

November 21, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Room S-230
United States Capitol
Washington, D.C. 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
Room S-221
United States Capitol
Washington, DC 20510

Dear Senators McConnell and Schumer:

We are writing to respond to correspondence recently submitted to you by the National Association of Assistant United States Attorneys (NAAUSA). NAAUSA is little more than another special interest advocacy organization, albeit a radical one that works to avoid real accountability for governmental participants in the criminal justice system. Given its meager membership, NAAUSA's views represent a mere fraction of the AUSAs across the country. More importantly, NAAUSA does not represent the views of the United States Department of Justice.

Use of Incentives to Encourage Completion of Release Preparation Programs

NAAUSA makes the case that there's no need to incentivize inmates to complete re-entry preparation programs. "[A]ccording to the federal Bureau of Prisons (BOP), virtually all inmates already *participate* in education and training programs... [T]he legislation does not promise any meaningful change in inmate behavior or increase in participation in reentry programs." Once again, NAAUSA's verbiage is misleading.

As the Department of Justice Inspector General pointed out in December 2017:

[W]e found that less than a third of the inmates required to participate in the [Release Preparation Program] actually completed the entire program. Moreover, we determined that because of inconsistencies in the content and quality of RPP courses, the BOP could not ensure that all inmates received the information they needed to successfully transition back into the community.¹

¹ <https://oig.justice.gov/testimony/t171213.pdf>.

Clearly, the Bureau of Prisons' re-entry program can – and should – be improved, so that all inmates are prepared to be good neighbors when they return to our communities. That is the fundamental purpose of the First Step Act.

Scope of Pre-Release Custody Provisions

NAAUSA breathlessly cites a list of offenses that would still allow an inmate to obtain the benefits of the First Step Act's incentives. What NAAUSA fails to note is that in almost every case and crime category cited, the inmate will be released eventually. The only question is whether our system should encourage offenders to use their time behind bars to improve themselves, so they don't reoffend after they leave prison. By incentivizing them to complete programming proven to reduce re-offending, the First Step Act can reduce recidivism rates, thereby making our communities safer.

Those who pose a public safety risk would not qualify for use of "earned time credits" to move to pre-release custody. Only those deemed low- and minimum-risk prisoners are eligible for earned time credits.

Moreover, the First Step Act contains a list of crimes so serious that they are, in fact, excluded from any benefits of the bill. The legislation would create a new provision in Title 18 (Section 3632(a)(4)(D)(i)-(lii)), which would exclude categories of violent crimes from any earned-time credits.

Modest Sentencing Reforms

NAAUSA claims the "primary effect of the First Step Act will be to reduce the consequences for serious criminals when they break the law." The First Step Act does, in fact, reduce some sentences. For example, the bill would reduce the statutory lifetime sentence under the "three strikes" rule for prior drug felons to a 25-year mandatory minimum. Anyone who thinks that a 25-year mandatory minimum sentence is being soft on crime clearly has a skewed sense of reality.

Three of the four sentencing reforms are intended to provide narrow and prospective modifications to Title 18 to reduce some of the most extreme outcomes of our current sentencing regime. Outcomes such as sentencing a non-violent drug dealer to a 55-year mandatory minimum would be ridiculous if they weren't so tragic.²

The only retroactive sentencing provision deals with the Fair Sentencing Act of 2010. The Fair Sentencing Act addressed the disparity between crack and powder cocaine, bringing the drug weight ratio in relation to sentencing from 100:1 to 18:1. However, the reform was applied prospectively only.

A March 2018 study³ by the United States Sentencing Commission (USSC) looked at recidivism rates for those charged with drug crimes who benefitted from the Fair Sentencing Act versus those who did not. The USSC found that there was no difference in re-offending among people charged with the same offense but served significantly different sentences. Both groups had an identical 37.9% recidivism rate within three years of release.

² <https://famm.org/stories/weldon-angelos/>

³ <https://www.ussc.gov/research/research-reports/recidivism-among-federal-offenders-receiving-retroactive-sentence-reductions-2011-fair-sentencing>

The USSC study demonstrates that the additional time behind bars translated into no additional public safety benefit. All it did was waste taxpayer dollars. Correcting this situation will reduce unnecessary spending, which can be repurposed for our law enforcement community to address violent crime.

Recidivism Rates

At its base level, NAAUSA claims that prison reform is unnecessary. NAAUSA bases its opinion on the claim that “24% of federal prisoners are rearrested for a new crime within five years of release” compared to “77% of state inmates rearrested within the same period of time.” It is unclear where NAAUSA sourced their data.

According to a March 2016 study by the United States Sentencing Commission, 49.3% of federal offenders were re-arrested within eight years.⁴ By comparison, a 2018 Bureau of Justice Statistics study of recidivism by state offenders noted that 83% of offenders were re-arrested within 9 years.⁵ Under NAAUSA’s logic, there’s no need to reform the federal prison system that only fails half the time, because a 49% failure is better than an 83% failure.

We would note for the record that federal prisons tend to have as a percentage of the population more non-violent and white-collar offenders incarcerated than in state prisons. As such, it should come as no surprise that – even accounting for NAAUSA’s questionably sourced numbers – the federal recidivism rate is lower than the *average* state recidivism rate. It should be.

What is blatantly misleading is using a national average of state recidivism numbers to somehow show that the Bureau of Prisons has no need for improvement. Every case of recidivism is another crime, another victim, another court case, and likely another prison cell. Reducing recidivism wherever possible should be the goal of the Bureau of Prisons, notwithstanding any comparisons to state systems.

More to the point, the state data demonstrates that recidivism can be impacted by smart justice policies. The concept of Federalism empowers each state to set its own policies for its governmental operations. And as a result, there is a wide differentiation between state recidivism rates. We note that the Commonwealth of Virginia recently completed an analysis of recidivism of 45 states and found re-offense rates ranging from 22.4% (Virginia) to 66.4% (Alaska).⁶ Twelve years ago Texas made reforms similar to those contained in the First Step Act and was able to reduce its recidivism rate from 28% to 22.6%.⁷

The misleading implication from NAAUSA is that BOP is a top performer, and as a result, prison reforms are unnecessary. However, recent data shows that high performing states such as Virginia and Texas have recidivism rates that are half of those of BOP. If there are paths to reduce recidivism in the federal system, you as good stewards of taxpayer resources have an obligation to pursue such policy changes.

⁴ <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/RG-recidivism-overview.pdf>

⁵ <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>

⁶ <https://vadoc.virginia.gov/about/facts/research/recidivism/State%20Recidivism%20Comparison%20November%202017.pdf>

⁷ https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/27/tough-texas-gets-results-by-going-softer-on-crime/?utm_term=.6a9158615fee

Conclusion

NAAUSA makes the case that the *First Step Act* is merely a naked effort to “reduce the consequences for serious criminals when they break the law.” This is a patent falsehood. If it were the case, organizations such as the Fraternal Order of Police, the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives, and the National District Attorneys Association would not have endorsed the First Step Act.

The bill makes narrow changes to correct a sentencing regime that has produced extreme sentences irreconcilable with the concept of a just outcome or a wise use of taxpayer money. Equally important, it leverages lessons learned by states such as Texas, Utah, Mississippi, and Georgia to make our prisons more accountable and effective at reducing recidivism.

NAAUSA asks that you reject the First Step Act. Make no mistake, doing nothing – as advocated by NAAUSA – means accepting a prison system that fails half of the time and makes our neighborhoods less safe than they should be.

Respectfully,



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