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# INSIGHT: The First Step Act of 2018—A Significant First Step in Sentencing Reform

By Alan Ellis and Mark Allenbaugh

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*Federal criminal sentencing experts Alan Ellis and Mark Allenbaugh dissect the First Step Act of 2018, a new bipartisan federal prison reform law. In Part 1 of a three-part series, the authors focus on: the significant expansion of the "safety valve;" the reduction of mandatory minimum penalties for second and third-strike offenders; the elimination of a particular draconian form of "stacking"; and making the Fair Sentencing Act of 2010 retroactive. The authors warn the immediate impact of the changes may be minimal, given that some are not retroactive.*

The First Step Act of 2018 (the Act) has been heralded as "the most far-reaching overhaul of the criminal justice system in a generation."

The Act represents a dramatically different and enlightened approach to fighting crime that is focused on rehabilitation, reintegration, and sentencing reduction, rather than the tough-on-crime, lock-them-up rhetoric of the past.

While not containing many reforms urged by criminal justice experts, including these authors, what is overwhelmingly clear from the legislation is that Congress recognizes not just the importance of data analysis in reducing recidivism (that will be addressed in subsequent articles), but also recognizes that long prison sentences really ought to be reserved only for the more dangerous offenders.

**Title IV: Sentencing Reform & Mandatory Minimum Penalties**

*1. Broadening the Scope of the Safety Valve*

Perhaps the Act's most far-reaching change to sentencing law is its expansion of the application of the Safety Valve—the provision of law that reduces a defendant's offense level by two and allows judges to disregard an otherwise applicable mandatory minimum penalty if the defendant meets certain criteria. It is aimed at providing qualifying low-level, non-violent drug offenders a means of avoiding an otherwise draconian penalty. In fiscal year 2017, nearly one-third of all drug offenders were found eligible for the Safety Valve.

Until the Act, one of the criteria for the Safety Valve was that a defendant could not have more than a single criminal history point. This generally meant that a defendant with as little as a single prior misdemeanor conviction that resulted in a sentence of more than 60 days was precluded from receiving the Safety Valve.

Section 402 of the Act relaxes the criminal history point criterion to allow a defendant to have up to four criminal history points and still be eligible for the Safety Valve (provided all other criteria are met). Now, even a prior felony conviction would not per se render a defendant ineligible from receiving the Safety Valve so long as the prior felony did not result in a sentence of more than 13 months' imprisonment.

Importantly, for purposes of the Safety Valve, prior sentences of 60 days or less, which generally result in one criminal history point, are never counted. However, any prior sentences of more than 13 months, or more than 60 days in the case of a violent offense, precludes application of the Safety Valve regardless of whether the criminal history points exceed four.

These changes to the Safety Valve criteria are *not* retroactive in any way, and only apply to convictions entered on or after the enactment of the Act. Despite this, it still is estimated that these changes to the Safety Valve will impact over 2,000 offenders annually.

*2. Reduction and Restriction of Mandatory Minimum Penalties for Recidivists*

Currently, defendants convicted of certain drug felonies are subject to a mandatory minimum 20 years' imprisonment if they previously were convicted of a single drug felony. If they have two or more prior drug felonies, then the mandatory minimum becomes life imprisonment. Section 401 of the Act reduces these mandatory minimums to 15 years and 25 years respectively.

Section 401 expands the prior predicates to include serious violent felonies but limits any predicate offenses to either serious drug felonies or serious violent felonies. Furthermore, to qualify as a predicate, the defendant must have received more than 12 months' imprisonment, and, with respect to drug offenses only, the sentence must have ended within 15 years of the commencement of the instant offense.

These amendments apply to any pending cases, except if sentencing already has occurred. Thus, they are not fully retroactive. Had they been made fully retroactive, it is estimated they would have reduced the sentences of just over 3,000 inmates. As it stands, these reduced mandatory minima are estimated to impact only 56 offenders annually.

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*3. Eliminating 924(c) Stacking*

Section 403 of the Act eliminates the so-called "stacking" of 18 U.S.C. § 924(c)(1)(A) penalties. Section 924(c) provides for various mandatory *consecutive* penalties for the possession, use, or discharge of a firearm during the commission of a felony violent or drug offense. However, for a "second or subsequent conviction" of 924(c), the mandatory consecutive penalty increases to 25 years.

Occasionally, the Government charges a defendant with multiple counts of 924(c), which results in each count being sentenced consecutive to each other as well as to the underlying predicate offense. For example, a defendant is charged with two counts of drug trafficking and two counts of 18 U.S.C. § 924(c)(1)(A)(i), which requires a consecutive 5 years' imprisonment to the underlying offense for mere possession of a firearm during the commission of the drug offense. At sentencing, the Court imposes 40 months for the drug trafficking offenses. As a result of the first § 924(c)(1)(A)(i) conviction, the Court must impose a consecutive 60 months (5 years). But what about the second § 924(c)(1)(A)(i) conviction? In such situations, courts have been treating the second count as a "second or subsequent conviction." As such, the 60-month consecutive sentence becomes a 300 month (25 years) consecutive sentence. In our hypothetical, then, the sentencing court would impose a total sentence of 400 months (40+60+300) inasmuch as the second 924(c) count was a "second or subsequent conviction."

Now, under the Act, to avoid such an absurd and draconian result, Congress has clarified that the 25-year mandatory consecutive penalty only applies "after a prior conviction under this subsection has become final." Thus, the enhanced mandatory consecutive penalty no longer can be applied to multiple counts of 924(c) violations.

This amendment is applicable only to pending cases and is not fully retroactive to cases where a sentence already has been imposed by the date of the enactment of the Act. Had this change been made fully retroactive, it is estimated it would have impacted 731 offenders. As it is, this change to the law will only impact an estimated 57 offenders annually.

*4. Making the Fair Sentencing Act of 2010 Fully Retroactive*

Finally, Section 404 of the Act makes the changes brought about by the Fair Sentencing Act of 2010 fully retroactive. As the U.S. Sentencing Commission's "2015 Report to Congress: Impact of the Fair Sentencing Act of 2010," explained: *"The Fair Sentencing Act of 2010 (FSA), enacted August 3, 2010, reduced the statutory penalties for crack cocaine offenses to produce an 18-to-1 crack-to-powder drug quantity ratio. The FSA eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased statutory fines. It also directed the Commission to amend the U.S. Sentencing Guidelines to account for specified aggravating and mitigating circumstances in drug trafficking offenses involving any drug type."*

While the Act now makes the FSA fully retroactive, those prisoners who already have sought a reduction under the FSA and either received one, or their application was otherwise adjudicated on the merits, are not eligible for a second bite at the apple. It is estimated that full retroactive application of the FSA will impact 2,660 offenders.

**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.

Reducing the severity and frequency of some draconian mandatory minimum penalties, increasing the applicability of the safety valve, and giving full retroactive effect to the FSA signals a more sane approach to sentencing, which will help address prison overpopulation, while ensuring scarce prison space is reserved only for the more dangerous offenders.

While there certainly is more that can and should be done in terms of criminal justice reform, the Act is a significant step in the right direction.

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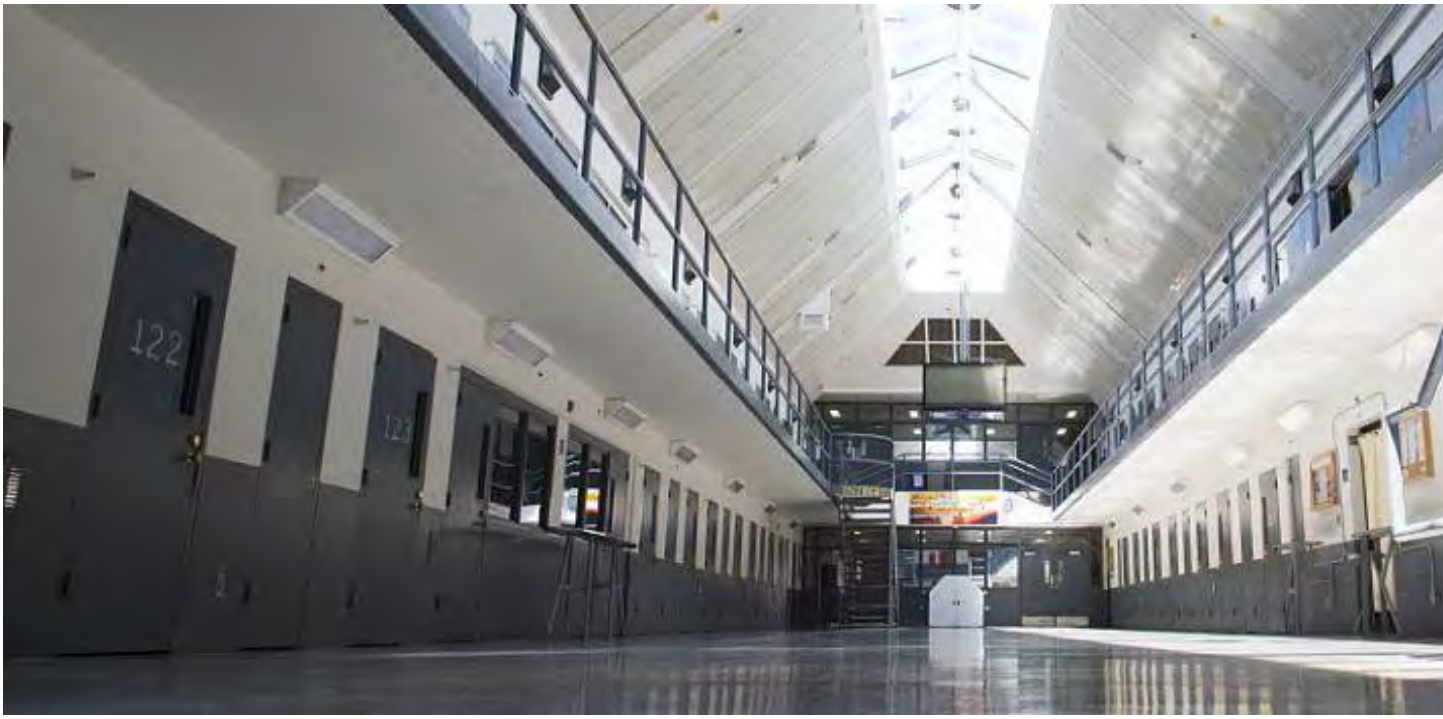

A prison cell block.
SAUL LOEB/AFP/Getty Images

Insights

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

Posted Feb. 15, 2019, 4:00 AM

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.

## 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 regulationsrequire 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 helda 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, 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.

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# 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.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

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