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Federal Correctional Reform and the First Step Act of 2018

The size of the federal prison system has grown significantly since the beginning of the 1980s. The number of convicted offenders under the Bureau of Prison's (BOP's) jurisdiction has decreased in each of the past four fiscal years, but even with the recent decrease, the number of federal prisoners in FY2017 (185,617) was six times greater than was it was in FY1980 (24,640). During the same time, the population of the United States increased by 44%. Although the federal prison population decreased from FY2013 to FY2017, appropriations for BOP continued to increase through FY2016. The BOP's appropriations, adjusted for inflation, increased by \$6.5 billion from FY1980 (\$871 million) to FY2018 (\$7.326 billion). During this time, the BOP's expanding budget consumed a larger share of the Department of Justice's overall annual appropriations.

Concerns about the financial and social costs of incarcerating a growing number of federal inmates have generated interest among some policymakers about ways to reduce the federal prison population while maintaining public safety. Aside from the costs of incarceration, other costs include the detrimental effects that incarceration can have on economic opportunities and familial bonds of people who have spent time behind bars or the potential that detention may increase an inmate's likelihood to commit other crimes.

Generally speaking, there are two, not mutually exclusive, methods for reducing the number of prison inmates: (1) send fewer convicted offenders to prison or (2) reduce the length of sentences served. The 115th Congress enacted the First Step Act of 2018 (S. 756) and considered other proposals that focused on both methods.

Correctional Reform in the 115th Congress

The First Step Act largely focused on (1) reducing the penalties, especially mandatory minimum terms of imprisonment, for various federal drug and firearm offenses and (2) allowing prisoners to be placed in pre-release custody earlier by earning additional time credits as part of a recidivism reduction program built upon a risk and needs assessment system. Other legislative proposals in past Congresses to reduce the federal prison population would have made broader reductions to mandatory minimum sentences. Still other proposals sought to eliminate uncertainty over the level of knowledge or intent (*mens rea*) that culpability for some criminal offenses requires.

Reducing Penalties

The First Step Act made the following changes to federal sentencing law:

- Adjusted the mandatory minimum sentences for certain drug traffickers with prior drug convictions by increasing the threshold for qualifying prior convictions from 1-year drug felonies to 10-year drug felonies (but adding some violent felonies and not subjecting them to the 10-year threshold), reducing the 20-year mandatory minimum (applicable where the offender has one prior qualifying conviction) to a 15-year mandatory minimum, and reducing the lifelong mandatory minimum (applicable where the offender has two or more prior qualifying convictions) to a 25-year mandatory minimum.
- Permitted drug offenders with minor criminal records to qualify for the *safety valve* provision, which previously applied only to offenders with virtually spotless criminal records. The safety valve allows judges to sentence low-level, nonviolent drug offenders to a term of imprisonment that is less than the applicable mandatory minimum.
- Authorized courts to apply retroactively the Fair Sentencing Act of 2010 (P.L. 111-220), which increased the threshold quantities of crack cocaine sufficient to trigger mandatory minimum sentences, by resentencing qualified prisoners as if the act had been in effect at the time of their offense.
- Eliminated *stacking*; the 25-year mandatory minimum for a "second or subsequent" conviction for use of a firearm in furtherance of a drug trafficking crime or a violent crime now applies only where the offender has a prior conviction that is already final, not where two violations are charged concurrently (as occurred under prior law).

Other proposals would have done the following:

- Made the adjustments to mandatory minimum sentences for repeat drug offenders and the elimination of stacking retroactive, by authorizing the courts to resentence qualified prisoners consistent with general sentencing policies.
- Lowered to 10 years the 20-year mandatory minimum sentence for low-level, nonviolent participants in a substantial drug enterprise who had no more than minor criminal records.
- Reduced to 15 years the 25-year mandatory minimum for possession of a firearm in furtherance of a crime of violence or drug trafficking when the offender has a prior conviction for a crime of violence involving a firearm and permitted the courts to apply this reduction retroactively.

- Lowered to 10 years the 15-year Armed Career Criminal Act mandatory minimum sentences for felons convicted of possession of a firearm, who have three prior convictions for violent felonies or serious drug offenses (but increased from 10 years to 15 years the maximum penalty for firearm possession by felons and members of other disqualified groups).

Clarifying the Mens Rea Standard

Several bills in the 115th Congress would have endeavored to reduce the number of convictions, and consequently the number of those imprisoned, attributable to broad interpretations of federal mens rea standards. Mens rea is criminal law's state of mind standard. It is the level of knowledge or intent an individual must exhibit to be guilty of a crime. The standard varies considerably from one crime to another.

For some crimes, like speed-limit violations and certain regulatory offenses, there is no mens rea requirement. An individual is liable even though he may have acted or failed to act unknowingly or inadvertently. For other crimes, the operative criminal statute may have no express mens rea standard; it is for the courts to determine what level of knowledge or intent, if any, is required for conviction. For still other crimes, an individual may be liable for intentional conduct that he reasonably believed was not criminal. These are the situations that the proponents of mens rea proposals in the 115th Congress addressed.

One proposal spoke to the criminal statutes that have no explicit mens rea standard. There, as a default rule going forward for newly enacted criminal statutes, culpability would have been limited to those who acted *willfully*—that is, who knew their conduct was unlawful and who acted with the intent to engage in the unlawful conduct. This default rule would have become applicable to existing offenses no later than five years after enactment of the proposal. The proposal would have created exceptions to the default standard for statutes with text evidencing a congressional intent to dispense with a mens rea requirement and for elements that give rise to federal jurisdiction under various statutes (e.g., the offender travels in interstate commerce). The proposal also would have created a National Criminal Justice Commission charged with creating an inventory of federal criminal offenses that lack an explicit mens rea requirement for some or all elements.

Other proposals in earlier Congresses contained provisions for

- A default standard requiring proof that the accused acted “knowingly.” That standard, unlike the willfulness standard, would not have required proof that the accused acted with knowledge of illegality unless, under the circumstances, he might reasonably have been unaware of the criminal nature of his action.
- Separate default rules for statutes that explicitly assign a mens rea standard for some of a crime’s substantive elements but neglect to do so for other substantive elements.

- Exemptions for crimes under the Uniform Code of Military Justice.

Early Release for Prisoners

The First Step Act establishes a risk and needs assessment system in federal prisons. The legislation allows certain prisoners to earn additional time credits for successfully completing rehabilitative programs, leading to an earlier release from prison to community supervision. More specifically, the act

- Requires the Department of Justice (DOJ) to develop a risk and needs assessment system that determines the risk of recidivism for each prisoner.
- Requires the system to provide guidance on the type, amount, and intensity of rehabilitative programming that is appropriate for each prisoner and assign prisoners to appropriate rehabilitative programs.
- Requires DOJ to review and validate the system annually.
- Allows prisoners to earn 10 days of time credits for every 30 days they successfully participate in rehabilitative programming (earned time credits under the system would be in addition to any other rewards or incentives for which prisoners are eligible).
- Allows prisoners deemed a minimum or low recidivism risk and whose risk does not increase over two consecutive assessments to earn an additional five days of time credits for every 30 of successful participation in rehabilitative programming.
- Excludes prisoners serving sentences for one of dozens of enumerated offenses from earning additional time credits for successfully participating in rehabilitative programming (these crimes generally can be categorized as violent, terrorism, espionage, human trafficking, sex and sexual exploitation, repeat felon in possession of firearm, certain fraud, and high-level drug offenses).
- Requires BOP to provide rehabilitative programming and productive activities to all prisoners within two years of completing the initial risk and needs assessments for all prisoners.
- Allows prisoners to be placed on home confinement or in a residential reentry center (i.e., a halfway house) when the amount of additional time credits earned is equal to the time remaining on the prisoner’s sentence.

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