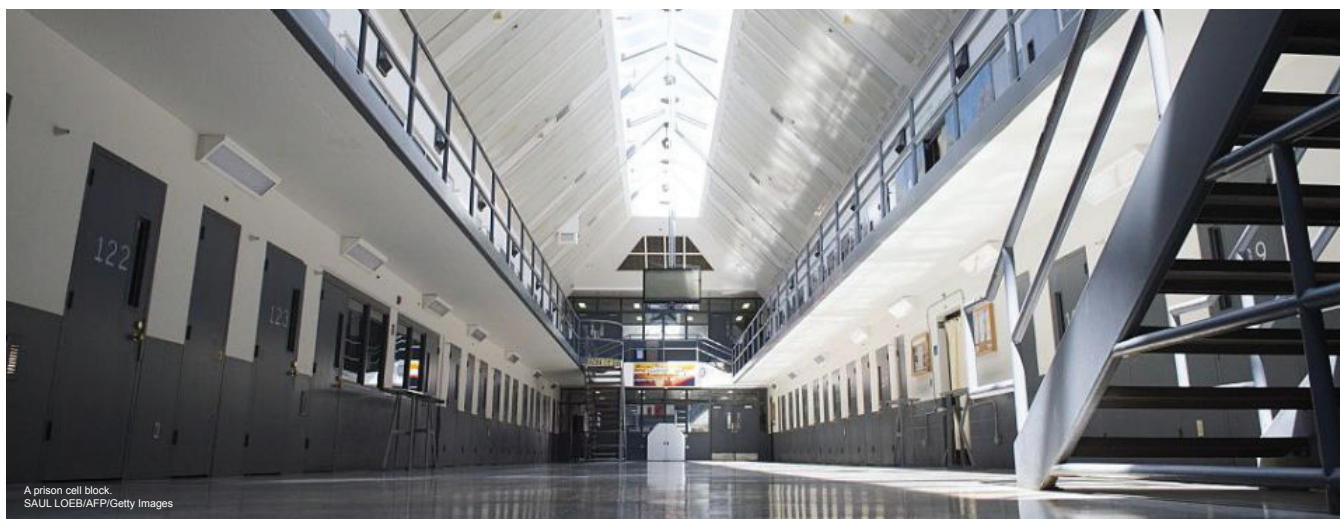


## INSIGHT: The First Step Act of 2018— Expect More Early Releases From Prison

By Alan Ellis, Mark Allenbaugh and Nellie Torres Klein

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*Federal sentencing and prison experts Alan Ellis, Mark Allenbaugh, and Nellie Torres Klein continue their look at the First Step Act of 2018, a new bipartisan federal prison reform law. In Part 2 of this three-part series, they review a long-awaited revision to the controversial method for calculating good conduct time credits, which may result in more granted requests for compassionate release.*

The Bureau of Prisons' controversial method for calculating good conduct time credits has finally been overturned by Congress.

While the BOP always has had the statutory authority to reduce a term of imprisonment by up to 54 days for every year served as a reward for good conduct, the BOP adopted a rather convoluted method for calculating such credit, which resulted in an effective good conduct credit of only 47 days per year.

In 2010, the Supreme Court affirmed this method as “reasonable.”

### Changes to Calculation of Good Conduct Time Credits

Section 102 of the [First Step Act of 2018](#) (Act) now makes clear that 54 days' good conduct credit per year served means exactly that, which can result in a rather significant increase in credits for those currently serving time.

For example, a defendant sentenced to 120 months' imprisonment would only receive 471 days good conduct credit under the BOP's old method for calculating the credit. Now, in

light of the Act, the same defendant is eligible for 540 days of good conduct credit, i.e., an additional 69 days' credit. Thus, the Act, it was initially thought, could result in the immediate release of hundreds of inmates.

Unfortunately, in Congress' haste to pass this legislation, a provision of a prior version was left in place that will significantly delay the effective date of this change. According to Section 102(b)(2) of the Act, this change to calculating good conduct time credits will not take effect until “the Attorney General completes and releases the risk and needs assessment system” required by another provision of the Act that we will address in the third installment to this series.

The First Step Act requires that the risk assessment system be finalized and released publicly no later than 210 days (seven months) after the Act's signing. In other words, no one will see additional good time credit added to their sentence until at least seven months after Dec. 21, 2019, unless the Department of Justice completes and releases the risk assessment tool sooner.

Obviously, the recent record-long government shutdown has only contributed to further delays in implementing this and other provisions of the Act. In the meantime, fortunately, indications are that Congress is aware of the problem and working on a legislative fix. In any event, once effective, it will apply retroactively.

All incarcerated individuals, other than those serving a life sentence, are eligible for good time credits.

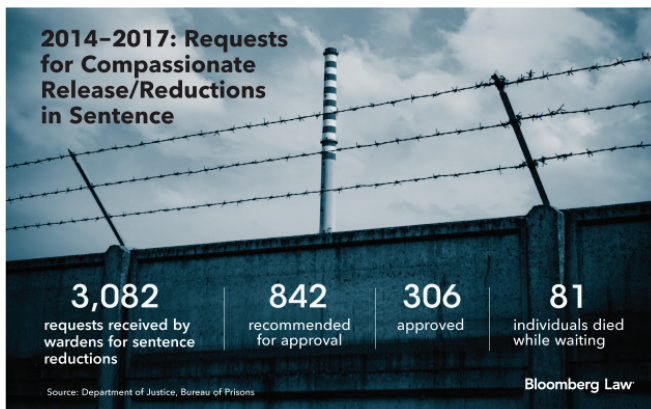
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## Compassionate Release

Congress created compassionate release as a vehicle for reducing the sentences of inmates with a debilitating medical condition (e.g., serious or terminal illness), or elderly inmates who already have served a significant amount of their time where continued incarceration would be inequitable and unjust. Compassionate release may also be considered in non-medical circumstances such as the death or incapacitation of a spouse, registered partner, or the sole family caregiver of an inmate's child. Regardless of the basis for compassionate release, [BOP regulations](#) require extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.

In 2016, the U.S. Sentencing Commission, "conducted an in-depth review" of the BOP's compassionate release program "including consideration of Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates, as well as two reports issued by the Office of the Inspector General of the Department of Justice that were critical of the Bureau of Prisons' implementation of its compassionate release program. . . . In February 2016, the Commission held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility, to add guidance to the medical criteria, and to remove other administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants."



So concerned was the Sentencing Commission by the low approval rates and the fact that only the director of the BOP could file compassionate release motions, that it actually amended the U.S. Sentencing Guidelines to "encourage" the director to more frequently file such motions under even broader criteria than what the BOP then [utilized](#).

In Section 603 of the Act, Congress now has gone one step further by giving inmates the right to file a motion for compassionate release with their sentencing judges. This right is only triggered, however, if a warden fails to move for compassionate release within 30 days of an inmate's initiating request, or after the inmate has

exhausted his administrative remedies if the warden denies compassionate release within the 30 days.

Specifically, and most importantly, [Program Statement 5050.50](#) issued on Jan. 17, 2019, entitled "Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)" previously provided and still provides in relevant part (28 C.F.R §571.63 Denial of request):

- When an inmate's request is denied by the Warden, the inmate will receive written notice and a statement of reasons for the denial. The inmate may appeal the denial through the Administrative Remedy Procedure (28 CFR part 542, subpart B).
- When an inmate's request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) is denied by the General Counsel [BP-11], the General Counsel shall provide the inmate with a written notice and statement of reasons for the denial. This denial constitutes a final administrative decision.

## What's New?

What is new is the following:

- Under 18 U.S.C. 3582 (c) (1), an inmate may file a request for a reduction in sentence with the sentencing court after receiving a BP-11 response under subparagraph (a), the denial from the General Counsel under subparagraph (d), or the lapse of 30 days from the receipt of such a request by the Warden of the inmate's facility, whichever is earlier. (Emphasis added).

In other words, before the First Step Act took effect, inmates could not appeal the denial of their application for compassionate release to their sentencing judge. Now, under the First Step Act, they can. They may file a request for reduction of sentence with the sentencing judge after receiving a BP-11 denial of the application or the lapse of 30 days from the receipt of such a request by the warden at the inmate's facility, whichever is earlier.

In light of the fact inmates now have the right to move for compassionate release, it is expected that such releases will be more frequently and quickly granted. Luckily, this provision of the Act took immediate effect, and was not hampered by an oversight in legislative drafting.

## Conclusion

The tough-on-crime/War on Drugs rhetoric that largely contributed to the incarceration crisis in this country appears to finally be turning a corner in favor of an empirical-based approach focused on recidivism reduction, favorable re-entry programming,

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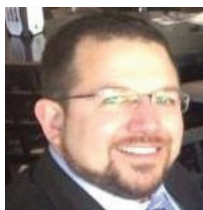
and earlier release. More about recidivism reduction programming and earlier release in our next article in the series.

\*A prior [article](#) focused on the sentencing reform aspects of the Act. The final article will discuss the Act's requirement of the BOP to introduce recidivism reduction programming, which can lead to earlier releases and expanded use of home confinement.

#### About the Authors



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