December 17, 2018

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, D.C. 20510

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

Dear Majority Leader McConnell and Minority Leader Schumer:

The Senate is on the verge of passing the most comprehensive criminal justice reform package of the last three decades, with the support of a super-majority of U.S. Senators. Known as the *First Step Act* (S. 3747), this legislation is the product of careful bipartisan and bicameral negotiations. Last minute

changes suggested by Senators Cotton (AR) and Kennedy (LA), however, pose a risk that they will upset the delicate balance that has made movement of this bill possible.

1. Expanding the Exclusions List Undermines Public Safety

The first amendment to be offered by Senators Kennedy and Cotton is an expansion of the list of offenders who would be ineligible to use earned time credit under the *First Step Act*. It is premised on the inaccurate claim that offenders who use earned time credits are entitled to an early release.

The legislation's earned time framework is a critical incentive to encourage offenders to complete evidence-based rehabilitative programming, which research and experience tells us cuts recidivism and increases public safety. Use of earned time credits, however, does not impact the date upon which an offender is released from custody. Rather, earned time credits may be used by an offender to move to *pre-release* custody (*i.e.*, residential reentry centers or home confinement). During that time, all offenders remain subject to Bureau of Prisons regulations and strict oversight. Moreover, before offenders are permitted to "cash in" earned time credits, they must demonstrate they are no longer a threat to public safety, based on objective, evidence-based risk assessments.

The Cotton-Kennedy amendment would exclude from "earned time credits" anyone convicted of any offenses in which the elements *or* facts of the offense involved the substantial risk of physical force against a person *or* property. This exception would make virtually all federal prisoners ineligible for earned time credits, with the exceptions of low-level drug offenders and white collar criminals. The Supreme Court has found this exact language to be unconstitutionally vague in two opinions, *Sessions v. Dimaya* and *Johnson v. United States*.

The amendment is antithetical to the heart of the bill. It would deny incentives for rehabilitative programming to the offenders in most need of it. And in doing so, the amendment would maintain the status quo in our prisons, thereby continuing to put communities at risk.

2. Undermining an Evidence-Based Approach to Risk Assessment

The second Cotton-Kennedy amendment has two components: (a) it would permit wardens to ignore evidence-based risk assessment tools and veto the use of earned time credits by low- or minimum-risk offenders; and (b) it would require wardens to consider a victim impact statement in that calculation.

(a) Providing Wardens Veto Authority

The core of the *First Step Act* rests on *objective, evidence-based* risk assessments to ensure prisoners leave prison prepared to be productive members of society. Converting what should be an objective assessment into a subjective, bureaucratic process governed by wardens leaves important public safety considerations open to emotion, human error, and, potentially, bias.

(b) Victim Impact Statements

As groups dedicated to promoting and preserving public safety, we also believe victims deserve respect, consideration, consultation, and information. Indeed, current law (18 USC sec. 3771) requires exactly that. Victims must also be protected. But they have no objective insight into whether an

offender has rehabilitated himself. Providing a *de facto* veto to victims would reject the evidence-based approach upon which the *First Step Act* is based.

3. Additional Reporting Requirements are Based on Inaccurate Metrics

The third Cotton-Kennedy amendment would require the Bureau of Prisons to publicly report on the re-arrest data of each prisoner. We support the use of accurate data to make public policy and measure results.

However, the metric contained in the third Cotton-Kennedy amendment is flawed. Arrests are not a proxy for subsequent criminal conduct. Data collection should be based on whether ex-offenders have been *convicted* of new crimes after leaving the custody of the Bureau of Prisons.

We would support a standardized definition of recidivism for data gathering and statistical purposes that is based on subsequent *convictions*. Indeed, we believe such a standard definition would validate the approaches taken in the *First Step Act* and in various states that have led the way on reforming their own justice systems.

Conclusion

The amendments proposed by Senators Cotton and Kennedy will weaken what would otherwise be a significant step towards making our federal prisons more accountable and results-oriented. Beyond substance, however, they are political "poison pills." The changes proposed are intended to upset the delicate balance found by stakeholders in both chambers, in both parties, and at both ends of Pennsylvania Avenue.

We urge you to oppose the Cotton-Kennedy amendments and pass the *First Step Act* as introduced.

Respectfully,

David Safavian, Esq.
General Counsel
American Conservative Union

Kevin Ring
President
FAMM

Jason Pye
Vice President, Legislative Affairs
FreedomWorks

Jessica Jackson, Esq.
National Director and Co-Founder
#Cut50

Marc Levin, Esq.
Vice President of Criminal Justice Policy
Right on Crime

Holly Harris
Executive Director
US Justice Action Network

Arthur Rizer, Esq.
Director of Criminal Justice & Civil Liberties Policy
R Street Institute

Van Jones
Host
The Van Jones Show, CNN

Tim Head, Esq.
Executive Director
Faith and Freedom Coalition

Mark Varca, J.D.
Chairman
FederalCURE

Mark Holden, Esq.
President
Freedom Partners

Kevin Roberts, Ph.D.
Executive Director
Texas Public Policy Foundation

Craig DeRoche
Senior Vice President for Public Policy
Prison Fellowship

David Borden
Executive Director
StoptheDrugWar.org

Josh Crawford, J.D.
Director of Criminal Justice Policy
Pegasus Institute

Brent Gardner
Chief Government Affairs Officer
Americans for Prosperity

Grover G. Norquist
President
Americans for Tax Reform

Katie McAuliffe
Executive Director
Digital Liberty

Tim Chapman
Executive Director
Heritage Action for America

CC: Senate Republican Conference Members
Senate Democratic Conference Members