



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 12 2018

The Honorable Marc Short
Assistant to the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. Short:

We write to advise that H.R. 5682, the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act" ("FIRST STEP Act"), would adversely affect public safety and law enforcement efforts. Below is an explanation of the Department of Justice's (Department) concerns with the legislation, which the Department requests be addressed before any further action is taken on the bill.

The Department supports commonsense, evidence-based prison reform and reentry programs and is already working to find ways to reduce recidivism and help federal inmates learn to respect the rule of law and develop the skills necessary to become contributing members of society after they have served their full sentences. However, this legislation in its current form goes further, eliminating important limitations on early release for federal inmates and allowing many convicted felons to be released back into their communities far sooner than is necessary or safe for both the inmate and society. In the Department's view, this legislation, if passed in its current form, would further and significantly erode our long established truth-in-sentencing principles, create impossible administrative burdens, effectively reduce the sentences of thousands of violent felons, and endanger the safety of law-abiding citizens and law enforcement officers.

In recent years, drug traffickers, gang members, and other violent criminals have received significant sentencing breaks from the federal courts and the United States Sentencing Commission. The average sentence length for federal drug traffickers sentenced in 2016 was more than 19 percent lower than in 2009. The number of federal inmates has declined more than 16 percent since 2013 and is at its lowest level since 2004. It is likely no coincidence that, at the same time, we are in the midst of the largest drug crisis in our nation's history and recently experienced the two largest single-year increases in the national violent crime rate in a quarter of a century. The Department is concerned that provisions currently in the FIRST STEP Act would

exacerbate, rather than mitigate, these trends. The Department highlights several of these problematic provisions below.

First, this legislation would eliminate important restrictions on the portion of sentences that federal inmates could spend outside of a Bureau of Prisons (BOP) facility in prerelease custody, such as residential reentry centers (halfway houses) or home confinement. The Department supports incentivizing participation in evidence-based recidivism reduction programming, but the nearly-unlimited opportunities to receive substantial time outside of BOP facilities as contemplated by the bill would allow criminals to serve too little of their actual sentences before returning to the community. There are many tragic examples¹ of inmates taking advantage of the less restrictive environment afforded by home confinement and halfway houses to commit additional, heinous crimes. This legislation would increase those opportunities at the expense of law-abiding citizens. It would, in effect, allow a backdoor early release, affecting a major alteration in the federal government's truth-in-sentencing philosophy.

Second, the Department is concerned about the legislation's provisions that would allow criminals to be given substantial time credits for participation in nearly any activity (including programming that is otherwise mandatory or already has high levels of inmate participation). This would effectively function as a blanket, *one-third* reduction in the amount of time that many convicted felons would spend in BOP custody, without actually incentivizing any additional programming participation or behavioral changes.

The legislation would also revise the current good conduct credit system to allow inmates to earn time off for good conduct for time they did not actually serve in prison. Under current law, BOP credits inmates with 54 days off of their sentences for each year they actually serve with good behavior in federal custody. Under the legislation, inmates (including illegal aliens) would also earn time off for good behavior even for the days they *do not serve* in federal custody—essentially allowing them to “double-dip” by being prospectively credited additional time off for years they will never actually serve because they will have already been released.

Combining the good conduct credit and time credit schemes from this legislation with other early-release opportunities like the Residential Drug Abuse Program (RDAP) would allow serious criminals to bypass a substantial portion of the consequences associated with their actions. For example, under the bill, a repeat drug trafficker who distributed thousands of doses of lethal fentanyl would be able to combine these programs to be back in the community he

¹ See, e.g., “Homicide victim's family sues Port of Hope,” IDAHO PRESS-TRIBUNE, Aug. 18, 2016 (woman in a halfway house beat her roommate to death with a metal pipe because she “smelled”); “Felon from Rochester convicted of escape, facing murder charge in Pennsylvania,” DEMOCRAT & CHRONICLE, April 20, 2018 (man escaped and disappeared for eight months after being released to a halfway house, now charged with shooting two people, one fatally, while attempting a robbery following his escape); “There are people dead now that wouldn't be dead”: U.S. attorney for Utah says law change forced releases of criminals, including 2 killers,” DESERET NEWS, June 23, 2018 (man walked away from a halfway house, killed his 89-year-old grandmother, and seriously injured his 71-year-old stepgrandfather, only to be stopped when police shot and killed him).

ravaged after serving only approximately five years of a ten-year mandatory minimum sentence—a 50 percent reduction in the time served in prison for his crimes.

Third, the time credit eligibility requirements under the bill would allow many of the most serious, violent criminals in federal prison, including hardened drug traffickers responsible for the opioid epidemic, to be released early. While the bill lists a few particular convictions as disqualifying (including, for example, committing terrorist attacks against railroad carriers, kidnapping a President or a member of Congress, or committing treason), it does not prevent drug traffickers, cartel members, or gang leaders from quickly returning to the streets. In other words, it grants the option of significantly early release to many of the most serious criminals who drive death and destruction in our communities.

Even where the bill references some “serious violent felonies” as defined by 18 U.S.C. § 3559(c)(2)(F) as disqualifying the offenders from earning time credits, it clarifies that those would only be disqualifying if the offender has *already* served a sentence for a prior conviction for certain violent offenses, including murder, voluntary manslaughter, assault with intent to commit murder, aggravated sexual abuse and sexual abuse, abusive sexual contact, kidnapping, carjacking, arson, or terrorism. Under the bill, someone convicted of a serious violent felony but who had not previously served time for one of those listed offenses could still be allowed to substantially reduce their time in BOP facilities through the use of time credits.

Fourth, the Department is concerned that the legislation as drafted will be interpreted to provide significant benefits to illegal aliens, including requiring that they be moved closer to their primary residences in the United States and releasing them early (for the maximum amount of time allowable by law) to home confinement. Both of these benefits, which are intended to help inmates adjust to life outside of prison before release, are inapplicable to illegal aliens who should be deported after serving their sentences. Even more concerning, the placement of many deportable aliens in home confinement would allow them an opportunity to escape from custody and disappear before U.S. Immigration and Customs Enforcement (ICE) would be able to deport them.

Fifth, the legislation also would impose impossible administrative burdens that would cripple BOP and impose significant costs on taxpayers. For example, the legislation would significantly increase limits on each prisoner’s amount of phone time per month, which would severely limit BOP’s ability to monitor calls to prevent inmates from conducting criminal activity. The bill would also require BOP to calculate time credits for each activity and program for each prisoner (subject to a few exclusions), even if only some of those prisoners are actually eligible for time credits, and would require BOP to use two different definitions of nonviolent offenses to determine eligibility for various programs. Further, the legislation would require BOP to incur significant additional costs for long-term use of halfway houses and home confinement (both of which are costlier than housing inmates in federal custody) for tens of thousands of additional inmates. Finally, the legislation would require substantial expenditure of

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BOP, prosecutorial, and court resources as it allows prisoners to file motions for compassionate release in federal court.

The Department stands ready to work with the White House and Congress to address these and other concerns. There is more to be done to make our federal prison system more efficient while making inmates more productive and helping them learn to respect the rule of law and the rights of others while they serve their sentences. The Department is working hard to improve its evidence-based recidivism-reduction efforts to help prisoners become contributing members of society. However, the Department urges the White House and Congress to consider the potential ramifications of this legislation in its current form. Respectfully, the Department believes the legislation as drafted would increase costs and make it more difficult for the Department to achieve our shared goals of ending the drug crisis and protecting public safety.

Please do not hesitate to contact my office with questions or concerns.

Sincerely,



Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Jared Kushner
The Honorable Donald F. McGahn II
The Honorable Andrew P. Bremberg