WASHINGTON
LEGISLATIVE OFFICE

October 31, 2017

The Honorable Charles Grassley
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: The ACLU Supports S. 1917, the Sentencing Reform and Corrections Act of 2017

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

Dear Chairman Grassley and Ranking Member Leahy,

On behalf of the American Civil Liberties Union (ACLU), we write to express our support for S.1917, the Sentencing Reform and Corrections Act of 2017 ("SRCA"). The bill is a first step to address the problem of mass incarceration in the federal system, but for all its benefits, much more needs to be done. We oppose the expansion of mandatory minimum sentences, including those in S.1917 for certain arms export control crimes and interstate domestic violence offenses that result in death. In its entirety, however, we support this bill because it is the most significant criminal justice reform legislation to be considered by Congress since the Fair Sentencing Act of 2010.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than 2 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

Mass incarceration is an utter failure as a public policy due to its devastating impact on those who become ensnared in the criminal justice system, its failure to produce a proportional increase in public safety, and its disproportionate harm to poor communities and communities of color. This nation's use of incarceration is no longer grounded in sound principle or policy. The U.S. has the highest rate of incarceration of any country in the world, and federal spending on incarceration in 2010 was estimated at $80 billion.[1]

[1] *See* TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2012 — PRELIMINARY TBL. 1 (2015), *available at*

The cost of the federal Bureau of Prisons (BOP) accounts for nearly a third of the Department of Justice's discretionary budget. Federal incarceration has become one of our nation's biggest expenditures, swallowing the budget of federal law enforcement.[2] It costs almost $32,000 a year to house just one federal inmate, almost four times the average yearly cost of tuition at a public university.[3]

This country's extraordinary incarceration rates impose much greater costs than simply the fiscal expenditures necessary to incarcerate almost 25 percent of the world's prisoners in a country with less than 5 percent of the world's population. Although Americans commit drug offenses at roughly equal rates across race and ethnicity[4], almost half of the people in federal prisons are serving time for drug sentences. Just as troubling, African Americans make up almost 38% and Hispanics 33% of the Bureau of Prisons (BOP) population, confirming that our criminal justice system disproportionately incarcerates people of color. The true costs of this country's addiction to incarceration must be measured in human lives and particularly the generations of young black and Latino men who serve long prison sentences and are lost to their families and communities.

I. Expanding the safety valve

The SRCA begins to change some of the federal policies and laws that have contributed to the growing federal prison population and racial disparities in the system.[5] S.1917 will expand eligibility for the existing safety valve under 18 U.S.C 3553(f)[6] from one to four criminal history points if a person does not have prior 2-point convictions for crimes of violence or drug trafficking offenses and prior 3-point convictions. Under the expanded safety valve judges will have discretion to make a person eligible for the safety valve in cases where the seriousness of his or her criminal history is over-represented or it is unlikely he or she would commit other crimes. The bill also would give judges discretion to sentence a person, who under current law would receive a 10-year mandatory minimum, to a 5-year mandatory minimum if the person meets certain criteria.[7] While we support this provision, we hope that the impact will not be limited to a small number of people.

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http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239 (showing FY 2012 state and federal corrections expenditure was $80,791,046,000

[2] NANCY LAVIGNE & JULIE SAMUELS, THE URBAN INSTITUTE, THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 1-2 (Dec. 2012) [hereinafter LAVIGNE URBAN INSTITUTE REPORT], *available at* http://www.urban.org/uploadedpdf/412693-the-growth-and-increasing-cost-of-the-federal-prison-system.pdf.

[3] "*Annual Determination of Average Cost of Incarceration*", 80 Fed. Reg. 12,523 (March 9 2015), *available at* http://docs.regulations.justia.com/entries/2015-03-09/2015-05437.pdf (showing FY 2014 average annual cost of incarceration for federal inmates was $30,619.85)

[4] *See, e.g.*, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES (J. TRAVIS AND B. WESTERN, EDS.), THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION at 60-61, 97 (2014).

[5] LAVIGNE URBAN INSTITUTE REPORT at 5; NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 9 (Jan. 22, 2013) [hereinafter CRS REPORT]; KAMALA URBAN INSTITUTE REPORT, *supra* note 5, at 3; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM (Aug. 1991).

[6] A "safety valve" is an exception to mandatory minimum sentencing laws. A safety valve allows a judge to sentence a person below the mandatory minimum term if certain conditions are met. Safety valves can be broad or narrow, applying to many or few crimes (e.g., drug crimes only) or types of offenders (e.g., nonviolent offenders). *See* 18 U.S.C. 3553(f) (2010)

[7] Unless the person had an enhanced role in the offense or was an importer, exporter, high-level distributor or supplier, wholesaler, or manufacturer. Consistent with 18 U.S.C. 3553(f) the person must not have used violence or a firearm or been a member of a continuing criminal enterprise, and the crime must not have

II. Reducing the impact of mandatory minimums

Also, the legislation would reduce the mandatory life sentence for a third drug felony to a mandatory minimum sentence of 25 years and reduce the 20-year mandatory minimum for a second drug felony to 15 years. Both changes would be retroactive except for people with prior convictions for serious violent felonies.[8] The bill would also require a sentencing enhancement for heroin laced with fentanyl or fentanyl disguised as heroin.

The bill would also amend 18 U.S.C. 924(c), which currently allows "stacking," or consecutive sentences for gun charges stemming from a single incident committed during a drug crime or a crime of violence. The legislation would require a prior gun conviction to be final before a person could be subject to an enhanced sentence for possession of a firearm. This provision in federal law has resulted in very long and unjust sentences[9] and this change would also apply retroactively unless the person was convicted of a serious violent offense. These changes in federal law will result in fewer people being subjected to harsh mandatory minimums.

III. Making revisions to crack disparity retroactive

Title I of the legislation would retroactively apply the statutory changes of the Fair Sentencing Act of 2010 (FSA), which reduced the disparity in sentence lengths between crack and powder cocaine. This change in the law will allow people who were sentenced under the harsh and discriminatory 100 to 1 crack to powder cocaine ratio to be resentenced under the 2010 law.[10]

IV. Inventory of All Federal Criminal Offenses and Regulations

S.1917 includes a provision that would require the Department of Justice to create a report listing all federal criminal offenses and regulations and their elements in order to determine which laws and regulations are lacking an appropriate *mens rea*. According to the best estimates, there are more than 4,500 federal criminal laws and as many as 300,000 federal regulations.[11] For this reason, the ACLU has encouraged lawmakers to make it a priority to ensure both a *mens rea* and an *actus reus* are incorporated in any new criminal statutes.

For many years, the ACLU has engaged in discussions with members of Congress and in various advocacy efforts to address over-criminalization at the federal level. In 2011, the

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resulted in death or serious bodily injury. The defendant must also truthfully provide to the government and any and all information and evidence the he has about the offense. This provision also excludes offenders with prior serious drug or serious violent convictions or offenders who distributed drugs to or with a person under the age of 18.

[8] However, "serious violent felonies" would be allowed to count as a "strike" or a prior conviction against a person under 21 U.S.C. 841(b)(1). *See* Sec. 101.

[9] However, prior convictions "under State law for a crime of violence that contains an element of the offense the carrying, brandishing or use of firearm" can count as a prior conviction under 18 U.S.C. 924(c). See Section 104.

[10] Although the ACLU supported the Fair Sentencing Act of 2010, we would ultimate support a change in law that would treat crack and powder cocaine equally; 1 to 1 ratio.

[11] Head, Timothy and Kibbe, Matt, *Too Many Laws Means Too Many Criminals*, National Review (May 21, 2015) : http://www.nationalreview.com/article/418689/too-many-laws-means-too-many-criminals-timothy-head-matt-kibbe

ACLU urged the House Judiciary Committee to review all federal offenses to ensure each has a clear *mens rea* requirement.[12] As a result of these efforts, we have concluded that any *mens rea* reform must result in a fair standard that clearly articulates the criminal intent necessary to commit an offense, not only to corporations or other entities, but to any person faced with the possibility of criminal charges. Reform proposals must create an appropriate level of criminal intent as an element of the crime to be proven. Thus, the first and most logical step to *mens rea* reform is to create an inventory of criminal laws and regulations to determine those lacking the appropriate *mens rea*. Therefore, the ACLU supports the approach SRCA takes to reform by a requiring a thorough inventory of all federal crimes and regulations in order to ascertain which laws and regulations are lacking *mens rea*.

V. Reducing the use of juvenile life without parole and juvenile solitary

The ACLU strongly supports provisions in Title II of the bill that would give judges discretion to reduce juvenile life without parole sentences after 20 years, allow compassionate release of more people over the age of 60 and essentially ban juvenile solitary confinement in the federal system. We also support provisions in Title II that would permit some juveniles to seal or expunge non-violent convictions from their record and establish procedures for people who undergo background checks for employment to challenge the accuracy of their federal criminal records.

VI. Need for improvements in Title II

We do have concerns about aspects of Title II included in the Corrections Act section of the bill that would require BOP to develop and conduct risk assessments to determine whether a person in the agency's custody could participate in recidivism reduction and re-entry programs. Those who successfully complete these programs can spend the final part of their sentences in home confinement or a halfway house. Because risk assessments often consider static factors such as criminal history, family members' criminal history and the community in which a person lived before entering the criminal justice system, racial disparities that have become defining features of both the federal prison population and this country's socio-economically disadvantaged neighborhoods could be compounded by racial disparities in the risk assessment tools created under this provision. We would like to work with the bill sponsors to address our concerns about any risk assessment tool.

Chairman Charles Grassley, Senator Richard Durbin, as well as Senators Sheldon Whitehouse and Cory Booker deserve credit for their commitment to rethinking and improving our federal justice system. This legislation is a delicate balance by the sponsors of competing visions for maintaining public safety and creating a system that is fair and just. SRCA is an important, but limited, step forward to address this country's deeply flawed criminal justice system. We encourage Senators to cosponsor and support this legislation. If you have any additional questions, please feel free to contact Jesselyn McCurdy, Deputy Director at jmccurdy@aclu.org or (202) 675-2307.

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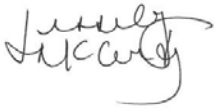
[12] ACLU Letter to the House Judiciary Subcommittee on Crime Terrorism and Homeland Security on H.R. 1823, Criminal Code Modernization and Simplification Act of 2011 (December 11, 2011) https://www.aclu.org/letter/letter-house-judiciary-subcommittee-crime-terrorism-and-homeland-security-hr-1823-criminal

Sincerely,



Faiz Shakir
National Political Director
National Political Advocacy Department

Jesselyn McCurdy
Deputy Director
Washington Legislative Office

cc: Senate Judiciary Members