TO:        First Step Act Supporters  
FR:        Kevin Ring, President  
           FAMM  
RE:        Need for legislative fix to the First Step Act’s “good time” provision

On behalf of the thousands of individuals incarcerated in federal prison and their families who thought the good time credit reform included in the First Step Act would take effect immediately upon enactment, I am writing to seek your support for a technical legislative fix to make that promise a reality. Without a fix that gives effect to Congress’s intent when it passed the law, families will be forced to wait six months or more for this reform to be implemented.

As you no doubt know by now, Section 102(b)(1)(A) of the First Step Act increases the amount of annual good time federal prisoners can receive from 47 days to 54 days. In addition, the provision applies this increase retroactively. This provision was added to the House version of the bill shortly before the Judiciary Committee approved it. From all accounts, the bill’s sponsors and advocates intended for the provision to take effect immediately after the bill was signed into law.

Unfortunately, the good time language was added to the subsection of the bill – 102(b) – that sets forth the implementation of the risk and needs assessment system that the Attorney General is required to create in section 101 of the Act. Section 102(b)(2) then includes the following:

   Effective Date.-- The amendments made by this subsection shall take effect on the date that the Attorney General completes and releases the risk and needs assessment system under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act. (emphasis added)

The Bureau of Prisons has interpreted 102(b)(2) to mean that all of the changes made in that subsection, including the good time credit reform, cannot take effect until the Attorney General completes and releases the risk and needs assessment system, which the law elsewhere gives the Attorney General 210 days to finish.

We believe this placement was inadvertent as there was no reason to put the good time language in the same section as the earned time credit and risk assessment system. This is because good time is awarded to all prisoners (other than lifers), regardless of their risk level. The risk and needs assessment system is not relevant to the good time increase.

The reason that Congress must fix this problem is that the law’s language is clear. BOP’s interpretation is not only reasonable, it is the only way to interpret the law without ignoring the text entirely. The Justice Department signed off on the BOP’s interpretation and released a
statement supporting it. The Department also agreed with BOP’s decision to send a memo to all federal prisons, beginning on approximately January 7, notifying prisoners that the good time reform would not take effect until after the Attorney General completed and released the risk and needs assessment.

Furthermore, the Justice Department adopted the BOP’s interpretation in defending the Bureau in a case brought by a federal prisoner who sought immediate release from a halfway house on the grounds that his sentence, as modified by the immediate and retroactive application of the good time reform, was complete. U.S District Court Judge Sharon Johnson Coleman sided with the government. In her January 3rd order, she wrote:

Petitioner argues that under the old Bureau of Prisons policy, he is set for release from his halfway house on February 4, 2019. However, under the amendment passed by the First Step Act, Petitioner asserts he is entitled to additional good conduct credit, which would result in his immediate release from his halfway house and placement onto supervised release.

Petitioner, however, cannot obtain relief under the Act at this time. Section 102(b) of the First Step Act states that the amendment to section 3624(b) does not take effect until after the Attorney General completes and releases the needs assessment system established under section 101(a) of the Act. First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 § 102(b)(2) (2018). The Attorney General is given up to 210 days to implement the risk and needs assessment system. First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 § 101(a) (2018).

The government, at oral argument, asserted that the amendment to section 3624(b) is not yet in effect because the Attorney General has not yet completed and released the needs assessment system. The Court agrees with the government. The plain language of section 102(b)(2) of the Act is clear that the entirety of section 102(b), including the amendment to section 3624(b), is not effective until the Attorney General completes and releases the risk and needs assessment system under section 101(a) of the Act. The Act gives the Attorney General up to 210 days to complete the task. Less than two weeks have elapsed since the Act’s passage. Consequently, pursuant to section 102(b)(2), the amendment to section 3624(b) set forth in section 102(b)(1)(A) is not yet in effect and so Petitioner is not yet entitled to relief.

This Court is not unsympathetic to the apparent inequity of Petitioner’s situation. This Court, however, is obligated to apply the law as it is written. Congress chose to delay the implementation of the First Step Act’s amendments until the Attorney General could complete the risk and needs assessment. The Court has no power to rewrite or disregard the statute in order to accommodate Petitioner’s situation (emphasis added).

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1 Shah v. Hartman, 18 C 7990 (2019)
Some suggest that the White House can fix this problem in one of two ways. First, they argue that the president can and should direct the Justice Department and BOP to interpret the First Step Act’s good time provision in accordance with its sponsors’ intent to make it effective immediately. Although this is theoretically possible, it seems extremely unlikely in light of the plain language in the Act and given that the Justice Department has already defended its interpretation in court and the BOP has notified all of its institutions of its view.

Second, some argue that the BOP should simply use its existing authority to interpret 18 U.S.C. §3624(b)(1) to mean that all prisoners are entitled to 54 days of good time. Under this view, the Supreme Court’s decision in Barber v. Thomas (2010) is not an obstacle because, they say, the Court held that the BOP’s interpretation (47 days) was a reasonable exercise of the BOP’s discretion to interpret the good time statute. This view misreads Barber.

The Court did not conclude that BOP’s interpretation of the statute was merely reasonable and therefore entitled to deference. Instead, the majority said BOP’s interpretation was the correct interpretation. The Court ruled that the BOP interpreted the statute as Congress intended it to be administered. Justice Breyer wrote for the majority:

In our view, the BOP’s calculation system applies that statute as its language is most naturally read, and in accordance with what that language makes clear is its basic purpose. No one doubts that the BOP has the legal power to implement the statute in accordance with its language and purposes; hence we need not determine the extent to which Congress has granted the BOP authority to interpret the statute more broadly, or differently than it has done here.

Given the Justice Department’s stance in the Barber case and the Court’s opinion, it seems extremely unlikely that the Justice Department can now adopt the position that the BOP has the authority to award 54 days of good time. Even if it were to take that position, we have serious doubts that it could apply that new interpretation retroactively.

We greatly appreciate the White House’s efforts to examine all of its options to fix this problem, a problem it did not create. In the end, however, we think it is unlikely that a nonlegislative solution will succeed. Even if we are wrong, we think Congress should not wait for the administration to exhaust every alternative before it acts. Working on two tracks, administrative and legislative, is more likely to produce the right result in the shortest period of time.

There is yet another important reason why Congress should act now. As stated, the Justice Department’s interpretation means that the good time reform can not take effect until the Attorney General completes and releases the risk and needs assessment system, and the law gives the Attorney General up to 210 days to do it. We have serious concerns that the government shutdown will make that already ambitious deadline impossible to meet. The Justice Department has already missed the first deadline established in the Act for the new
system. Section 107 of the First Step Act requires the National Institute of Justice to create an independent review committee to help the Attorney General develop the needs and risk assessment system. The law says the new committee “shall be established not later than 30 days after the date of enactment of this Act.” That deadline was January 21, 2019.

The delay is not surprising. At least some personnel who will be involved in the development of this system are not working now. Every day or week or month the system is delayed will result in further delay and hardship for the thousands of families who thought they would be reunited as soon as the bill became law.

We know that no one intended for this mistake to happen. We do not seek to blame anyone or take away from what we viewed as a heroic effort to pass major criminal justice reform. In fact, we take responsibility for our part in not catching this error before the law was enacted. At the end of the day, however, matters of credit and blame are not important to us. What matters is that the thousands of families promised a small bit of relief from this section of the bill get it.

We are happy to share with you language we have drafted to fix this error and to make clear that the retroactive increase in good time credit should take effect immediately. Please do not hesitate to contact us if you have any questions or need additional information.