

Summary: First Step Act, S. 756 (115th Congress, 2018)

FAMM's position on the First Step Act: FAMM supports the First Step Act. While the bill is not perfect, it will bring much-needed reform to federal mandatory minimum sentencing laws as well as improve programming and conditions within the federal Bureau of Prisons (BOP). These reforms will also improve the lives of the families of loved ones in federal prison, who often do the time with their loved ones in one way or another. We are grateful for the hard work of the bill sponsors, who have carefully listened to our feedback and incorporated some of our suggestions.

What the bill would do: The First Step Act would require the BOP to adopt a risk assessment tool in cooperation with an independent review commission, assess all federal prisoners for their risk of recidivism, and categorize them as minimum, low, medium, or high risk. Some federal prisoners would be able to earn time credits for completing rehabilitative programs, which minimum- and low-risk prisoners would be allowed to redeem for more time in a halfway house or home confinement at the end of a person's sentence. Medium- and high-risk prisoners would have to petition to redeem the time credits they earn, but would only redeem credits with approval of the warden and a determination that they are not likely to reoffend and not a public safety threat. Prisoners who cash in their time credits for time on home confinement or a halfway house would be sent back to prison for violating the conditions of their release. The bill would apply only to federal prisoners, not state prisoners.

The bill makes numerous other reforms to federal prisons, including the following:

Positive reforms:

1. **Reduces lengthy mandatory minimums for repeat drug offenders**, reducing mandatory life without parole for a third felony drug offense to 25 years and reducing the 20-year mandatory minimum for a second felony drug offense to 15 years under 21 U.S.C. § 841 (prospective only);
2. **Expands the drug safety valve** to grant judges greater discretion at sentencing. The First Step Act would expand the safety valve to apply to defendants with up to 4 criminal history points, as long as they do not have a 3-point offense or a 2-point violent offense as determined by the United States Sentencing Guidelines (prospective only);
3. **Fix 18 U.S.C. § 924(c) "stacking" practice** so that first-time offenders cannot receive the 25-year mandatory minimum sentence intended for repeat offenders (prospective only);
4. **Apply the Fair Sentencing Act of 2010 retroactively** so that the nearly 3,000 federal prisoners serving since-reformed mandatory minimum crack sentences may motion the court for resentencing;
5. **Adjusts good time credit calculation** so that prisoners receive 54 days of good time credit per year, not 47 days, for following prison rules (retroactive);

6. **Requires BOP to put lower-risk, lower-needs people in home confinement** for the full amount of time permitted under current law (10 percent of the person's sentence or 6 months, whichever is less);
7. **Requires the BOP to place prisoners within 500 driving miles, not air miles, of home**, if security classification, programming and medical needs, and bed space allow it;
8. **Reforms the BOP's compassionate release process** for prisoners facing "extraordinary and compelling" circumstances, including
 - Allowing prisoners to appeal denials of compassionate release to federal courts after all other BOP remedies have been exhausted or at least 30 days have passed since the request was submitted;
 - Requiring annual data reporting on BOP's use of compassionate release;
 - Creating an expedited timeline for BOP consideration of compassionate release requests of terminally ill prisoners;
 - Permitting family members, lawyers, and BOP staff to help prisoners file compassionate release requests;
 - Requiring better notice to BOP staff and prisoners of when compassionate release is available and how to ask for it;
9. **Authorizes \$75 million in funding per year for 5 years** for rehabilitative programs in federal prisons;
10. **Gives incentives to prisoners who cannot earn time credits for completing rehabilitative programs**, including:
 - Up to 510 phone minutes per month (which prisoners must pay for);
 - Additional time for visits, determined by the warden;
 - Addition time using the BOP's email system (which prisoners must pay for);
 - Transfer to a prison closer to the person's home, if the warden approves;
 - Increased commissary spending limits and product offerings;
 - Consideration for transfer to preferred housing units;
11. **Requires BOP to help people get government identification** cards and birth certificates before they leave prison;
12. **Reauthorizes an elderly prisoner early release pilot program** from the Second Chance Act of 2007, allowing elderly and elderly terminally ill prisoners in certain federal prisons to be released from prison early if they are at least 60 years old, have served 2/3 of their sentences, and meet all of the other requirements;
13. **Bans shackling of pregnant women** in federal prisons and jails;
14. **Expands Federal Prison Industries**;
15. **Requires BOP to expand programs quickly**, putting them in place for all eligible prisoners within three years of the bill's passage. During this phase-in period, prisoners closest to release get priority for being placed in programs. After the phase-in period, medium- and higher-risk prisoners are given priority to be placed in programs, while jobs are prioritized for minimum- and low-risk prisoners.
16. **Requires an independent review committee to study the BOP risk and needs assessment.** The bill would require the formation of an independent review commission consisting of academics and corrections professionals with expertise in risk assessments, and an individual with expertise in assessing risk assessment implementation.
17. **Greatly limits the use of solitary confinement for juvenile offenders.**
18. **Reauthorizes the Second Chance Act of 2007.**

Areas for future improvement:

1. **Repeals no mandatory minimum sentences, and reforms are not retroactive.** The bill's sentencing reforms are very modest and include no repeals of mandatory sentences, in contrast with what states like Louisiana, Oklahoma, and South Carolina have done. With the exception of retroactivity of the Fair Sentencing Act, none of the First Step Act's changes to mandatory minimums are applied retroactively to people already in federal prison.
2. **The bill excludes many people from earning and using time credits.** Any person who will return to our communities from prison someday should get time credit incentives for doing the hard work of rehabilitation. But the First Step Act excludes many people from earning time credits. Even though these offenders would not be eligible to earn time credits for program completion, they are not excluded from participating in programs. They are allowed to do programs and could earn other incentives for completing programming, such as increased visiting time with families, more minutes for phone calls, more commissary privileges, or transfer to a different prison. People who committed the following offenses cannot earn time credits under the First Step Act:
 - Trafficking or importing in heroin if the offender was an organizer, leader, manager, or supervisor of others in the offense (21 U.S.C. § 841 (b)(1)) or (21 U.S.C. § 960(b))
 - Trafficking or importing in fentanyl (21 U.S.C. § 841 (b)(1)) or (21 U.S.C. § 960(b))
 - Trafficking or importing in a mixture or substance containing a detectable amount of fentanyl if the offender was an organizer, leader, manager, or supervisor of others in the offense (21 U.S.C. § 841 (b)(1)) or (21 U.S.C. § 960 (b))
 - Trafficking or importing in a mixture containing a detectable amount of methamphetamine if the offender was an organizer, leader, manager, or supervisor of others in the offense (21 U.S.C. § 841 (b)(1)) or (21 U.S.C. § 960 (b))
 - Unlawful possession or use of a firearm during and in relation to any crime of violence or drug trafficking crime (18 U.S.C. 924(c))
 - Manufacturing or distributing drugs, with death or serious bodily injury resulting from the use of those drugs (21 U.S.C. § 841(b)(1)(A), (B), or (C))
 - Arson (18 U.S.C. § 81)
 - Assault, resist, or impediment of a police officer with a deadly weapon or resulting in bodily injury (18 U.S.C. § 111(b))
 - Assault with intent to murder or murder of a spouse, intimate partner, or dating partner by strangling or suffocating (18 U.S.C. § 113(a))
 - Manufacturing or distributing drugs, with death or serious bodily injury resulting from the use of those drugs (21 U.S.C. § 841(b)(1)(A), (B), or (C))
 - Receipt or distribution of child pornography (18 U.S.C. § 2252(a)(1), (2), or (3))
 - Possession, distribution, or sale of child pornography (18 U.S.C. § 2252A(a))
 - Assault with intent to commit murder (18 U.S.C. § 113(a)(1))
 - Influencing, impeding, retaliating against a federal officer by injuring a family member, except for a threat (18 U.S.C. § 115)
 - Female genital mutilation (18 U.S.C. § 116)
 - Domestic assault by a habitual offender (18 U.S.C. § 117)

- Biological weapons (18 U.S.C., chapter 10)
- Chemical weapons (18 U.S.C., chapter 11B)
- Assassination, kidnaping, or assault of a congressional, cabinet, or Supreme Court member (18 U.S.C. § 351)
- Felony committed while in a criminal street gang (18 U.S.C. § 521)
- Escape or attempt to escape from prison (18 U.S.C. § 751)
- Gathering, transmitting, losing defense information (18 U.S.C. § 793)
- Gathering or delivering defense information to aid a foreign government (18 U.S.C. § 794)
- Explosives or dangerous articles (chapter 39, U.S. Code, except for § 836 offenses involving transportation of fireworks into a state that prohibits their sale or use)
- Distribution of information relating to weapons of mass destruction (18 U.S.C. § 842(p))
- Use of fire or explosive (18 U.S.C. § 844(f)(3), (h), or (i))
- Computer fraud (18 U.S.C. § 1030(a)(1))
- Murder under 18 U.S.C., chapter 51, except for manslaughter (18 U.S.C. § 1112), attempt to commit manslaughter (18 U.S.C. § 1113), misconduct or neglect of ship officers (18 U.S.C. § 1115), protection against HIV (18 U.S.C. § 1122)
- Kidnaping (18 U.S.C., chapter 55)
- Human trafficking and slavery (18 U.S.C., chapter 77), except for sections 1593 through 1596
- Assault, kidnaping, or assassination of president or presidential staff (18 U.S.C. § 1751)
- Providing or possessing contraband in prison (18 U.S.C. § 1791)
- Rioting or mutiny in federal prison (18 U.S.C. § 1792)
- Intentionally killing or attempting to kill an unborn child (18 U.S.C. § 1841(a)(2)(C))
- Terrorist attacks against railways or mass transportation systems (18 U.S.C. § 1992)
- Bank robbery resulting in death (18 U.S.C. § 2113(e))
- Robberies or burglaries involving controlled substances resulting in assault or use of dangerous weapon (18 U.S.C. § 2118(c))
- Robberies or burglaries involving drugs, which result in death (18 U.S.C. § 2118(c)(2))
- Carjacking (18 U.S.C. § 2119)
- Sabotage (18 U.S.C., chapter 105, except for § 2152)
- Sexual abuse (18 U.S.C., chapter 109A, except for those convicted under any provision of § 2244 other than subsection (c))
- Failure to register as a sex offender (18 U.S.C. § 2250)
- Sexual exploitation of children (18 U.S.C. § 2251)
- Selling or buying children (18 U.S.C. § 2251A)
- Producing child pornography for importation (18 U.S.C. § 2260)
- Transportation of explosive, biological, radioactive, chemical, or nuclear materials (18 U.S.C. § 2283)
- Transportation of terrorists (18 U.S.C. § 2284)

- Destroying a vessel or port, if it involved substantial risk of death or serious bodily injury (18 U.S.C. § 2291)
- Terrorism (18 U.S.C. chapter 113B)
- Torture (18 U.S.C. § 2340A)
- Treason (18 U.S.C. § 2381)
- Recruiting or using child soldiers (18 U.S.C. § 2442)
- Developing or producing nuclear material (42 U.S.C. § 2077(b))
- Atomic weapons offenses (42 U.S.C. § 2122)
- Atomic energy license violations (42 U.S.C. § 2131)
- Communication or receipt of restricted atomic data (42 U.S.C. § 2274, 2275)
- Sabotage of nuclear facilities or fuel (42 U.S.C. § 2284)
- Damaging or destroying a pipeline facility, if the conduct involved a substantial risk of death or serious bodily injury (49 U.S.C. § 60123(b))
- Illegal reentry of certain removed aliens listed in 8 U.S.C. § 1326(b)(1) or (2) (e.g., the person has a prior conviction for a felony, an aggravated felony, or 3 or more misdemeanor drug or person crimes)
- Aiding or assisting certain aliens to enter the united states (8 U.S.C. § 1327)
- Importation of an alien for immoral purpose (8 U.S.C. § 1328)
- Export violations (50 U.S.C. App. 4611 et seq.)
- International Emergency Economic Powers Act (50 U.S.C. § 1705)
- Disclosing identities of undercover agents, informants, sources (50 U.S.C. § 3121)
- Robbery or burglary involving controlled substances resulting in death (18 U.S.C. § 2118(c)(2))
- Destruction of aircraft or aircraft facilities (18 U.S.C. § 32)
- Destruction of motor vehicles or motor vehicle facilities (18 U.S.C. § 33)
- Drive-by shooting (18 U.S.C. § 36)
- Threats against the President (18 U.S.C. § 871)
- Threats against former Presidents (18 U.S.C. § 879)
- Genocide (18 U.S.C. § 1091)
- A conviction for
 - a. An offense listed in 18 U.S.C. § 3559(c)(2)(F) (murder, manslaughter, voluntary manslaughter, assault with intent to commit murder, assault with intent to commit rape, aggravated sexual abuse, sexual abuse, abusive sexual contact, kidnaping, aircraft piracy, robbery, carjacking, extortion, arson, firearm use, firearm possession during a drug offense or crime of violence, and attempt, conspiracy, or solicitation to commit any of these offenses) AND
 - b. The person was sentenced to a year or more in prison for this conviction, AND
 - c. The person has a prior state or federal conviction for murder, voluntary manslaughter, assault with intent to commit murder, aggravated sexual abuse, sexual abuse, abusive sexual contact, kidnaping, carjacking, arson, or terrorism, for which the person served a year or more in prison
- District of Columbia offenders housed in federal prisons
- State offenders housed in federal prisons
- People serving life sentences

- Noncitizens facing deportation or removal from the U.S.
3. **May not greatly reduce recidivism** because the bill gives time credit incentives for completing rehabilitative programs to the minimum- and low-risk prisoners who are least likely to reoffend, not to the medium- and higher-risk prisoners who are more likely to reoffend and more in need of incentives to complete programs. This approach is not evidence-based. Minimum- and low-risk prisoners may earn more credits than medium- and high-risk prisoners (15 days per month of programming vs. 10 days per month of programming) and are the only prisoners likely to be able to “cash in” and actually enjoy earned time credits. It is unclear whether those with higher risk levels would ever be able to lower their risk scores or “cash in” the time credits they would earn. If time credits become an illusory incentive for those most likely to reoffend, the bill may not increase program participation and reduce recidivism – an outcome that could be blamed on prisoners rather than on the bill’s backwards incentive structure.
 4. **The bill’s time credit incentives are not real time off the person’s sentence.** Time credits earned may be used only for more time in a halfway house or on home confinement. Even those prisoners who would be able to cash in their credits could be unable to have a place to go to spend them, because of lack of halfway houses and limited use of home confinement. There are currently not enough halfway houses; average halfway house stays are only for two to four months. Home confinement has been historically underutilized, which this bill attempts to remedy. Nonetheless, the availability of home confinement will depend heavily on whether there are enough probation officers to meet demand. The most successful BOP rehabilitation program is the residential drug abuse program (RDAP) – and it works and has a 5,000-person waiting list because it gives a one-year sentence reduction to those who complete it. Congress should be following that model in doing prison reform and give people real time off their sentences, not a promise of more of something they already cannot get.