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The First Step Act is Anything but Flawed

The myths surrounding the First Step Act continue to emerge, most frequently from Sen. Tom Cotton (R-Ark.), the bill's most outspoken critic. The First Step Act, S. 3649, which was carefully drafted by a bipartisan group of lawmakers in Congress, is supported by President Trump, over 150 former federal prosecutors, multiple law enforcement agencies, a wide base of faith leaders, and conservative policy groups both in Washington and across the country.

Below is a full, line-by-line analysis of Sen. Cotton's most recent op-ed from November 29th in the Washington Times, "How the Senate First Step Act is flawed," which is full of misleading and at many times entirely false statements about the effects of the legislation.

1. **While the bill's supporters have started this reform process with good intentions, the latest version of the bill would result in the early release of thousands of violent felons.**

No, the earned time credit system established by the First Step Act only allows for early transfer into alternate forms of Bureau of Prisons (BOP) custody, such as halfway houses or home confinement. This is in no way, shape, or form "early release," and is in fact dubbed "pre-release custody." Just as it sounds, this type of custody comes before release, meaning that it cannot definitionally be release. The BOP is already permitted to do this by current law. The First Step Act simply incentivises important recidivism reduction programming by offering more time in pre-release custody.

Firstly, even Sen. Cotton has himself said that there "is no such thing as a 'low-risk violent sex offender.'" Therefore, there should be no fear that anybody of that nature would even benefit from early transfer to pre-release custody under the bill, as one must prove him or herself low- or minimum-risk by the risk assessment in order to quality.

Additionally, violent felons are largely excluded from benefiting at all from earned time credits under the bill. They would still be able to participate in recidivism reduction programming, but if they fall under one of the 50+ excluded offense categories under the bill, they cannot even "cash in" their successful participation for time in pre-release custody, let alone be released

early as a result. This exclusions list serves as an extra safeguard for these individuals in addition to the risk and needs assessment.

2. But these new time credits do allow for early release — up to one-third of the offender's sentence.

No, this is not even a half-truth. This is completely false. Again, pre-release custody, which is what qualifying prisoners are able to earn and benefit from under the First Step Act, is just that -- pre-release, meaning BEFORE release. These individuals, who have not only participated in but successfully completed programming that results in their continual re-evaluations proving him or her a low- or minimum-risk of recidivism, would be allowed to serve an increased portion of his or her sentence in pre-release custody.

For the sake of full disclosure, let's spell out what would happen to somebody who gets earned time credits under the First Step Act. A prisoner who qualifies for earned time credits simply would be moved to a lower security (i.e., more comfortable) environment for the duration of those credits. For example, he or she could be transferred from a low-security environment to a halfway house.

Such a prisoner is not released a single day earlier because of earned time credits under this bill, but all inmates desire to live in less secure and therefore more 'normal' circumstances. That's what they get with earned time credits, which is why the bill's modest but meaningful incentives will be effective in encouraging prisoners to rehabilitate themselves. Additionally, should an offender violate any of the terms imposed on him or her while in pre-release custody, he or she would be returned to prison to serve out the remainder of his or her sentence.

The maximum amount of his or her sentence that a qualifying, low- or minimum-risk offender would be eligible to serve in pre-release custody as a result of the earned time credits is up to one-third of the offender's sentence. This is because, for every 30 days of successfully completed recidivism reduction programming, qualifying offenders can earn ten days of earned time credits. But again, these earned time credits are not for early release, simply for a transfer into an alternate form of BOP custody.

In order for an offender to receive the maximum amount of earned time credits, he or she must successfully complete programming every single day he or she is incarcerated and also prove him or herself low- or minimum-risk of recidivism per multiple reassessments under the established risk and needs assessment created by the legislation. Needless to say, doing so would be incredibly difficult, and any individual who is able to successfully meet all of the requirements necessary for the maximum benefit would be an ideal model returning citizen, not a dangerous or violent offender.

Also of note is that the federal criminal justice system offers much less time in the form of credits than states do as a whole. The federal system ranked second lowest in the country in terms of the maximum amount of time possible to earn off one's prison sentence.

Many states, such as Arkansas, make time credits available to all prisoners except prisoners serving life sentences. The First Step Act is a far more measured approach, only allowing those who test as low-risk to qualify for earned time and providing a lengthy list of excluded offenses on top of the risk assessment requirement.

3. **One of the major problems with the bill is that thousands of offenders will be released almost immediately because two sections apply retroactively. That means they will not participate in any additional rehabilitation programs. The release of such a large number of prisoners at once will surely endanger public safety and will strain law enforcement's ability to protect their communities.**

This argument is incredibly misleading. Firstly, the two sections with retroactive application are are entirely separate and different provisions. The first would restore congressional intent that provides for up to 54 days of good time credits per year of incarceration. The other provision would apply the revised sentences of the Fair Sentencing Act of 2010 to all those convicted, whether sentenced prior to or after the date of that legislation's enactment.

The restoration of congressional intent to good time credits will apply to prisoners currently incarcerated as well as those who will come into the federal correctional system in the future. All the fix in the First Step Act would do is allow prisoners eligible for good time credits under the statute which became law in 1984 to earn at most 54 days per year of good time, as is explicitly written in the statute itself.

One would think that having 54 days stated in the text would be sufficient to ensure that Congress' intent for the statute is carried out. However, as incredible as it seems, the BOP bureaucracy claims that the number "54" as stated in the statute actually means 47 days.

Conservatives have been trying to re-establish congressional primacy in setting policy, giving less broad authority to executive agencies to interpret law however they choose. The words of a statute should be the law, not the whims of the bureaucracy. This bill does not "give" any additional time to prisoners. Rather it restores the days that the BOP has been cheating them out of for over 30 years.

Also, restoring the additional seven days lost per year by BOP's interpretation of the statute to those incarcerated who have been approved for the maximum amount of good time will not, as Sen. Cotton tries to claim, "surely endanger public safety." In fact, the prisoners who will benefit from this provision are those who have displayed the most exemplary compliance with disciplinary regulations during the entire period of his or incarceration.

The retroactive application of the Fair Sentencing Act of 2010, which lowered the crack-to-powder cocaine sentencing disparity is done to provide equity at no cost to public safety. The Fair Sentencing Act lowered the terribly unjust crack-to-powder cocaine sentencing disparity from 100-to-1 to 18-to-one. (It is important to note that then then-Senator Jeff Sessions (R-Ala.) was the principal co-sponsor of the bill.) Without retroactive application, some offenders are serving much longer sentences than others in their prison who dealt exactly the same amount of crack cocaine. The only factor that results in this wide disparity in sentences for the same offense is the date of their offense.

The offenders who may be in a position to benefit from this section will not by any stretch of the imagination "be released almost immediately." In order to even be considered for a sentence reduction, a motion must be made by the offender, the director of BOP, a federal prosecutor, or a court. Following this, the motion may, of course, be denied by the court. Additionally, the population currently incarcerated that would be eligible to make a motion for resentencing was 3,147 in October 2017, was 2,660 in August 2018, and can today be expected to be reduced by a similar amount, putting the total eligible population just above 2,000.

Additionally, partial-retroactivity of the Fair Sentencing Act has already been tried, via guideline changes from the United States Sentencing Commission (USSC) that resulted in a population of offenders who became eligible to make a motion to have sentence reductions under the law. The success of this limited retroactivity has been studied, and the USSC has determined that the population given retroactive sentencing had an identical recidivism rate -- 37.9 percent -- as the population that was not. This actually proves that, in fact, that applying the law retroactively will not have any negative effect on public safety.

4. **Even for the sections that only apply prospectively, inmates only have to participate in "productive activities" to get credits for early release. That includes playing softball, watching movies or doing activities that the prisoners are already doing.**

This claim is false on every single count. Again, earned time credits do not allow early release. They simply allow eligible offenders who work their way down to a low- or minimum-risk of recidivism through successful participation in programming to serve an increased portion of their sentences in alternate forms of BOP custody.

Additionally, to say that inmates can play softball and watch movies to earn time credits -- even for pre-release custody -- is absurd. In order to earn time credits, inmates must successfully participate in newly-established evidence-based recidivism reduction programming based on his or her individualized risk and needs assessment. He or she must also prove a low- or minimum-risk of recidivism under the reassessments in order to benefit from the earned time credits.

The only inmates for which “productive activities” are available are those who are already low-or minimum-risk of recidivism. 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- or low-risk of recidivism. These are inmates who have participated in existing programming, have proven themselves ready for reentry into society, and have little to no risk of recidivating upon release. This is also a matter of safety as well. It is a well-established best practice in correctional systems to not have low-risk prisoners mixed in programming with higher-risk prisoners, because doing so has a negative effect on the rehabilitation of low-risk prisoners. It is also most cost effective to reserve the most intensive programming for higher-risk prisoners.

Medium- and high-risk prisoners are excluded from participating in productive activities, and instead must participate in intensive recidivism reduction programming if they wish to benefit from earned time credits. Prisoners who are initially assessed as medium- or high-risk may only be allowed to participate in productive activities once they no longer have that medium- or high-risk status because they have successfully lowered their risk of recidivism to minimum or low through more intensive programming.

5. **While some inmates are excluded from earning new credits, many perpetrators of violent crimes would be allowed to earn these new credits — crimes including, but not limited to, drug-related robberies, involving assault with a dangerous weapon, using a deadly weapon to assault a law enforcement officer, assault resulting in substantial bodily injury to a spouse or child, and violent carjacking resulting in serious bodily injury.**

What this statement intentionally does is confuses earning time credits with benefiting from them. The exclusions list should be viewed as an additional safeguard on the risk and needs assessment created by the legislation. Therefore, just because specific crimes do not appear on the exclusions list does not mean that inmates convicted of those crimes will ever be able to benefit from the time credits they earn.

Rooted in evidence-based and proven models from across the many states that have implemented similar reforms, the risk and needs assessment given to all inmates is designed to capture the likelihood of inmates to recidivate, based on a holistic assessment of the inmate.

The exclusions list includes over 50 categories of serious and violent offenses fully excluded from benefiting from time credits, although these excluded offenders are still eligible to

participate in recidivism reduction programming. What one must not lose sight of is that somebody convicted of a crime such as violent carjacking resulting in serious bodily injury is an incredibly high-risk inmate. He or she, as evaluated under any risk assessment, would come back as such. Even if he or she is eligible to earn time credits, there is an extraordinarily slim chance that any offender of this nature would be able to reduce his or her risk of recidivism enough to qualify as the low- or minimum-risk status needed to benefit from the time credits.

Therefore, the rhetoric around specific crimes that are or are not excluded is simply intended to confuse and frighten those who are unfamiliar with the structure and impact of reforms such as incentivization through earned time credits into believing that any non-excluded offender will be getting immediate access to a get-out-of-jail free card. This is not even close to the reality.

The additional safeguard of an exclusions list, on top of the evidence-based risk and needs assessment, provides more than enough assurance that those criminals who are most dangerous will not be able to benefit from early transfer to pre-release custody, regardless of the alarming, misinformed, and misleading statements made by the bill's opponents.

6. **In addition to these offenses, sex offenders and drug traffickers would also be eligible for early release. According to the Justice Department, individuals convicted of failing to register as a sex offender, importing aliens for prostitution, and first-time assault with intent to commit rape or sexual abuse will be eligible for the new credits.**

   There is not much to say here that hasn't already been said. Nobody is eligible for early release via the new earned time credit system, once again. And those listed in reference to the Justice Department are such high-risk prisoners that he or she will not feasibly be able to reach the low- or minimum-risk status necessary to benefit from that system anyhow.

7. **On top of that, the vast majority of fentanyl, heroin and methamphetamine traffickers would also be able to accrue credits for early release under the First Step Act. Considering that more than 72,000 Americans died from drug overdoses last year, is this the right time to reduce the penalty for trafficking deadly drugs?**

Once again, nobody is able to accrue earned time credits for early release under the First Step Act. This is one-hundred percent false. Additionally, the fact that 72,000 Americans died from drug overdoses last year actually speaks to the dire need to try a new tactic.

This tactic is not, as Sen. Cotton claims, "reduc[ing] the penalty for trafficking deadly drugs," as mid- and high-level fentanyl and heroin traffickers are excluded from earning time credits under the legislation. But, it is ensuring that the punishment fits the crime at hand and ensuring that certain inmates are given reasonable incentives to meaningfully lower his or her risk of recidivism.

These reforms enhance public safety by reducing crime rates, save taxpayer dollars by reducing incarceration rates, contribute to the economy by bolstering the labor force and increasing the number of taxpaying citizens, and perhaps most importantly uplifts the value of human life.

8. **Let's take an example. Under current law, a second-time offender with 400 grams of fentanyl, which is enough to kill 50,000 people — about the size of Conway, Arkansas — would be sentenced to a mandatory minimum of 20 years. If the inmate behaves in prison and participates in drug rehabilitation, he could get out in 17 to 18 years. Under this bill, by shortening the mandatory minimums from 20 to 15 years on the front end, and adding new early-release provisions that can shorten the sentence by up to a third on the back end, he could be released in eight to nine years.**

Firstly, this hypothetical is misleading because it implies, again, that earned time credit somehow shorten the length of this offender's sentence. While the hypothetical is correct that the bill shortens the mandatory minimum for a second-time offender in this scenario from 20 years to 15, it is still important to note that this is the mandatory minimum, meaning that the sentence length imposed can always be above this minimum. It also does not factor in the sentence for the underlying crime being prosecuted.

Where it is entirely incorrect, however, is in calculating the potential for sentence reductions from there. With a maximum of 54 days of good time per year for perfect disciplinary behavior in prison, this offender, assuming he or she was sentenced to 15 years -- the minimum possible -- his or her sentence could be reduced to just under 13 years. (This would be just over 13 years under the current 47 day calculation without the bill's good time credit fix.) This offender would remain in BOP custody for the full time.

Even if he or she is eligible to earn time credits under the bill -- which is highly unlikely due to the exclusion for fentanyl offenders who are managers, leaders, organizers, or supervisors of others in the offense, that such a person would likely fall under anyhow -- would again only be able to cash in the time credits for pre-release custody, NOT for time off of his or her sentence. To say that this person could be released in eight or nine years is completely, utterly false.

All of the supporters of the First Step prioritize public safety in their crafting and consideration of criminal justice reform legislation, and the First Step Act is the culmination of these efforts.

It is nonsensical to believe, even for one minute, that legislation with this broad and intense level of support would in any way threaten public safety. In fact, the First Step Act would greatly enhance public safety and make our communities safer, regardless of the fear-mongering from opponents who speak to the contrary.

9. **We must also remember the federal agents and officers who have undertaken great risks in arresting violent criminals and drug dealers. Why would we cheapen their sacrifice by putting criminals back on the street before they are reformed members of society?**

Senator Cotton should not presume to speak for the brave officers who risk their lives protecting the public. Those who actually represent these officers support this important legislation, because the officers on the streets are tired of rearresting offenders who serve time but are not equipped to leave their lives of crime to live decent and constructive lives.

Research has shown that the programs which the First Step Act encourage are effective at changing offenders' lives. They will stop the revolving door of recidivism and help inmates become productive, law-abiding citizens. That is why the bill has the strong support of the Fraternal Order of Police, the International Association of Chiefs of Police, the National Organization of Black Law Enforcement Executives and the National District Attorneys Association. In addition, the bill is endorsed by over 170 former federal prosecutors, including two former US Attorneys General, and a former Director of the FBI.

Therefore, who should we believe? Police and prosecutors, or supposedly "tough on crime" politicians who have no direct experience with the criminal justice system? The choice is clear.

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