December 18, 2018

Key Vote Alert on the Cotton-Kennedy Amendment to the First Step Act

As noted on our key vote alert for the First Step Act, FreedomWorks reserved the right to score any related votes including amendments. Accordingly, we will be scoring on our 2018 Congressional Scorecard vote(s) on the Cotton-Kennedy amendment to the legislation, which includes three divisions of deceitfully crafted poison pills each intended to harm the legislation and upset the supermajority support for criminal justice reform in the Senate.

The Cotton-Kennedy amendment is separated into three divisions. Should there be a motion or motions to table this amendment or individual divisions, FreedomWorks will score YES votes. Should there be votes on the amendment itself or individual divisions themselves, FreedomWorks will score NO votes.

As suggested, each division of the Cotton-Kennedy amendment is carefully constructed to appear reasonable but in actuality undermines the legislation -- in some divisions more clearly than in others. FreedomWorks' reasons for strong opposition of each are outlined below.

Division I: Requires the Bureau of Prisons to notify victims of the date on which the prisoner is released and to make publicly available the rearrest, offense, and prior offense data of each prisoner in prerelease custody or supervised release, broken down by state.

- *Reasons to oppose:*
    - Turns victims' "rights" on its head: Although this amendment is redundant to the Crime Victims' Rights Act, it is, in fact, harmful to victims.
        - Under the current system, victim notification is already required by law if the victim chooses to receive notice. He or she may also choose to view this information according to his or her desire online. This is as it should be because *victims* should be in control of whether or not they receive information about the past crime -- *not the government*.

        - Multiple victims' rights groups have come out in opposition to the amendments. Their letters and op-eds can be found as follows: Crime Survivors for Safety and Justice letter, Fairness, Dignity, & Respect for Crime Victims and Survivors letter, and "The First Step Act will make us safer without the Cotton-Kennedy Amendments" op-ed
    - Builds in a mechanism intended to attack supporters of the bill: Redundant and cumbersome, but also makes readily available and weaponizes what would be an extremely poor measure of the bill's results.
        - Redundancy:
            - The U.S. Sentencing Commission already provides detailed information on the recidivism rates of federal offenders.
            - The bill itself includes multiple mechanisms to track data, including reporting requirements, an Independent Review Committee, and a Government Accountability Office report.
        - Weaponizes faulty data:
            - Rearrest rates are poor measures of recidivism because rearrests do not require one to be charged or tried, let alone convicted, of an alleged crime. Rearrests may also occur as a result of technical violations, which accounted for nearly 70 percent of supervised release revocations in Fiscal Year 2015. Technical violations do not involve a new or major crime.
            - The inclusion of a requirement to break down rearrest data by state is a clear effort to give opponents of the bill a tool to draw off of and attack those members who vote for the legislation. Specifically requiring a state-by-state breakdown in the amendment, the rearrest data -- which consistently and intentionally misrepresents recidivism of a given population -- would undoubtedly be used by opponents of criminal justice reform to paint the worst possible and most dishonest image of the results.

Division 2: Requires warden certification that the needs of any prisoner looking to "cash in" his or her earned time credits are best met by placement in pre-release custody or supervised release after the warden has notified each victim of such potential placement and after the warden has reviewed any statement by the victim regarding such placement.

- *Reasons to oppose:*
    - Takes away objectivity of the risk and needs assessment and increases subjectivity in eligibility for pre-release custody:
        - Gives nearly unlimited latitude to individual prison wardens to deny, without specific cause, the benefits of pre-release custody to any given

inmate based on the whims of one individual and ignoring years of programming and evaluation by an evidence-based tool.
        - Potentially politicizes Department of Justice policy with respect to warden responses to earned credits. Each new administration could curtail or expand earned credit based upon political change.
        - The purpose of the First Step Act is to use evidence-based and proven tools and programming to incentivize and rehabilitate inmates. Giving such great latitude to bypass this entire purpose is nonsensical.
    - Uses the guise of victims' rights for political purposes to undermine the already modest incentive structure of the prison reforms:
        - Politicizes victims' rights: Touts the sympathetic and important notion of victims' rights in order to disincentivize inmates from participating in programming and lowering their risk of recidivism. Injects emotion into the objectivity of the First Step Act and allows one individual to arbitrarily determine at the end of an inmate's path to rehabilitation that he or she is undeserving of the benefit of pre-release custody.
        - This has the undoubted effect of keeping recidivism rates high, which is fundamentally what is worst for victims. This is a large part of why victims' rights groups have come out against this amendment.
        - Multiple victims' rights groups have come out in opposition to the amendments. Their letters and op-eds can be found as follows: Crime Survivors for Safety and Justice letter, Fairness, Dignity, & Respect for Crime Victims and Survivors letter, and "The First Step Act will make us safer without the Cotton-Kennedy Amendments" op-ed.

Division 3: Purports to add more of the most serious, violent crimes to the list of crimes that renders an offender ineligible for earned time credits under the legislation, but is a thinly veiled and constitutionally dubious attempt to maximize the number of offenders excluded unequivocally from earning time credits.

- *Reasons to oppose:*
    - Redundant and unnecessary given the risk and needs assessment: The risk and needs assessment is already designed to ensure that those who have committed such serious crimes as Sen. Cotton has identified -- like sex offenses, carjacking, etc. -- will not reach the low- or minimum-risk of recidivism required to "cash in" time credits for pre-release custody.
    - Hides at the end a likely-unconstitutionally vague provision that nearly doubles the number of prisoners rendered ineligible from earning time credits:
        - The first eight proposed offenses for exclusion in the amendment are specific to individual crimes outlined in specific sections of code. The

ninth, however, is a broad catch-all exclusion with language that gives it a seemingly limitless effect and that is extremely similar if not identical to language that has already been struck down by the U.S. Supreme Court as unconstitutionally vague *twice*.

- Proposed exclusion (lxxi) would exclude any crimes not listed in the subsection for which the offender is sentenced to more than one year that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "that, based on the facts of the offense, involved a substantial risk that physical force against the person or property of another may have been used in the course of committing the offense."
    - This wording effectively guts the purpose and functionality of the entire prison reform section of the bill. The amendment pretends to be more of the same listing of egregious crimes that may arguably warrant exclusion, but in fact sneaks in unacceptable language meant to undermine the entire earned time credit system.
- In addition to such a broad exclusion being fundamentally incompatible with the purpose of the legislation -- to incentivize the most inmates to rehabilitate themselves -- this exclusion and its wording has a complicated constitutional past, to say the least.
    - In *Johnson v. United States* (2015), the Supreme Court held in an 8-1 opinion authored by the late Justice Antonin Scalia that the "residual clause" of the Armed Career Criminal Act violated the Fifth Amendment by increasing sentences for offenders who previously engaged in a felony which "involve[d] conduct that presents a serious potential risk of physical injury to another." The ruling held that the wording of the law "fail[ed] to give ordinary people fair notice… [and] so standardless that it invite[d] arbitrary enforcement." Upon even a quick glance, it is clear that the language used by Sens. Cotton and Kennedy in their amendment is substantively similar in vagueness.
    - Building off of this, the Supreme Court ruled again in *Sessions v. Dimaya* (2018) that the "residual clause" in 18 U.S.C. 1101(a)(43)(f), which includes the residual clause of 18 U.S.C. 16(b) was unconstitutional in that it was too vague to be enforced. Referencing the majority opinion from *Johnson*, the Supreme Court upheld the prior decision from the Ninth Circuit that the definition of a "crime of violence" under 1101(a)(43)(f) was unconstitutionally vague. In his concurrence, Justice Neil Gorsuch

wrote, “Because the residual clause in the statute now before us uses almost exactly the same language as the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.”

- The language in this division of the Cotton-Kennedy amendment is identical to the language in 18 U.S.C. 1101(a)(43)(f) as both are pulled directly from the definition of a crime of violence in 18 U.S.C. 16. It would be utterly ludicrous at worst and reckless at best for Congress to once again codify such language that is almost certain to have a court case brought against it, as the Supreme Court has already ruled *twice* that such vague language is unconstitutional.

- Sen. Cotton released an email from the United States Sentencing Commission revealing the impact of this amendment. Some numbers of note that would result from the adoption of this amendment follow:
  - The total number of offenders currently incarcerated who would be ineligible to earn time credits under the prison reforms in the First Step Act increases from 34,007 to 59,284: a *74 percent increase* in the total number of excluded offenders.
  - This is an increase of 25,277 from the addition of his amendment alone. As the email notes, one single exclusion, the constitutionally-dubious crime of violence exclusion, “alone accounts for *all but 42 of the 25,277* offenders excluded by the amendment.”
  - Clearly, adding more than 16 percent of the entire federal prison population to the list of excluded prisoners under the First Step Act via one single constitutionally very questionable measure is absurd.

It is evident, as both Sens. Tom Cotton (R-Ark.) and John Kennedy (R-La). voted no on cloture for the legislation last night, that these senators have not offered their amendment in good faith with the intention of improving the bill. If they ever intended to support the First Step Act should divisions of their amendment be added to the legislation, they would have voted in favor of opening debate on the legislation that allows for the consideration of their amendment.

Their amendment, crafted to deceive members and harm the progress of justice reform, should be strongly opposed by anybody and everybody who wishes to enact long-overdue meaningful reforms to the federal justice system and who takes seriously the words of the Constitution.