



November 16, 2018

Support and Whip YES on the First Step Act, S. 3649

On behalf of FreedomWorks' activist community, I urge you to contact your senators and ask them to support the First Step Act, S. 3649, and to *co-sponsor and whip YES when approached by Senate Republican leadership*.

Sponsored by Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) and co-sponsored by Sens. Mike Lee (R-Utah), Tim Scott (R-S.C.), Lindsey Graham (R-S.C.), and eight other senators. The First Step Act would require the implementation of evidence-based recidivism reduction programming in federal prisons and allow eligible offenders to earn time credits to serve part of their sentence in home confinement, halfway houses, or community supervision. The bill also includes four modest sentencing reforms.

The First Step Act would require the attorney general to develop and release a risk and needs assessment system within 180 days of the bill being signed into law. Each offender who enters the federal corrections system will be assessed and their risk of recidivism determined, classified as low, medium, or high. The director of the Bureau of Prisons would be required to implement and complete the assessment of those offenders in the system prior to enactment within 180 days of the release of the assessment. The Comptroller General of the United States would conduct an audit of the assessment to ensure that it is fair and effective.

All prisoners will be allowed the opportunity to participate in recidivism reduction programs, which the Bureau of Prisons would have two years to phase in after the completion of the initial risk and needs assessments. The bill would require the attorney general to develop policies for federal prison wardens to enter into partnerships with nonprofit and private organizations (including faith-based entities) to offer recidivism reduction programming, institutions of higher education, private entities for work training programs, and industry-sponsored organizations.

Certain prisoners would be allowed to earn time credits, incentivizing them to successfully complete recidivism reduction programming. Prisoners would earn ten (10) days of time credits for every 30 days of successfully completed programming. Prisoners determined to be at a low risk of recidivism over two assessments would earn an additional five (5) days of time credits for every 30 days of successfully completed programming. Prisoners would be periodically reassessed to determine whether their risk level has changed.

The time credits would not be available for productive activities and programming completed before enactment. The time credits would also not be available for prisoners who have committed certain offenses, including serious violent felonies, sex offenses, terrorism offenses, and offenses that result in death or serious bodily injury. A new exclusion has been added in the revised text for high-level fentanyl and heroin offenders. The list of the 52 excluded groups of offenses is available in the bill in Title I, Section 101.

Eligible prisoners who are low-risk would be allowed to cash in the time credits earned for the successful completion of programming for placement in pre-release custody, such as home confinement and halfway houses. The director of the Bureau of Prisons would be required to enter into agreements with the U.S. Probation and Pretrial Services for the supervision of prisoners in prerelease custody.

Deportable aliens are not allowed to earn time credits, and the revised language reinforces existing guidance issued by the Bureau of Prisons related to detainers for deportable aliens. The U.S. Immigration and Customs Enforcement would be required to take custody of a deportable alien after he or she has completed a prison term.

The First Step Act would also restore congressional intent to “good time credits,” which allow prisoners who “display exemplary compliance with institutional disciplinary regulations” to “receive credit toward the service of [his or her] sentence” of up to 54 days per year. Despite 54 days being written in statute, the Bureau of Prisons has interpreted this to mean a maximum of 47 days per year. The proposed change would simply alter the language of 18 U.S. Code 3624(b) to ensure that prisoners may receive “up to 54 days for each year of the prisoner’s sentence imposed by the court,” as was the original intent of the law, providing the intended time credits to prisoners who have earned them. The Bureau of Prisons’ creative math to limit the scope of good time credits has flown in the face of congressional intent for years.

The revised version of the First Step Act includes four modest sentencing reforms that FreedomWorks supports. The first would reform sentencing enhancements under 21 U.S.C. 841. Under current law, any prior drug felony offense can trigger a sentencing enhancement under 21 U.S.C. 841. The proposed reform would limit the use of the sentencing enhancement to serious

drug or violent felonies. The current 20-year mandatory minimum would be lowered to 15 years and the current penalty for life would be reduced to 25 years. The proposed reform is prospective, not retroactive.

The second reform would expand the existing safety valve exception to mandatory minimum sentences for low-level, nonviolent drug offenders. Under current law, 18 U.S.C. 3553(f) the safety valve may apply to an offender with up to 1 criminal history point who didn't use violence or a credible threat of violence, didn't possess a weapon, didn't cause serious bodily injury or death, and wasn't an organizer of the offense.

The proposed reform would expand the safety valve to apply to an offender with up to 4 criminal history points, excluding 1-point offenses. An offender with a single 3-point offense or a single 2-point violent offense wouldn't be eligible. Remaining existing eligibility criteria would remain the same. It would also allow the court, should it determine and specify why excluding a defendant from the safety valve's point limitation substantially overrepresents his or her criminal history, to waive the point limitations. However, this option is only available to defendants who fit all of the other criteria for the safety valve outside of the point limitation and whose offense at hand is not a serious violent felony or a serious drug felony. The proposed reform is prospective, not retroactive.

The third reform is the proposed clarification of 18 U.S.C. 924(c). Under current law, an offender who possessed, but didn't brandish or discharge, a firearm during a drug offense may receive a 5-year sentencing enhancement for a first offense and a 25-year sentencing enhancement for each subsequent offense. The 25-year sentencing enhancement is meant to target repeat offenders. In practice, however, it has been used to create lengthy prison sentences for first-time offenders who may be charged with the enhancement multiple times under a single indictment. The sentencing enhancements under 924(c) run consecutively, not concurrently, and may be stacked on top of each other.

For example, in 2003, Weldon Angelos was given a 55-year sentence for selling marijuana to a confidential informant during controlled buys. The informant claimed that Angelos, a first-time drug offender, had a firearm in his possession during two of the buys, although he didn't brandish the firearm. Additional firearms were found in his home during a raid. Angelos received three sentencing enhancements under 924(c), resulting in the 55-year sentence.

The federal judge who oversaw the case, Paul Cassell, issued a memorandum opinion in which he lamented the sentence he was forced by law to give. "The court believes that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational," Judge Cassell wrote. "Adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year

sentence that the congressionally-created expert agency (the United States Sentencing Commission) believes is appropriate for possessing firearms under the same circumstances. The 55-year sentence substantially exceeds what the jury recommended to the court.”

Judge Cassell, who is known for his advocacy of victims’ rights, has since noted, “If he had been an aircraft hijacker, he would have gotten 24 years in prison. If he’s been a terrorist, he would have gotten 20 years in prison. If he was a child rapist, he would have gotten 11 years in prison. “And now I’m supposed to give him a 55-year sentence? I mean, that’s just not right.”

The proposed reform of 18 U.S.C. 924(c)(1)(C) would simply clarify that the sentencing enhancement may only apply if the offender has been previously convicted and completed a prison term for the applicable offense. The proposed reform is prospective, not retroactive.

The fourth and final proposed sentencing reform would make the Fair Sentencing Act of 2010 retroactive. The Anti-Drug Abuse Act of 1986 created lengthy mandatory minimum sentences for crack cocaine, resulting in a 100-to-1 disparity between crack cocaine and powdered cocaine. For example, 500 grams of powdered cocaine would trigger a 5-year mandatory minimum sentence, but only 5 grams of crack cocaine would trigger a 5-year mandatory minimum.

In 2010, Congress passed the Fair Sentencing Act to address the severe disparity, lowering it to 18-to-1 in Section 2. It also eliminated the mandatory minimum sentencing for simple possession of crack cocaine in Section 3. The bill wasn’t controversial and passed the Senate by unanimous consent and the House by voice vote. Still, some are serving time under the previous unfair and severe law. The proposed sentencing reform would make the Fair Sentencing Act retroactive. This particular reform was part of the Smarter Sentencing Act of 2013, as well as its most recent iteration, which enjoyed the support of Sens. Mike Lee (R-Utah) and Ted Cruz (R-Texas), both of whom voted for the bill in markup in January 2014, and Sen. David Perdue (R-Georgia), who co-sponsored the bill in 2015.

Because the Fair Sentencing Act included a directive to the U.S. Sentencing Commission in Section 7 to amend sentencing guidelines, the members of the commission voted to make the subsequent guideline changes retroactive. (Current law, 28 U.S.C. 994(u), allows the U.S. Sentencing Commission to consider retroactivity whenever it lowers offense levels in the sentencing guidelines. These changes are subject to congressional review.) Around 55 percent of those who petitioned courts under the sentencing guideline changes were granted relief. The average sentence reduction for offenders whose petitions were granted was 30 months. The recidivism rate of those granted relief under the Fair Sentencing Act was the same, 37.9 percent, as the comparison group that was not granted relief, according to a March 2018 report by the U.S. Sentencing Commission.

The proposed reform would make Section 2 and Section 3 of the Fair Sentencing Act retroactive for crack cocaine offenses committed before August 3, 2010. A reduction is not automatic and may be denied by a court. A motion would have to be made by the offender, the director of the Bureau of Prisons, a federal prosecutor, or a court for the sentence reduction to be considered. Those who were previously denied relief under the guideline changes made by the U.S. Sentencing Commission wouldn't be eligible for relief under this proposed reform.

The First Step Act brings the successes of the states to the federal criminal justice system. The bill focuses on determining prisoners' level of risk of reoffending, implementing programming to treat addiction or get an education or develop a trade and reduce that risk, and incentivizes eligible prisoners to reduce their risk of reoffending. The proposed modest sentencing reforms would ensure that punishments are just and reasonable compared to the offenses committed. More work to reform the federal criminal justice system is needed, but the First Step Act provides a logical starting point to set the tone for future efforts.

Other provisions of the First Step Act are worthy of support as well. The text of the Lieutenant Osvaldo Albarati Correctional Officer Self-Protection Act, H.R. 613, is included in the bill. This language would require the Bureau of Prisons to provide a secure area outside of the secure parameter of a prison facility for corrections officers to store firearms, allows officers to store firearms in a lockbox inside their vehicle, and allows officers to carry concealed firearms outside of the secure area of a prison facility.

The bill includes language that would prohibit restraints on pregnant prisoners, with certain exceptions, such as if an officer or marshal determines that the prisoner is an immediate and credible flight risk or if the prisoner poses a threat of harm to herself or others or if a healthcare professional determines that the use of restraints is appropriate. It would require that certain hygiene products be made available to prisoners.

For these reasons, I urge you to contact your senators and ask them to support the First Step Act, S. 3649, and to co-sponsor and whip "yes" when approached by Senate Republican leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam Brandon", with a stylized flourish at the end.

Adam Brandon
President, FreedomWorks