350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300; 917-591-3452

HUMAN RIGHTS WATCH

HRW.org

February 11, 2015

The Honorable Charles E. Grassley
United States Senate
Chairman, Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
United States Senate
Ranking Member, Committee on the Judiciary
437 Russell Senate Building
Washington, DC 20510

RE: Improving the CORRECTIONS Act

Dear Chairman Grassley and Ranking Member Leahy:

I am writing to urge you to support legislation that will reduce excessively long periods of incarceration for federal prisoners in a fair and effective manner. Specifically, we recommend that the Corrections Oversight, Recidivism Reduction, and Eliminating Costs for Taxpayers in Our National System (CORRECTIONS) Act be improved as it is being considered by the Senate Judiciary Committee.

As Human Rights Watch and others have repeatedly documented, federal prisons today are filled with too many prisoners who stay behind bars far longer than is necessary to serve the purposes of punishment. The result, beyond being unfair to the individual men and women who are needlessly kept from their homes and communities, also burdens the United States with the expense of a soaring federal prison population and offers little public safety return.

The fair and effective way to tackle unduly long terms of imprisonment is legislation that encompasses both sentencing reform and increased options for early release under supervision. Introduced yesterday, the CORRECTIONS Act (which we understand to be similar to S.1675 as voted out of committee last year) appears to fail to address the former, and should therefore be improved.

Before we detail our concerns about the CORRECTIONS Act, we believe it is important to note the basic principles of justice and human rights that should govern sentencing:

- Individuals convicted of breaking the law should be held accountable, but their sentences must be proportionate to the offense and the goals of punishment.[1]
- Encouraging rehabilitation respects the inherent human dignity of prisoners[2] and is sound penal policy, as most offenders eventually return to their communities.
- Penal policies—including mechanisms for early release—should not have an unwarranted racially discriminatory impact. Legislators must exercise their discretion to avoid unintentional but nonetheless potent discriminatory impact on racial or ethnic minorities.[3]

With these principles in mind, here are the key concerns about language and omissions in the CORRECTIONS Act.

Risk Assessments

The CORRECTIONS Act requires the Justice Department to develop a post-sentencing risk assessment system that would help to identify the recidivism risk of individuals confined in prisons, which would help to inform custody decisions. We agree with the bill's premise that prisoners may differ in the risk they might pose to public safety after returning to the community. At some point there may be scant public safety benefit in requiring certain low risk individuals to complete their sentences behind bars rather than placing them under some form of community-based supervision.

Risk assessments do not come in a "one size fits all" model. They should only be used after they have been validated for the specific population to which they will be applied, and only after the reliability of its predictions has been established, i.e. that its predictions of future behaviors are shown to be reasonably accurate.

Development and validation of this new risk assessment instrument should be appropriately funded. The Justice Department will need the resources to be able to contract with outside individuals who possess the necessary expertise and experience to develop and test the instrument. Absent those resources, the federal prison system could end up with a shoddy, poorly constructed and insufficiently tested instrument.

---

[1] Human Rights Watch, *Nation Behind Bars: A Human Rights Solution*, May 2014

[2] International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 10(3) ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.")

[3] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, ratified by the United States November 20, 1994, art. 1(1) (defining racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.")

Congress should make clear in the bill that, even with a risk assessment instrument in place, officials should still be able to exercise professional judgment as warranted in specific circumstances to override the instrument. Even the best of risk assessment instruments are based on statistical analyses of aggregate data—they cannot take into account every possible factor in rich and complex human lives that may affect any given individuals' likelihood to commit another crime when released from prison.[4]

Congress should also require the Bureau of Prisons (BOP) to provide prisoners an opportunity to view their risk assessment results, including the reasons for any override by staff, and establish an administrative procedure by which prisoners can challenge those results. Research indicates that "error rates when projecting that a particular person will engage in serious criminality in the future are notoriously high."[5] Mistaken determinations of high risk—false positives—needlessly subject prisoners to longer time behind bars than public safety requires.

Offenders Excluded from Possibility of Earned Time Credits

The CORRECTIONS Act excludes certain designated categories of prisoners from the possibility of earned time credits. These exclusions undercut the goal of the bill to reduce the federal prison population by authorizing the Bureau of Prisons to release to alternative forms of custody or supervision prisoners unlikely to reoffend who have completed rehabilitative programs.

The CORRECTIONS Act excludes, among others, persons serving a sentence for a second or subsequent conviction for a federal offense, persons with a criminal history category of VI or above, persons sentenced to more than 15 years for fraud, and persons convicted of a federal crime of violence. We do not know the rationale for the specific exclusions identified in the bill. Perhaps its drafters thought that certain types of prisoners will always pose a high risk of recidivism. But we are not aware of any evidence that, for example, all federal prisoners serving time for crimes of violence, or those who had been previously convicted of one or more federal offenses, or those who have long sentences for fraud, always pose a high risk of committing a dangerous crime upon release from prison.

The exclusion of prisoners with prior federal convictions is particularly perplexing. The exclusion is likely to reduce the number of federal prisoners who might qualify for earned time credit and therefore reduces the potential impact of the legislation on the federal prison population. For example, nearly two-thirds (64 percent) of federal defendants convicted in 2013 had prior convictions.[6] Assuming this percentage is typical, it is

---

[4] Edward Latessa, Ph.D. et al., Creation and Validation of the Ohio Risk Assessment System, Final Report (July 2009) http://www.pretrial.org/download/risk-assessment/Ohio%20Pretrial%20Risk%20Assessment%202009.pdf (accessed February 2, 2015).

[5] American Law Institute, Model Penal Code: Sentencing, Tentative Draft No. 2, (March 25, 2011), p.56, http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf (accessed February 2, 2015).

[6] United States Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics, Table 20. http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013 (accessed February 2, 2015). The USSC data does not distinguish how many federal offenders had prior federal versus state convictions.

possible a hefty percentage of federal prisoners would be excluded from earned time credit simply through this category.

Categorical exclusions ignore the impact of age, personal change and growth on individual offenders, as well as the success of programs on recidivism reduction.

Many of the prisoners with prior convictions would otherwise be eligible to earn early release. For example, drug offenders are not categorically excluded under the bill. Yet more than 50 percent of drug offenders in 2013 had prior convictions and might therefore be excluded.[7]

Prisoners convicted of crimes of violence are also categorically excluded. Yet the most recent recidivism analyses by the Bureau of Justice Statistics indicate that offenders who had been convicted of violent crimes have lower recidivism rates than property and drug offenders.[8] And recidivism rates typically measure how many times someone has been convicted, not how many times they have offended, making them particularly susceptible to distortion because of the racially disparate impact of law enforcement policies.

Racial Impact of Exclusions

If enacted, the exclusion of certain offenders in the CORRECTIONS Act will likely result in more white offenders being able to benefit from the law's provisions than African American offenders. Overall, 69 percent of African American federal defendants were in criminal history category II or above, compared to 45 percent of white defendants. Much of this disparity reflects the prominence of drug offenders as a proportion of federal defendants, as well as racial disparities in the impact of law enforcement practices—and consequently criminal history records—among drug offenders, with 74 percent of African American defendants having a prior criminal history compared to 55 percent of white drug offenders.

The US Sentencing Commission data from which we obtained these percentages does not indicate whether the prior convictions were for federal or state offenses, and we do not know how many of those in category I had no prior convictions. But the data nonetheless raises concerns that the exclusion of offenders with any prior federal convictions will have racially disparate impact. This concern gains even greater importance in light of the widely recognized fact that drug sentences for federal drug offenders are already marked by racial disparities that arise from differences in sentencing for crack versus powder cocaine offenses, among other factors.

Federal sentencing guidelines already incorporate consideration of prior offenses into sentencing calculations; offenders with prior convictions face longer guideline

---

[7] According to USSC data, 50 percent were in criminal history category II or higher. In addition, some percentage of those in criminal history category I had at least one conviction. We do not know how many of the convictions were for federal crimes rather than state. USSC, 2013 Sourcebook, Table 37.

[8] Matthew R. Durose, Alexia D. Cooper, Ph.D., and Howard N. Snyder, Ph.D., US Department of Justice Office of Justice Programs, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 (April 2014)*, http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf (accessed February 2, 2015).

sentences. It is not clear what added benefit to public safety results from excluding those offenders from the possibility of successfully engaging in recidivism reducing programs and jobs, reducing their risk level and being able to reduce their sentences by so doing.

Judicial Review

The CORRECTIONS Act rightly assumes that judicial review can and should play an important role in pre-release decisions. For example, the bill requires that the BOP give the sentencing court advance notice before any prisoner serving more than three years in prison can be transferred to pre-release custody. Judicial review should be expanded, however, to include review of petitions by prisoners who challenge decisions by the BOP to deny them pre-release custody. Officials from the BOP should not have final say over when or whether a prisoner should be able to move from prison to pre-release custody. It is too easy for officials to make mistaken, arbitrary, unsubstantiated or biased decisions about the length of time someone should stay in prison.[9] Prisoners should be able to challenge such decisions and to require the BOP to justify its decisions in open court with a full record.

Appropriations for Recidivism Reduction Programs

The CORRECTIONS Act does not authorize any appropriations to pay for the greatly enhanced types, quantity and quality of recidivism-reducing programs and productive activities and jobs that the BOP is supposed to provide each federal prisoner. The BOP cannot realize cost-savings from early release without up-front investments into expanded programming that will make early release possible. We are not aware of any state that witnessed a marked increase in prison rehabilitation activities without additional public expenditure.

We realize that the bill calls for BOP to partner with faith-based groups to provide recidivism reduction programming in prison on a volunteer basis. Valuable as those programs may be, they do not address the need for programming for people who do not share a given faith—or any faith. The ability to secure early release from prison should not depend on exposure to or acceptance of a particular religious viewpoint.

Addressing Mandatory Minimum Sentences

We cannot fail to mention that any legislative effort to reform the federal criminal justice system should include much-needed reforms to mandatory minimum sentences, the single most important force behind the soaring federal prison population. We urge the sponsors of the CORRECTIONS Act to incorporate sentencing reform into the legislation that will ensure federal courts are able to tailor sentences that are proportionate to the offense and appropriately protect the public from dangerous offenders. Research and policy analyses have shown repeatedly and consistently that mandatory minimums result in disproportionately severe sentences for many individuals, fail to promote uniformity in

[9] Human Rights Watch, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*, November 2012, http://www.hrw.org/reports/2012/11/30/answer-no.

punishment because of markedly different enforcement and charging patterns by prosecutors in different offices, and are unnecessary and ineffective at advancing public safety goals of deterrence and incapacitation. They also distort the plea-bargaining process by enabling prosecutors to coerce guilty pleas to lesser charges as to avoid the threats of longer mandatory terms.

We urge you to take all of the above concerns into consideration as you improve the CORRECTIONS Act in the current Congress. We are available to discuss this letter further at your convenience.

Sincerely,

Jamie Fellner
Senior Advisor, US Program
Human Rights Watch