Justice, *Offender Orientation Handbook 3* (2015), http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf. All inmates can earn "good conduct" time credits both for "actively engag[ing]" in work and programs, Tex. Gov't Code § 498.003(a), and for "diligent[ly] participat[ing]" in work and educational/vocational programs, *id.* § 498.003(d). The number of days inmates can earn ranges from zero to 45 days per month, *id.*, § 498.003(a), (b), (d), and is set by the inmate's "time earning class," which is based on the inmate's "conduct, obedience, and industry," *id.* § 498.002. New inmates are placed in the time earning class that earns 35 days per month, and are automatically promoted after six months to the class that earns 40 days per

month as long as they have no “major disciplinary cases.” See Tex. Dep’t of Criminal Justice, *Good Conduct Time*, AD-04.80 (rev. 9), at 1, 4 (2010) (“Tex. *Good Conduct Time*”); Tex. Dep’t of Criminal Justice, *Review Process for Promotion in Time Earning Class*, AD-04.81 (rev. 8), at 2 (2010); Texas Dep’t of Criminal Justice, *Offender Orientation Handbook* 8 (2015); *Class*, AD-04.81 (rev. 8), at 2 (2010); see also William T. Habern, David P. O’Neil & Debra Bone, *Going to Prison in Texas in 2014*, at 14 (2014), www.paroletexas.com/articles/GTP2008.pdf. Further promotion to earn the maximum 45 days per month, or subsequent demotion to a lower time earning class or to a non-time earning class, also depends on whether the inmate has a major disciplinary case. See *ibid.*; see also Texas Dep’t of Criminal Justice, *Disciplinary Rules and Procedures for Offenders* 21 (2012), http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf.

⁷ Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 4-6 (Aug. 1, 2012), <http://www.justice.gov/ola/testimony/112-2/08-01-12-bop-samuels.pdf>; FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf; Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

⁸ See, e.g., Skeem, J. & Lowenkamp, C. (2015). Risk, Race & Recidivism: Predictive Bias and Disparate Impact. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687339.