



Families for Justice Reform

## A Second Chance Starts With A Second Look:

### The Case for Reconsideration of Lengthy Prison Sentences

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#### INTRODUCTION

Beginning in the 1980s, Congress enacted several pieces of legislation designed to increase prison stays in response to the rise in crime and drug use seen nationwide. The Anti-Drug Abuse Act of 1986 – spurred by the death of college basketball star Len Bias – ushered in a regime of mandatory minimum sentences for drug offenses and kicked off decades of increasingly harsh punishment at the federal level. Many states followed suit. These policies, which targeted primarily drug- and firearm-related offenses, helped lead the United States into our current era of over-incarceration. While the majority of our country’s prison population is incarcerated at the state level, the federal prison system is home to some of our nation’s lengthiest and most wasteful sentences. Unlike most states, there is no parole in the federal system.

Responding to evidence proving the ineffectiveness of lengthy mandatory sentencing schemes, the federal government has begun to move away from the strategy of relying on such sentences. However, as these reforms begin to shorten prison terms for future cases, many people already serving excessive and now outdated punishments remain in prison, because Congress has not made such reforms retroactive. The federal government should pass and implement a “second look at sentencing” provision to allow courts to examine sentences now considered excessive and reduce sentences when they can no longer be justified by public safety needs.

#### EXCESSIVE SENTENCES CONTRIBUTE TO OVER-INCARCERATION

Mandatory minimum sentencing laws prescribe one-size-fits-all sentences to a wide swath of people, often resulting in low-level offenders serving sentences designed for major kingpins or repeat serious offenders. Laws such as 18 U.S.C. § 924(c) and (e), which relate to illegal possession of firearms, and the Controlled Substance Abuse Act prescribe mandatory sentences in excess of 15 years – and up to life without parole – to a broad spectrum of defendants with greatly varying degrees of culpability.<sup>1</sup>

These laws have resulted in a significant portion of the federal prison system serving lengthy prison sentences. From 1988 to 2012, federal sentence length skyrocketed, with the average sentencing length more than doubling from 17.5 months to 37.9 months.<sup>2</sup> Despite recent reforms, a high volume of people continue to be sentenced to and serve long federal sentences. In Fiscal Year 2018, more than 6,000 federal defendants were sentenced to mandatory minimum drug sentences of 10 years or greater.<sup>3</sup> As of May 2019, more than a quarter of the federal prison population was serving a sentence greater than 15 years, approximately three percent of whom were serving a life without parole sentence.<sup>4</sup>

The prevalence of lengthy sentences, and a lack of a meaningful mechanism through which an incarcerated individual may seek relief from one,

means that a significant subpopulation of the federal prison population remains incarcerated well past the age most associated with criminal behavior. The “age-crime” curve theorizes that the risk of criminal behavior increases as an individual reaches late adolescence but drops steadily once an individual reaches adulthood.<sup>5</sup> Consistent with this theory, researchers have found an association between age and recidivism. A 2017 study from the U.S. Sentencing Commission (USSC) found that 13.4 percent of people released at the age of 65 or older recidivated, compared to 67.6 percent of people under 21 at the time of release.<sup>6</sup> Furthermore, the USSC found that the pattern of decreased risk of recidivism as age increased was “consistent across age groupings, and recidivism measured by rearrest, reconviction, and reincarceration declined as age increased.”<sup>7</sup>

As of May 2019, more than half of the federal prison population was 36 years old or older – past the ages of highest risk.<sup>8</sup> Nearly one in five people (19.2 percent) in federal prison are over age 50, well into the period of life at which we see a steep decrease in recidivism risk.<sup>9</sup>

### **CURRENT MECHANISMS FOR EARLY RELEASE ARE INADEQUATE**

Because there is no federal parole system, if an individual has been sentenced to a lengthy term of imprisonment, there are few mechanisms through which he or she can receive a reduction in sentence and early release. One is executive clemency, which allows the president to either reduce an individual’s sentence up to time served or grant a full pardon of the offense. Another is outlined in 18 U.S.C. § 3582, which provides for early release in narrowly defined situations, such as through compassionate release or a retroactive change to the United States Sentencing Guidelines, among other things. Finally, an individual may challenge the constitutionality of a sentence through a writ of habeas corpus as outlined in 28 U.S.C. § 2255.

All of these important mechanisms have been underutilized over the past 40 years or more. Even when they are used robustly, they are not

sufficient to reduce the large number of excessively sentenced people in federal prison. For example, President Barack Obama commuted 1,715 sentences, the highest total since the Truman administration, yet he approved only 5 percent of the tens of thousands of requests received.<sup>10</sup> Recent reforms to the federal compassionate release program should expand the number of early releases, but the program’s criteria likely will limit its impact on reducing the prison population.

### **ABSENCE OF RETROACTIVE SENTENCING RELIEF LIMITS FIRST STEP ACT REFORMS**

The last decade has seen the tide beginning to turn at the federal and state levels against an overly punitive approach to sentencing and corrections. In 2018, the building momentum behind federal criminal justice reform culminated in the passage of the First Step Act, a comprehensive prison and sentencing reform package. The new law, the first criminal justice reform bill to pass Congress in nearly a decade, seeks to transform the federal criminal justice system into one that focuses more intensely on rehabilitation as opposed to punishment and incapacitation, while mitigating some of the wasteful and inefficient effects of federal mandatory minimum sentencing laws.

The new law includes four long-awaited sentencing reform provisions, but only one was made retroactive. The bill made prospective reforms removing life without parole for three-strike drug offenses, expanding the safety valve, and reforming the § 924(c) stacking practice for those sentenced after December 21, 2018. As a result, thousands of people are now serving sentences that are no longer valid under federal law.

### **SECOND LOOK SENTENCING**

While the First Step Act is a much-needed step in the right direction, advocates have continued to push for policies that would bring relief to those still serving lengthy, unjust, and ineffective sentences in the federal prison system. One solution is a second look sentencing provision. This would allow individuals to petition the courts for resentencing after a period of incarceration set by Congress. The court would

then have the ability to consider an individual's rehabilitation and behavior in prison and determine whether the original sentence was still appropriate and necessary for public safety. If the progression of the individual is such that the original sentence would be a waste of resources, is unnecessary to protect the public, and unjust or harmful for the person, the court may resentence the individual to a shorter prison term or time served.

Second look sentencing is not a new concept. A second look sentencing provision was added into the American Legal Institute's *Model Penal Code* in 2008. This provision would allow the court to regain jurisdiction over a case for the purpose of considering resentencing after 15 years, with eligibility for reapplication every 10 years. In 2016, the Justice Roundtable offered a second look sentencing proposal as part of its "Roadmap for Criminal Justice" report. Under this proposal, individuals would be allowed to apply for resentencing after 10 years served, with eligibility for reapplication every two years thereafter.<sup>11</sup>

The federal government should adopt a second look sentencing provision. Federal sentencing laws have resulted in far too many people serving sentences that have reached the point of diminishing returns. With an average cost of incarceration of \$34,704<sup>12</sup>, continued incarceration when an individual is no longer a substantial risk to public safety is a waste of finite correctional resources.

Furthermore, the absence of retroactive sentencing under the First Step Act for all prisoners except those sentenced for crack cocaine offenses before August 3, 2010, has resulted in thousands of individuals serving sentences that no longer would be handed down today—including life without parole sentences. In the 114th Congress, there was strong bipartisan support for the Sentencing Reform and Corrections Act (SRCA), a comprehensive criminal justice reform bill that included the same sentencing reforms as the First Step Act but also would have provided for retroactivity. These reforms would have allowed for a resentencing hearing for individuals serving life without parole or 20-year sentences for repeat felonies. The USSC estimated that more

than 3,000 currently incarcerated individuals would have received an opportunity for sentencing relief had SRCA passed.<sup>13</sup> The First Step Act did not permit an opportunity for resentencing of the 3,095 individuals serving the very sentences the legislation has reformed going forward.

During the 116<sup>th</sup> Congress, Sen. Cory Booker (D-New Jersey) and Rep. Karen Bass (D-California) introduced a second look bill named the Matthew Charles and William Underwood Act. This bill would allow all federal prisoners with lengthy sentences to petition the courts for resentencing after serving at least 10 years of the imposed prison sentence. Prisoners who are denied during their initial review would be allowed to reapply three more times during their period of incarceration and would be granted the opportunity to appeal both the first and final determination by the sentencing court.

A second look mechanism would allow a sitting federal judge to reevaluate these cases and determine if the original sentence is still appropriate based on the individual's prison record and rehabilitation, and grant immediate release when appropriate—freeing up resources and aligning current prison sentences with federal law.

## CONCLUSION

A second look would not preempt the need for retroactive sentencing reform. Instead, a second look would function as a safeguard against costly and unnecessary incarceration of not just those already sentenced, but those sentenced in the future, as well. Despite recent legislative success on sentencing reform, many lengthy, wasteful, and unjust sentences remain intact. People with extreme sentences continue to age in prison, costing taxpayers more while posing lower and lower risk to public safety. Congress should remedy this growing problem by instituting a second look sentencing provision, which will allow people to petition the court for a reduction in sentence upon serving a significant portion of their term and allow the federal government to refocus finite correctional resources and continue their ongoing commitment to rehabilitation.

**About the Author:** Daniel Landsman is the Director of Federal Legislative Affairs for FAMM. Daniel manages FAMM's federal legislative work and collaborates with members of Congress and their staff to promote criminal justice policies that are fair, individualized, and humane.

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## ENDNOTES

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