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Separating Facts from Fiction on the First Step Act

In the wake of news that President Trump is in full support of prison reform legislation not only as it passed the House of Representatives in May but also now as it is being considered in the Senate with added sentencing reforms,¹ opponents of this bill, though few, have been quite loud.

Opponents have several reasons for crying out against the effort, which include disingenuous calls for delaying the process alongside outright misinformation and, at times, blatant lies. The common theme is their intention to mislead and scare supporters away from the bill. Opponents constantly move the goalposts on their supposed concerns. They try to confuse the unaware in an effort to convince them that a bill which has the backing of conservatives in the House and the Senate, multiple law enforcement groups, nearly every conservative group in Washington, many state level groups, and President Donald Trump is somehow soft on crime and threatening to public safety.

Nothing could be further from the truth. Some of the chief arguments put forth by opponents of the FIRST STEP Act in the House and the First Step Act in the Senate are outlined and debunked as follows.

Fiction: The FIRST STEP Act was rushed through the House without a hearing or score.

Facts: The topic of criminal justice reform has been debated by the House Judiciary Committee for many years, the House-passed FIRST STEP Act included. During the 114th Congress, in July 2015, the House Committee on Oversight and Government Reform held two days of hearings on criminal justice reform, including front-end sentencing reforms, back-end reentry reforms, and prison reforms.^{2,3}

¹ C-SPAN, "President Trump Remarks on Prison Sentencing," November 14, 2018

<https://www.c-span.org/video/?454557-1/president-trump-delivers-remarks-criminal-justice-reform-bill>

² House Committee on Oversight and Government Reform, "Criminal Justice Reform, Part I," July 14, 2015
<https://oversight.house.gov/hearing/criminal-justice-reform-part-i/>

³ House Committee on Oversight and Government Reform, "Criminal Justice Reform, Part II," July 15, 2015
<https://oversight.house.gov/hearing/criminal-justice-reform-part-ii/>

In February 2016, the House Judiciary Committee marked up the Corrections and Recidivism Risk Reduction Act, H.R. 759,⁴ by voice vote. The bill wasn't considered on the floor of the House before the end of the Congress.

Once again, the issue has been and still is being debated in Congress. In July 2017, Rep. Doug Collins (R-Ga.) introduced the Prison Reform and Redemption Act, H.R. 3356.⁵ Although the bill was slated for mark up in the spring, it was eventually put aside in favor of a new bill, the FIRST STEP Act, H.R. 5682.⁶

The FIRST STEP Act was marked up by the House Judiciary Committee on May 9, 2018 and passed out of committee by a 25 to 5 vote.⁷ The merits of the bill were debated during the markup. The bill passed the House on May 22 by a 360 to 59 vote⁸ without an official cost estimate by the Congressional Budget Office (CBO). Because the FIRST STEP Act was passed under the suspension of the rules, a score wasn't required. An official cost estimate was produced by the CBO on August 20.⁹

Fiction: Sentencing reforms need to be debated in committee before being added to the FIRST STEP Act.

Facts: The Senate Judiciary Committee has already debated and marked up each provision of sentencing reforms in the bill multiple times, and those who are suggesting that more consideration is needed are only seeking to delay. Put simply, it's time for these reforms to be considered on the floor.

During the 113th Congress, in January 2014, the committee marked up¹⁰ the Smarter Sentencing Act, S. 1410.¹¹ Section 3 of the Smarter Sentencing Act would have made the Fair Sentencing Act, which became law in 2010, retroactive. This is a provision included in the First Step Act, S. 3649,¹² which was introduced in the Senate in mid-November and would be the bill that comes up for a vote in this lame duck session.

The new First Step Act includes the base text of the House-passed FIRST STEP Act, plus four sentencing reforms and a few changes to the base text. The Smarter Sentencing Act also

⁴ H.R. 759, 114th Congress (2015) <https://www.congress.gov/bill/114th-congress/house-bill/759>

⁵ H.R. 3356, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/house-bill/3356>

⁶ H.R. 5682, 115th Congress (2018) <https://www.congress.gov/bill/115th-congress/house-bill/5682>

⁷ House of Representatives Committee on the Judiciary, "Final Passage of H.R. 5682," May 9, 2018 <https://judiciary.house.gov/wp-content/uploads/2018/05/RC-2-HR-5682-Final-Passage.pdf>

⁸ Office of the Clerk, U.S. House of Representatives, "final Vote Results for Roll Call 215," May 22, 2018 <http://clerk.house.gov/evs/2018/roll215.xml>

⁹ Congressional Budget Office, "H.R. 5682, FIRST STEP Act," August 20, 2018 <https://www.cbo.gov/publication/54395>

¹⁰ Senate Committee on the Judiciary, "Hearings: Executive Business Meeting," December 19, 2013 <https://www.judiciary.senate.gov/meetings/executive-business-meeting-2013-12-19>

¹¹ S. 1410, 113th Congress (2013) <https://www.congress.gov/bill/113th-congress/senate-bill/1410>

¹² S. 3649, 115th Congress (2018) <https://www.congress.gov/bill/115th-congress/senate-bill/3649>

included a different, broader expansion of the federal safety valve, which is a component of the First Step Act.

The Sentencing Reform and Corrections Act, S. 2123, was subject to a hearing¹³ and a markup¹⁴ by the Senate Judiciary Committee in October 2015. Earlier this year, the committee once again marked up¹⁵ the 115th Congress version of the Sentencing Reform and Corrections Act, S. 1917.¹⁶ Both iterations of the bill included all of the four reforms included in the First Step Act in addition to others, some of which would have had retroactive application. Of the reforms in the First Step Act, only the provision related to the Fair Sentencing Act would be retroactive.

Fiction: The sentencing reforms that are being considered as part of the First Step Act would give criminals reduced sentences.

Facts: Definitionally, pending and future sentences that have not yet been handed down cannot be “reduced.” With the exception of retroactivity of the Fair Sentencing Act, the sentencing reforms that have been added to the House-passed FIRST STEP Act for inclusion in the Senate’s First Step Act are prospective, meaning that the reductions in mandatory minimums will apply only to pending cases and future cases.

Retroactivity of the Fair Sentencing Act is the only reform that could result in reduced sentences. Even so, its inclusion in the First Step Act is with good reason and its effect is limited. We’ll focus on this particular provision.

The Anti-Drug Abuse Act of 1986 created lengthy mandatory minimum sentences for crack cocaine offenses, resulting in a 100-to-1 disparity between crack cocaine and powdered cocaine weights and their application to sentencing laws. For example, 500 grams of powdered cocaine would trigger a 5-year mandatory minimum sentence, but only 5 grams of crack cocaine would trigger that same 5-year mandatory minimum.

Not only did this mandatory minimum create a severe sentencing disparity between crack cocaine and powdered cocaine, it also led to racial disparities. Estimates vary, but according to the United States Sentencing Commission, over 80 percent of offenders convicted of crack cocaine offenses are African-American.¹⁷

¹³ Senate Committee on the Judiciary, “S. 2123, Sentencing Reform and Corrections Act of 2015,” October 19, 2015 <https://www.judiciary.senate.gov/meetings/s-2123-sentencing-reform-and-corrections-act-of-2015>

¹⁴ Senate Committee on the Judiciary, “Hearings: Executive Business Meeting,” October 22, 2015 <https://www.judiciary.senate.gov/meetings/executive-business-meeting-10-22-15>

¹⁵ Senate Committee on the Judiciary, “Hearings: Executive Business Meeting,” February 15, 2018 <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting>

¹⁶ S. 1917, 115th Congress (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/1917>

¹⁷ United States Sentencing Commission, “Overview of Federal Criminal Cases Fiscal Year 2016,” May 2017 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf

Because the Fair Sentencing Act included a directive to the U.S. Sentencing Commission (USSC) in Section 7 to amend sentencing guidelines, the members of the commission voted to make its 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.

The proposed reform would allow Section 2 and Section 3 of the Fair Sentencing Act to be applied retroactively for crack cocaine offenses committed before August 3, 2010, as the USSC guideline change retroactivity didn't reach the full population serving sentences under the previous 100-to-1 disparity. Someone who receive a 5- or 10-year mandatory minimum weren't impacted by the USSC's guideline changes.

According to the United States Sentencing Commission, there were 3,147 offenders still in prison as of October 2017 who would become eligible to apply for a retroactive sentence reduction were the proposed retroactive application of the Fair Sentencing Act to become law.¹⁸ As of May 2018, this number had declined to 2,660 eligible offenders, just shy of 500 less than the estimate from seven months prior. In the six months that have now passed since May 2018, one can expect that total to have decreased once again by a similar number.

A sentence reduction under this provision 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.

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,¹⁹ as the comparison group that was not granted relief, according to a March 2018 report by the U.S. Sentencing Commission.

According to the USSC, roughly 85 percent of those who petitioned for resentencing under the Fair Sentencing Act were African-American.²⁰

¹⁸ United States Sentencing Commission, "Impact Analysis for CBO Re: S. 1917, the Sentencing Reform and Corrections Act of 2017, March 19, 2018
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf

¹⁹United States Sentencing Commission, "Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment," March 2018
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf

²⁰United States Sentencing Commission, "Final Crack Retroactivity Data Report: Fair Sentencing Act," December 2014
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf

Fiction: Other sentencing provisions are retroactive and will provide for reduced sentences.

Facts: This is false. Again, with the exception of the retroactivity of the Fair Sentencing Act, none of the sentencing reforms are retroactive and would apply to only pending cases and future cases.

The First Step Act 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 felonies and expand its use to serious violent felonies, ensuring that enhanced sentences are used wisely. 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. Any suggestion that prisoners currently incarcerated under 21 U.S.C. 841 would be released because of the change to the mandatory minimum sentence is flatly false. To call this “early release” is to abuse the meaning of those words.

Qualifying prisoners sentenced under this enhancement may earn time credits should they complete programming and reduce their risk of recidivism to minimum or low risk. Even then, his or her earned time credits only translate to an increase in the portion of his or her sentence in an alternate form of BOP custody, such as a halfway house, not early release. If the prisoner was an organizer, leader, manager, or supervisor involved in a heroin or fentanyl offense, he or she won't be able to use earned time credits at all.

The proposed clarification of 18 U.S. Code 924(c) is long overdue. 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.

As *The Federalist* noted in a recent piece,²¹ “Contrary to [some] reporting, the proposed compromise does not eliminate the sentencing enhancement for possession a firearm while committing another offense. Rather, the floated change would add a minor tweak to the governing law to assure that first-time offenders are not treated the same as repeat offenders.”

For example, in 2004, 24-year-old Weldon Angelos was given a 55-year sentence for selling

²¹ Margot Cleveland, “Here's What The Media's Not Telling You About That Lame-Duck Criminal Justice Bill,” *The Federalist*, November 21, 2018 <http://thefederalist.com/2018/11/21/heres-medias-not-telling-lame-duck-criminal-justice-bill/>

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."²²

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'd 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."²³

The proposed reform of 18 U.S.Code 924(c) is prospective, not retroactive.

Finally, the First Step Act would expand the existing federal 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, wasn't an organizer of the offense, and has truthfully provided to the government all information and evidence that he or she has concerning 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.

²² 345 F.Supp.2d 1227 <https://h2o.law.harvard.edu/collages/39812>

²³ Bryon Pitts, Jackie Jesko, and Lauren Efron, "Former Federal Judge Regrets 55-Year Marijuana Sentence," ABC News, February 18, 2015 <https://abcnews.go.com/US/federal-judge-regrets-55-year-marijuana-sentence/story?id=28869467>

Fiction: The First Step Act has an expansion of good time credits that will allow prisoners to be released early.

Facts: This is not an expansion of good time credits. The First Step Act would 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 of his or her sentence.

Despite 54 days being clearly written in statute, the Bureau of Prisons (BOP) has interpreted this to mean a maximum of 47 days per year. The Supreme Court upheld the BOP’s interpretation, based on the deference to federal agencies established in *Chevron*.²⁴

The proposed change would simply alter the language of 18 U.S.C. 3624(b)²⁵ 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. This could amount to up to an additional seven days per year of good time above the BOP’s interpretation of 47 days.

Additionally, the proposed clarification brings good time credits into their intended alignment with truth-in-sentencing policies, which require that an offender serve not less than 85 percent of his or her total sentence. Under BOP’s current 47 days calculation, an offender who receives the maximum amount of good time is arbitrarily held to serve just over 87 percent of his or her sentence. This same offender under the proposed change would receive 54 days per year of his or her sentence, and therefore would serve just over 85 percent of his or her sentence. This restores congressional intent to the good time credit system and brings it into full alignment with truth-in-sentencing policy.

Those who would benefit from the clarification of good time credits would still be subject to three to five years of supervised release, as required by 18 U.S.C. 3583.²⁶ Additionally, this provision was included in the House-passed version, the FIRST STEP Act, which passed by a vote of 360-59. Only two Republicans voted against the bill.

Fiction: Prisoners will be released early because of the earned time credits in the First Step Act.

Facts: Section 101 of 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 or is currently in the federal corrections system will be assessed and their risk of recidivism determined, classified as minimum, low, medium, or high.

²⁴ 560 US 474 (2010) <https://www.supremecourt.gov/opinions/09pdf/09-5201.pdf>

²⁵ 18 U.S.C. 3624 <https://www.law.cornell.edu/uscode/text/18/3624>

²⁶ 18 U.S.C. 3583 <https://www.law.cornell.edu/uscode/text/18/3583>

All prisoners will be allowed the opportunity to participate in evidence-based 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. These programs must show by empirical evidence to reduce recidivism and help prisoners successfully reenter society. Programs may include education, drug rehabilitation, faith-based services and classes, behavioral treatment, and social learning. Prisoners who are minimal or low risk may participate in productive activities, in addition to evidence-based recidivism reduction programs.

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 consecutive 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.

Only those who are minimal or low risk as determined by the risk assessment, pursuant to the last two reassessments of the prisoner, may use earned time credits for placement in pre-release custody. Prisoners who have demonstrated recidivism risk reduction through periodic risk reassessments who wish to “cash in” time credits must have a petition approved by the prison warden upon the warden’s determination that he or she would not be a danger to society, has made a good faith effort to lower his or her risk, and is unlikely to recidivate in order to become eligible.

These earned time credits were included in -- and in fact are the most significant part of -- the House-passed version of the bill, the FIRST STEP Act, which passed by a vote of 360-59 and received only 2 Republican “no” votes.

Fiction: Violent prisoners, including those who assault police with a deadly weapon, will be able to earn time credits for early released.

Facts: This is false. Section 101 of the First Step Act specifically excludes certain prisoners from being able to use earned time credits for placement in pre-release custody. There are more than 50 categories of offenses in the list. If a prisoner is convicted of any one of these offenses, he or she won’t be able to use earned time credits, regardless of their risk of reoffending. The section that contains the list of exclusions begins on page 12, line 5 and runs through page 23, line 3.

The list of exclusions, as well as relevant statutes, includes assault with the intent to murder, sex offenses, child pornography, terrorism offenses, and offenses that result in death or serious bodily injury. Exclusions have also been added for certain fentanyl and heroin offenders. These excluded offenders are defined as being organizers, leaders, managers, or supervisors of others in the offense.

Fiction: Illegal immigrants will be able to use time credits for placement in pre-release custody.

Facts: Some opponents of the First Step Act have, perhaps unwittingly, confused the good time credits and earned time credits. The First Step Act specifically excludes illegal immigrants from being able to use earned time credits for placement in pre-release custody. This provision is found in Section 101 of the text,²⁷ beginning on page 23, line 4.

Fiction: The First Step Act's emphasis on home confinement means that illegal immigrants won't be transferred into ICE custody.

Facts: Although the First Step Act does place emphasis on home confinement to the extent possible for minimal and low risk prisoners, existing BOP guidelines wouldn't be altered or changed by the bill. Under current Bureau of Prisons' regulations, a prisoner who is subject to a detainer filed by Immigration and Customs Enforcement (ICE) wouldn't be eligible for placement in home confinement.

Detainers are defined in BOP Program Statement 5800.15 as such: "A formal request from a Federal, state, or local jurisdiction for an inmate's custody upon completion of a term of imprisonment. This definition includes requests for criminal and non-criminal charges (e.g., material witnesses, deportation, probation/parole violator warrants, child support, etc.)." A federal agency such as ICE would be given priority over state or local detainers.²⁸

A separate regulation, BOP Program Statement 7310.04, makes it clear that "detainee inmates" -- that is, a prisoner subject to a detainer -- are excluded from placement in Community Corrections Centers.²⁹ Other limitations, including a limitation on "[i]nmates who are assigned a 'Deportable Alien' Public Safety Factor," also apply. Another regulation, BOP Program Statement 7320.01, CN-2, excludes inmates with public safety factors from placement in home confinement.³⁰

For example, in 2015, when approximately 6,000 prisoners were released from federal prisons as a result of the USSC's "all drugs minus two" amendment to the sentencing guidelines, almost a third of them were transferred into ICE custody.³¹ "They never step on free land," said an assistant federal public defender. The FIRST STEP Act does nothing to change this. In fact, the text explicitly states this in Section 105 (beginning on page 51, line 14) that "Nothing in this Act,

²⁷ S. 3649, 115th Congress (2018)

<https://www.judiciary.senate.gov/imo/media/doc/115.xxx%20-%20First%20Step%20Act%20of%202018.pdf>

²⁸ BOP Program Statement 5800.15 https://www.bop.gov/policy/progstat/5800_015_CN-01.pdf

²⁹ BOP Program Statement 7310.04 https://www.bop.gov/policy/progstat/7310_004.pdf

³⁰ Program Statement 7320.01, CN-2 https://www.bop.gov/policy/progstat/7320_001_CN-2.pdf

³¹ Andrea Noble, "With federal cooperation, illegals won't set foot on free U.S. soil after mass prison release," The Washington Times, October 11, 2015 <https://www.washingtontimes.com/news/2015/oct/11/illegal-immigrant-inmates-will-go-from-prison-to-d/>

or in the amendments made by this Act, may be construed to...amend or affect the enforcement of the immigration laws.”

Fiction: A recent report from the Bureau of Justice Statistics found that 83 percent of prisoners released from state prisons in 2005 were rearrested within nine years. This shows that efforts to reduce recidivism at the state level haven't worked.

Facts: Recidivism can be measured in different ways, including the rearrest rate. But the rearrest rate may not be a good guide. A former prisoner who was arrested may not have been convicted and incarcerated. A better measure may be the reconviction rate or the reincarceration rate. Additionally, state-level reforms did not begin until 2007 in Texas, so studying a population that was released in 2005 captures nothing about the effectiveness of the reforms that have been implemented from 2007 to the present.

The Bureau of Justice Statistics (BJS) did, in May, release data on the rearrest rates of prisoners from 30 states.³² These prisoners were released in 2005 and tracked through 2014, a nine-year time period. The report shows that 68 percent of these former prisoners were rearrested within three years, 79 percent were rearrested within six years, and 83 percent were rearrested within nine years. Reconviction and reimprisonment rates were not included in the latest BJS report, although the 2014 version did include such data.³³

Those who oppose criminal justice reform, even prison reform, which is the lowest hanging fruit, are using the BJS data to argue that efforts to reduce recidivism won't work. But using this data in such a way is misleading, again, because rearrest may not be a fair measure and because the reform movement in the states isn't captured by the data.

Criminal justice reform is a fairly recent movement at the state level. More than 30 states have passed criminal justice reforms,³⁴ although some more comprehensively than others. The data analyzed by the Pew Charitable Trusts show that recidivism is on a downward trajectory.³⁵ Texas was one of the early states, beginning its reforms in 2007. South Carolina passed reforms in 2010. Georgia didn't adopt legislation until 2012. These states, as well as others, are seen as successes.

Prisoners tracked in the BJS data wouldn't have been exposed to the recidivism reduction

³² Bureau of Justice Statistics, "2018 Update On Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)," May 23, 2018 <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6266>

³³ Bureau of Justice Statistics, "Recidivism Of Prisoners Released In 30 States In 2005: Patterns From 2005 To 2010 - Update," April 22, 2014 <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>

³⁴ The Pew Charitable Trusts, "35 States Reform Criminal Justice Policies Through Justice Reinvestment," July 11, 2018 <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/07/35-states-reform-criminal-justice-policies-through-justice-reinvestment>

³⁵ Adam Gelb and Tracy Velazquez, "The Changing State of Recidivism: Fewer People Going Back to Prison," The Pew Charitable Trusts, August 1, 2018 <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison>

programming offered as a result of the reforms in these states prior their release in 2005. Moreover, the measure of recidivism by BJS is rearrest rates. Another measure is reincarceration. Texas, for example, had a three-year recidivism rate -- as measured by reincarceration -- of 21 percent among prisoners released in 2013.³⁶

Similarly, South Carolina had a three-year recidivism rate -- measured by reincarceration -- of 23.1 percent in 2013.³⁷ Georgia's three-year recidivism rate -- measured by reconviction -- was around 27 percent in 2014.³⁸ Although it's unclear, these figures may not include reincarceration as a result of technical violations, which could lead to the reimprisonment of former prisoners. Technical violations can include a failure to meet with a parole officer or failing a drug test.

Fiction: Offenders excluded from earning earned time credits under the First Step Act will still be able to earn good time credits.

Facts: Yes. This is existing law and has been for over two decades, since the passage of the Comprehensive Crime Control Act of 1984.³⁹ Under 18 U.S.C. 3624(b), good time credits may be awarded by the BOP to any prisoner who is serving more than one year in federal prison, with the only exclusion being for prisoners serving life sentences. There are other requirements, however. Not only must a prisoner have "displayed exemplary compliance with institutional disciplinary regulations," but the BOP also takes into account whether the prisoner "has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree" during the relevant period of incarceration.

To our knowledge, only two bills have been introduced in the current Congress to add an exemption from good time credits, S. 3477⁴⁰ and H.R. 6844,⁴¹ and those bills, which were introduced in September 2018, are targeted at excluding fentanyl offenders.

As we mentioned elsewhere in this document, the only revision that the First Step Act makes to the good time credit program is to clarify that the maximum days that a prisoner can earn good time credits per year is 54 days as written in statute, not 47 days as the Bureau of Prisons has calculated.

³⁶ Legislative Budget Board, "Statewide Criminal and Juvenile Justice Recidivism and Revocation Rates," January 2017 http://www.lbb.state.tx.us/Documents/Publications/Policy_Report/3138_Stwide_Crim_Just_Recid_Revoc.pdf

³⁷ South Carolina Department of Corrections, "Recidivism Rates of Inmates Released during FY2009 - FY2013," Accessed on November 20, 2018 <http://www.doc.sc.gov/research/SpecialReports/RecidivismRatesOfInmatesReleasedDuringFY2009-FY2013.pdf>

³⁸ Georgia Council on Criminal Justice Reform, "Report of the Georgia Council on Criminal Justice Reform," February 2018 https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/press_release/2017-2018%20Report%20of%20the%20GA%20Council%20on%20Criminal%20Justice%20Reform.pdf

³⁹ Public Law 98-473

⁴⁰ S. 3477, 115th Congress (2018) <https://www.congress.gov/bill/115th-congress/senate-bill/3477>

⁴¹ H.R. 6844, 115th Congress (2018) <https://www.congress.gov/bill/115th-congress/house-bill/6844>

Fiction: The first problem with this new system is that “productive activities” is defined so vaguely that, according to the Bureau of Prisons, playing softball, watching movies, or doing activities that the prisoners are already doing today will result in new time credits. The whole idea behind these incentives is that prisoners will be less likely to recidivate upon release. But if the credits are this easy to get, how will this change the behavior of serious felons?⁴²

Facts: This is incredibly misleading. The First Step Act does create a new system of “earned time credits.” 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, and whose risk of recidivism hasn’t increased, 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 term “productive activity,” and to whom it applies, is defined in the bill on pages 34 and 35. The text of the relevant provision states: “The term ‘productive activity’ means either a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating, and may include the delivery of the programs described in paragraph (1) to other prisoners.”

Clearly, productive activities are geared toward prisoners who are assessed as a minimum- and low-risk of recidivism. Medium- and high-risk prisoners are excluded from productive activities. Instead, intensive recidivism reduction programming would be available to these prisoners, who may eventually be allowed to participate in productive activities if they have successfully lowered their risk of recidivism to minimum or low.

⁴² Tom Cotton, “What’s Really in Congress’s Justice-Reform Bill,” National Review, November 26, 2018 <https://www.nationalreview.com/2018/11/first-step-criminal-justice-reform-bill-whats-in-it/>

Fiction: [T]here are almost no low-level, non-violent offenders in federal prison, as opposed to state prison, to begin with.⁴³

Facts: This is flatly false. In fact, the inverse is true. State prisons house more violent offenders than federal prisons in terms of offense category. According to the Bureau of Justice Statistics,⁴⁴ 54.5 percent of prisoners in state prisons were classified as violent offenders. Only 15.2 percent were drug offenders. At the federal level, 46.1 percent are drug offenders.⁴⁵

Fiction: Proponents also claim that we have nothing to fear because only offenders classified as having a “low-level” of recidivism risk can use their credits to get early release. But this requires extraordinary faith in the government’s ability to predict the recidivism risk of violent felons. I understand why liberals have such faith. But it is surprising to me that conservatives, and especially libertarians, have faith that government bureaucrats can judge the state of a felon’s soul and predict his future behavior.⁴⁶

Facts: States have proven that evidence-based criminal justice reform works, which is why conservatives and libertarians have embraced this strategy. Georgia has arguably done more on criminal justice reform than any other state.⁴⁷

Gov. Nathan Deal (R-Ga.) made reform a central part of his agenda in a Republican-dominated legislature, passing front-end sentencing and back-end prison reforms, juvenile justice reform, and second chance policies to give people who have made mistakes an opportunity to become productive, taxpaying citizens.

Georgia utilizes a risk and needs assessment to determine an offender’s risk of recidivism, and his or her rehabilitative programming is based on that assessment. When Gov. Deal launched this effort in 2011, Georgia’s violent crime rate was 374.6 incidents per 100,000 inhabitants. If one were to believe the fear-based rhetoric used by opponents of criminal justice reform, one would assume that crime has skyrocketed in Georgia in the years since the initiative began.

That hasn’t happened. In fact, in 2017, the violent crime rate in Georgia was to 357.2 incidents per 100,000 inhabitants; the lowest rate since 1970.

⁴³ *Ibid.*

⁴⁴ The Pew Charitable Trusts, “Missouri Policy Shortens Probation and Parole Terms, Protects Public Safety,” August 8, 2016 <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/missouri-policy-shortens-probation-and-parole-terms-protects-public-safety>

⁴⁵ Bureau of Prisons, “Offenses,” Accessed on November 26, 2018 https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp

⁴⁶ Cotton, 2018

⁴⁷ Jason Pye and Sarah Anderson, “Peach State Justice: Successes of Smart on Crime Policies in Georgia,” FreedomWorks, December 2017 <https://www.freedomworks.org/content/peach-state-justice-successes-smart-crime-policies-georgia>

Of course conservatives and libertarians remain skeptical of government bureaucracy, but they are overwhelmingly supportive of facts and evidence. In the case of criminal justice reform, the facts and evidence speak strongly to the effectiveness of the state level reforms on which the First Step Act is based.

Fiction: [T]o the extent people are in federal prison for low-level convictions, they typically pled down from more serious charges.⁴⁸

Facts: This is false. It is the official policy of the Department of Justice for federal prosecutors to charge the “most serious, readily provable offenses.”⁴⁹ Even in plea agreements, prosecutors are tasked with requiring the defendant to plea to the “most serious readily provable charge consistent with the nature and extent of his/her criminal conduct.”⁵⁰

Fiction: [T]he Senate FIRST STEP Act gives judges much more discretion to ignore the mandatory minimum sentence for criminals with prior records. Since when has increased judicial discretion been a conservative principle?⁵¹

Facts: Several states, including Georgia⁵² and Mississippi,⁵³ have adopted safety valve exceptions to mandatory minimum sentences. The American Legislative Exchange Council (ALEC) has produced model legislation, the Justice Safety Valve Act,⁵⁴ for state legislators who are exploring similar policies.

As we mentioned elsewhere in this document, the proposed expansion of the federal safety valve exception to mandatory minimum sentences is quite modest, and it comes with certain exclusions. An offender can't have more than 4 criminal history points, excluding single 1-point offenses. An offender with a single 3-point prior offense or a single 2-point violent prior offense wouldn't be eligible for the safety valve.

Again, conservative principles are rooted in what the facts and the evidence show to be good, sound policy for taxpayers, for public safety, and for Americans' prosperity. With regard to the safety valve, the states have proven that such a reform is in fact beneficial for all three.

⁴⁸ Cotton, 2018

⁴⁹ JM 9-27.300 <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.300>

⁵⁰ JM 9-27.430 <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.430#9-27.430>

⁵¹ Cotton, 2018

⁵² Aaron Sheinin, “Governor to sign sweeping justice reform bill,” The Atlanta Journal-Constitution, May 2, 2012

<https://www.ajc.com/news/state--regional-govt--politics/governor-sign-sweeping-justice-reform-bill/k2hfftKECpVrfX7wM0qs8O/>

⁵³ Adam Gelb and Casey Pheiffer, “Mississippi Enacts Round 2 of Criminal Justice Reform,” The Pew Charitable Trusts, May 14, 2018 <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/14/mississippi-enacts-round-2-of-criminal-justice-reform>

⁵⁴ American Legislative Exchange Council, “Justice Safety Valve Act,” Accessed on November 26, 2018 <https://www.alec.org/model-policy/justice-safety-valve-act/>

Fiction: The bill has a loophole that will let prison wardens reduce sentences for violent offenders.

Facts: No, it doesn't. We've explored this one to determine which section of the First Step Act opponents could be complaining about given the lack of specificity. We assume that the complaints are being made against the provision entitled, "Prerelease Custody or Supervised Release for Risk and Needs Assessment System Participants," which is found on page 40, beginning on line 17.

Again, the only provision of the First Step Act that may reduce sentences is the proposed retroactivity of the Fair Sentencing Act. A prison warden can't reduce a sentence. Earned time credits may be used to place an eligible prisoner in pre-release custody, but again this not early release or a reduced sentence.

The specific complaint may relate to subsection (D). The provision details the handling of a prisoner who is eligible for placement in prerelease custody. Subsection (D)(i) explains that only prisoners who have reduced their risk of recidivism to minimum or low over two consecutive reassessment periods are eligible for placement in pre-release custody. Subsection (D)(ii) provides that a prisoner may be placed in pre-release custody if the prison warden determines that the prisoner isn't a danger to society, made a good-faith effort to reduce his or her risk of recidivism, and is unlikely to recidivate. The final requirement is a high bar.

Interestingly, in their criticism of this provision, opponents fail to mention that the prisoner would have to show "a demonstrated recidivism risk reduction" and can't fall into one of the excluded classes of offenses defined in Section 101 of the First Step Act.

Fiction: The bill reduces sentences for heroin and fentanyl offenders.

Facts: This is misleading. Once again, the only provision of the First Step Act that may reduce sentences is the proposed retroactivity of the Fair Sentencing Act. The remaining sentencing reforms, including the proposed change to 21 U.S.C. 841(b), are prospective, meaning that the reforms will apply to pending and future cases. Definitionally, these sentences cannot be "reduced."

21 U.S.C. 841(b)⁵⁵ and 21 U.S.C. 960(b)⁵⁶ establish mandatory minimum penalties for drug trafficking offenses, domestically in the case of 841(b) and importation and exportation in 960(b). Penalties for powdered cocaine, crack cocaine, marijuana, heroin, and other controlled substances are found in these two sections of statute.

⁵⁵ 21 U.S.C. 841 <https://www.law.cornell.edu/uscode/text/21/841>

⁵⁶ 21 U.S.C. 860 <https://www.law.cornell.edu/uscode/text/21/860>

If an individual is successfully prosecuted for trafficking 100 grams of heroin, he or she will receive a 5-year mandatory minimum sentence. If the individual is prosecuted for 1 kilogram of heroin, he or she will receive a 10-year mandatory minimum sentence. The maximum sentence is 40 years. If death or bodily injury occur from the use of heroin, the mandatory minimum sentence is 20 years. The maximum is life.

As it relates to fentanyl and its analogues under 21 U.S.C. 841, 100 grams of a mixture or substance containing a detectable amount of a fentanyl analogue carry a mandatory minimum sentence of 5 years. A 10-year sentence comes with 400 grams of a mixture or substance containing a detectable amount of fentanyl. If death or bodily injury occur from fentanyl or one of its analogues, whether the amount is 40 grams or 400 grams, the mandatory minimum sentence would be 20 years. The maximum is life.

The First Step Act doesn't change these penalties for heroin and fentanyl, or any other controlled substance. What Section 401 of the First Step Act does is tailor the use and length of enhanced penalties that may be sought for offenders charged with an offense under 21 U.S.C. 841 who have prior offenses on their record.

It does so in two ways, and it is necessary to bear in mind that the reforms are designed to ensure that the lengthy sentences that prosecutors are able to seek for repeat offenses are used on those most dangerous to our communities. Because 841(b)(1)(A) and (B) are, according to the United States Sentencing Commission,⁵⁷ two of "the top five most frequent statutes of conviction carrying a mandatory minimum penalty," it is imperative that their application is used wisely.

First, Section 401 of the First Step Act alters which prior convictions would trigger enhanced mandatory minimum sentences under both 841(b)(1)(A) and (B). Currently, a simple "felony drug offense" triggers the enhanced mandatory minimums defined in the code. The reform would narrow the scope of drug offenses that would trigger enhancements to those with prior "serious drug felony" convictions, but would also broaden the triggering of enhancements to those with prior "serious violent felony" convictions as well.

It ties the definition of a "serious drug felony" to 18 U.S.C. 924(e)(2)⁵⁸ and the definition of a "serious violent felony" to 18 U.S.C. 3559(c)(2).⁵⁹ Both of the new definitions still include prior state offenses of those natures to trigger the enhanced mandatory minimums, which retains the integrity of the enhancements -- Giving prosecutors the ability to seek sentencing enhancements for a federal crime based off of prior offenses not prosecuted in federal courts.

⁵⁷ U.S. Sentencing Commission, "An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System," July 2017 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf

⁵⁸ 18 U.S.C. 924 <https://www.law.cornell.edu/uscode/text/18/924>

⁵⁹ 18 U.S.C. 3559 <https://www.law.cornell.edu/uscode/text/18/3559>

Second, Section 401 of the First Step Act would modestly lower the enhanced mandatory minimum sentences triggered by the prior offenses noted above under 21 U.S.C. 841(b)(1)(A), but not those for (B). The mandatory minimums would be reduced from 20 years to 15 years for one prior conviction and from life imprisonment to 25 years for two or more prior convictions. Again, there is no change proposed to the mandatory minimum sentence for the underlying offense should a defendant not have any prior offenses on his or her record.

In practical terms, these are very modest reductions in mandatory minimums, especially considering that the offenders who would be handed down these lengthy sentences have already spent time in prison. Additionally, mandatory minimum reductions -- as the words imply -- do not mandate shorter sentences if the judge determine that the facts of a case require lengthier punishment.

For instance, a defendant with two prior convictions under this section would have already have served a minimum sentence of at least 15 years as defined by the law, as well as time for the prior offense that triggered the enhancement in the first place -- at least one year. For this person, a 25 year mandatory minimum sentence, assuming he or she was 25 years old at the time of his or her first offense, would result in his or her release date being when he or she is 66 at the youngest. This is effectively the equivalent of a life sentence, as is required in current law.

Additionally, when paired with the prison reforms in the First Step Act, one can reasonably expect the use of enhanced mandatory minimum sentences for individuals with prior offenses will be significantly less frequent than under current law, because the recidivism reduction programming will result in successful inmate reentry into society and discourage repeat offenses.

By providing such programming with modest incentives for successful participation, perhaps -- and hopefully -- the use of the enhancements under 21 U.S.C. 841 will wane into obscurity anyway. In the meantime, though, it is imperative that lengthy enhancements are used wisely.

Fiction: Republicans can just wait to do this next year and will have more time to consider a better product then, right?

Facts: No, this is wrong. With Democrats taking over the House again in the 116th Congress that begins in January, Republicans will lose out on the opportunity to ensure that the package Congress considers prioritizes the top concern of to criminal justice reform: public safety.

By taking best practices from the states, the reforms being considered in the First Step Act in this lame duck session of the 115th Congress are certain to put the issue of public safety, which is achieved through reducing crime rates, first.

One primary goal of criminal justice reform for conservatives is to ensure that when offenders return to their communities, they do so as reformed individuals who will not commit more crimes upon release. Another primary goal for conservatives is to make certain that we are using incarceration effectively and as needed, that the punishment handed down fits the crime committed, and that resources are used most on those criminals we are afraid of and not needlessly wasted beyond necessity on those criminals we are mad at.

These goals must be at the top of the list when crafting criminal justice reform policies, and with strong conservative leaders like Rep. Doug Collins (R-Ga.), Sens. Chuck Grassley (R-Iowa) and Mike Lee (R-Utah), and President Donald Trump, Republicans can be certain that these are in fact at the top. The attempts to lure Congress into waiting to move on this issue until next Congress is faulty at best and intentionally sabotaging at worst.

In order to ensure that public safety remains the top priority in criminal justice reform, Republicans must push to send the First Step Act to President Trump's desk before the 115th Congress comes to a close. Additionally, passing comprehensive criminal justice reform as crafted by conservatives while Republicans have united government is a politically smart move, showing the whole country that Republicans are able and willing to work across the aisle to achieve real reform.

In a time with such a constantly polarized political atmosphere, passing this carefully crafted, heavily debated, well-vetted, and proven successful criminal justice reform package would go a long way for a lot of Americans. Those touched by the criminal justice system directly or secondhand and those who have never interacted with the system alike will see the noticeable impact of safer streets and rehabilitated neighbors, friends, and citizens.

The Senate must act swiftly to pass the First Step Act, S. 3649, and send it to the House -- which has already overwhelmingly approved a former version of the bill -- to do the same. President Trump has already expressed his full support for the comprehensive package, saying he "look[s] very much forward to signing it."⁶⁰ Congress must give him this chance.

⁶⁰ The White House, "Remarks by President Trump on H.R. 5682, the FIRST STEP Act," November 14, 2018 <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-h-r-5682-first-step-act/>

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The mission of FreedomWorks is to build, educate, and mobilize the largest network of activists advocating the principles of smaller government, lower taxes, free markets, personal liberty, and the rule of law. Find out more at FreedomWorks.org.