

## INSIGHT: First Step Act of 2018— Early Release for Elderly Inmates

By Alan Ellis, Mark Allenbaugh and Nellie Torres Klein

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An inmate walks to his cell as corrections officers patrol.  
(Photo by David Paul Morris/Bloomberg)

*Federal sentencing and prison experts Alan Ellis, Mark Allenbaugh, and Nellie Torres Klein take another look at the First Step Act of 2018, a new bipartisan federal prison reform law. In Part 3 of this three-part series, they examine the pilot program offering early release and expanded home confinement to elderly and terminally ill prisoners.*

In response to numerous concerns about the Bureau of Prisons aging inmate population, including a [2016 Report from the Office of Inspector General for the U.S. Department of Justice](#), the First Step Act (FSA) has expanded early-release programs available to inmates in several ways, which are found in two separate policies.

The OIG Report found that elderly inmates are more costly to incarcerate than their younger counterparts due to increased medical needs, limited institution staff and inadequate staff training affect the BOP's ability to address the needs of aging inmates, and the BOP does not provide programming opportunities specifically to meet the needs of aging inmates.

The OIG report also determined that aging inmates engage in fewer misconduct incidents while incarcerated and have a lower rate of re-arrest while released; but noted that BOP policies limit the number of aging inmates who could be considered for early release and, as a result, few were actually released early.

The report concluded that early release could result in significant cost savings without any danger to the community. This article, the third in an on-going series of articles about the First Step Act, reviews the criteria for early release under these new policies.

### Compassionate Release

The updated [Compassionate Release Program Statement](#) allows the director of the BOP to file a motion for a reduction in time for inmates age 70 years or older who have served 30 years or more of their term of imprisonment after Nov. 1, 1987, and deemed not a danger to the safety of any other person or the community.

A second new policy also allows the BOP to file a motion for a Reduction in Sentence (RIS) to inmates with medical conditions who meet the following criteria:

- Aged 65 and older;
- Suffer from a chronic or serious medical condition related to the aging process;
- Experiencing deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility;
- Conventional treatment promises no substantial improvement to their mental or physical condition; and
- Have served at least 50 percent of the sentence.

Additionally, for inmates in this category, the BOP should consider the following factors when evaluating the risk that an elderly inmate may reoffend:

- The age at which the inmate committed the current offense;
- Whether the inmate suffered from these medical conditions

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- at the time the inmate committed the offense; and
  - Whether the inmate suffered from these medical conditions at the time of sentencing and whether the Presentence Investigation Report (PSR) mentions these conditions.

A third category of inmates also qualify for RIS entitled “Other Elderly Inmates.” This applies to individuals who are aged 65 or older who have served the greater of 10 years or 75 percent of the term of imprisonment to which the inmate is sentenced.

### Factors, Evaluation of Circumstances in RIS Requests

For all RIS requests, the following factors should be considered:

- Nature and circumstances of the inmate’s offense
- Criminal history
- Comments from victims
- Unresolved detainers
- Supervised release violations
- Institutional adjustment
- Disciplinary infractions
- Personal history derived from the PSR
- Length of sentence and amount of time served. This factor is considered with respect to proximity to release date or Residential Reentry Center (RRC) or home confinement date.
- Inmate’s current age
- Inmate’s release plans (employment, medical, financial)
- Whether release would minimize the severity of the offense

When reviewing RIS requests, these factors are neither exclusive nor weighted. These factors should be considered to assess whether the RIS request presents particularly extraordinary and compelling circumstances.

### Expanded Home Detention

The FSA also expanded a pilot program created by the [Second Chance Act of 2007](#), to determine the effectiveness of placing eligible federal prisoners on home detention, which includes detention in nursing homes or other residential long-term care facilities, until the end of their prison term.

The earlier program did not achieve critical acclaim. In fact, nothing further happened with respect to the pilot program until the enactment of the FSA on Dec. 21, 2018, when Congress renewed and expanded the pilot program.

The FSA now provides for certain nonviolent offenders to be placed in home detention. The program:

- Is open to those 60 and older or terminally ill;
- Provides that violations of the terms of home detention result in a return to prison;

- Will be carried out during fiscal years 2019 through 2023;
- Is not open to those serving life terms or convicted of certain offense, such as crimes of violence or sex crimes.

These updated eligibility criteria are substantially different and have the potential to assist qualified inmates to transition directly from prison to home detention earlier. The Attorney General, through the BOP, retains broad discretion in implementing this program and each case is expected to result in substantial savings to the government.

The BOP did not waste any time in promulgating an Operations Memorandum issued April 4, 2019, entitled “[Home Confinement under the First Step Act](#).” This Operations Memo re-established and expanded the above pilot program in relevant part as follows:

Home Confinement for Low Risk Offenders—Section 602 of the FSA modified 18 U.S.C. §3621(c)(1), and authorizes the BOP to maximize the amount of time spent on home confinement when possible. The provision now states, with the new FSA language in bold.

- “Home confinement authority. The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.” (Emphasis added).
- The Bureau interprets the language to refer to inmates that have lower risks of reoffending in the community, and reentry needs that can be addressed without RRC placement. The Bureau currently utilizes home confinement for these inmates. Accordingly, staff should refer eligible inmates for the maximum amount of time permitted under the statutory requirements. (Emphasis added).

The following practical issues should be considered even if an inmate believes he or she is otherwise eligible. Under 18 U.S.C. § 3624, home confinement was originally intended for the shorter of 10 percent of the remaining term of imprisonment or six months. Therefore, in some cases, the BOP will have to consider and grant Section 3624 waivers for eligible elderly offenders (and eligible terminally ill inmates). As a result, inmates may have to lower their expectations as to how quickly their applications may be considered.

The BOP will also consider several other factors such as the inmate’s history of violence, prior escapes (or attempted escapes), issues related to custody classification, and a determination that the individual does not pose a substantial risk of engaging in criminal

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conduct or of endangering any person of the public if released to home confinement.

Finally, a transfer to home confinement must result in a substantial net reduction of costs to the federal government as determined by the BOP. This gives the agency tremendous discretionary power.

Qualified inmates should strive to maintain clear conduct, have a release plan, and if possible, have medical insurance or be ready to apply for Medicare if eligible. To be sure, home detention will be treated as a place of incarceration. Any violations of the terms of home detention will likely result in an immediate return to a secure correctional facility and there is nothing in the statute requiring any due process protections for alleged infractions.

The new compassionate release programs actually shorten the term of imprisonment; whereas those transferred to home confinement pursuant to Operations Memorandum 001-2019 will serve their entire sentence (minus good conduct time).

## Conclusion

Elderly inmates are often the most vulnerable individuals in custody. The FSA provides the BOP with the authority for both compassionate release and home detention as tools to provide valuable and meaningful opportunities to reunite low risk offenders with their families. It will also likely result in substantial cost savings to the public without any risk to their safety.

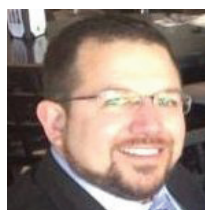
The BOP is to be commended on moving so quickly on the new compassionate release and expanded home detention pilot program policies. Now is the time for the agency to execute these programs as intended.

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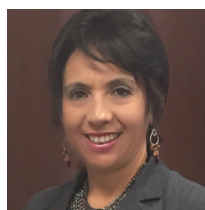
## About the Authors



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