How Much Credit Should Trump be Given for the First Step Act?

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Introduction

President Trump signed the First Step Act (FSA), a bi-partisan bill that introduced reforms into the federal criminal justice system, in the Oval Office on December 21, 2018. Since then, he, his family and supporters have described the Act as "the most significant criminal justice reform of our generation," a success his predecessors couldn't achieve. He uses the FSA to burnish his claim of having "done more for the Black community than any other president… with a possible exception of Abraham Lincoln." And, Trump uses the FSA as a cudgel with which to hammer Joe Biden for his support of the 1994 crime bill, endorsed by Black leaders at the time but long since seen as a mistake that fueled mass incarceration and racial injustice.

Trump is clearly overstating the case. Yet in this political season, there's been a noticeable lack of pushback against the president's inflated claims. I think I understand why this is so.

Passing the FSA required bipartisan support. Drafters wrote the bill to appeal to conservative as well as more liberal legislators in both parties and, ultimately, the President. Advocates and congressional proponents compromised to get a majority, and then enthusiastically backed the bill, indulging in hyperbole of their own while overlooking conceptual and structural flaws built into it, in order to get it on the President's desk. It's likely these groups are disinclined to highlight the FSA's conceptual or structural limitations, for which they are more responsible than is Trump. And, the Act has benefited thousands of federal prisoners. Taking these things together, neither the organized criminal justice reform advocates nor Democratic politicians are well-positioned to contest the President's inflated claims.

So, here's pushback. Trump is entitled to take credit for signing the FSA into law and the **reductions in the federal prison use** that followed. But the FSA, which was drafted by legislators, is neither the first nor the largest reform in recent years. For examples, a reform in sentences for crack cocaine at the close of the George Bush administration reduced the use of federal prisons by close to three-quarters of the reduction obtained from the FSA. A downward adjustment in drug sentences that cleared the United States Sentencing Commission (USSC) during the Obama administration resulted in nearly half-again as much a reduction in prison use (146%) as resulted from the FSA at the end of its first year. And, finally, including the downward adjustment in drug sentences, Obama-era reforms resulted in more than double (230%) the FSA's reduction in prison use in its first year.

As to **benefits for Black Americans,** the FSA's reductions in sentences for crack cocaine benefited Black individuals disproportionally, as intended, yet very little more than did three similarly structured reforms intended to alleviate racial disparities in federal drug sentencing. The FSA's other provisions benefit smaller proportions of Black individuals.

As to **reentry**, the Trump administration's claim that, "[t]he landmark First Step Act enacted commonsense criminal justice reform that is helping prisoners gain a new lease on life and is

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making America safer" is, regrettably, simply not true. These aspects of the FSA are not working. But the fault lies more with Congress than Trump.

Finally, there is a **cynical aspect to Trump's claims** to have achieved justice reforms that eluded other presidents while he assails Biden for actions 26 years in the past. Trump, it turns out, has the opportunity to appoint five Commissioners to the seven-member USSC, the agency responsible for implementing the largest reduction in prison use to date. Trump has named a slate lacking in diversity and which includes sentencing hardliners. Should Congress fail to critically vet Trump's nominees, a future USSC could put the kibosh on needed federal sentencing reforms or even increase penalties, ultimately increasing federal prison use more than the FSA decreased federal prison use.

Reductions in the Federal Prison Population

Several provisions in the FSA reduced prison use. The USSC, which has a heavy research and data-collecting component, recorded and analyzed each provision through the first year that the FSA was in effect.

The USSC reported on the FSA's provisions and their impact on incarceration as follows:

> Reducing Drug Recidivist Penalties as applied at sentencing. Section 851 of the United States Code provides for enhanced penalties for drug offenders who have qualifying prior offenses. Prosecutors must file an additional charge (an "information") to implicate Section 851 enhancements. The FSA changed the prior offenses that trigger enhancements and reduced the length of enhancements proscribed under Section 851, including reducing mandatory minimums.
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> To estimate the impact of this provision on sentences in its first year report, the USSC compared the average length of sentences in 849 cases in which prosecutors filed the additional charges and courts acted upon them in the FSA's first year (179 months) to the average length of sentences in the same category of cases in Fiscal Year 2018 (187 months). The USSC's estimate may be inexact because the number of cases charged and the way in which they were charged varied in the years compared, quite possibly as prosecutors adjusted to a new penalty structure.
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> Expanded "safety valve". The FSA gave federal judges more discretion to excuse some individuals from mandatory minimum sentences or to reduce non-mandatory guidelines sentences by expanding the criteria of drug defendants eligible for "safety valve" relief. According to data reported in the USSC's first year report judges applied the expanded "safety valve" to 1,369 individuals who would have been ineligible for the safety valve before the FSA's enactment. These individuals were sentenced to on average 53 months in prison compared to 77 months for individuals to whom judges did not apply the "safety valve," for an average reduction of 24 months. Because the "safety valve" applies at sentencing, individuals sentenced in future years will benefit from its expansion under the FSA.

Limits on "stacking" 25-year sentences for multiple weapons offenses. Federal criminal law (U.S.C. § 924(c)) provides a mandatory minimum sentence of at least five years when a firearm is used in the commission of a crime. The mandatory minimum, which is added to the sentence for the underlying offense, increases up to 10 years depending on how the firearm was used and up to 30 years based on the type of weapon.

The same law requires a sentencing judge to "stack" an additional 25 year "enhanced penalty" for each second or subsequent conviction under this provision including convictions in the same case (i. e., multiple incidents charged as separate counts in one indictment). The FSA ends "stacking" when the second or subsequent conviction is in the same case. This is a significant reduction which however applies in a relatively small number of cases. The USSC provides hypothetical examples: 55 years reduced to 15 years and a 30-year sentence reduced to 10 years.

Most convictions under U.S.C. § 924(c) were for one count. The FSA had a modest impact in these cases. The USSC reported that sentences imposed on 3,073 individuals convicted of one count under U.S.C. § 924(c) in the FSA's first year were ten months shorter than the sentences imposed on individuals convicted under one count in 2018. But for 215 individuals convicted of multiple counts under U.S.C. § 924(c) in the FSA's first year, the average sentence length was 127 months − or just over ten years − shorter than the sentenced imposed on individuals convicted of multiple counts in 2018.

Making the Fair Sentencing Act of 2010 retroactive. The FSA belatedly ameliorated a long-standing injustice by authorizing federal judges to retroactively reduce long sentences imposed for possession of crack cocaine for individuals who had been excluded from the benefits of the original Fair Sentencing Act of 2010 (described below). In an updating "retroactivity" report issued in October 2020, the USSC reported that 3,363 individuals had been granted motions for sentence reductions under this provision. Records were incomplete for nearly 1,000 of these cases, but the USSC analyzed data for 2,320 cases and found that courts ordered an average of 71 month's decrease in sentence length. For purposes here we will assume the same average reduction applies to all 3,363 individuals.

Compassionate release. The FSA also opened the way for prisoners to petition federal courts for "compassionate release," effectively bypassing an obstructionist Bureau of Prisons and diluting the influence of United States Attorneys. In the FSA's first year, the number of compassionate releases quadrupled from 24 to 145 with an average reduction of 84 months The BOP has advised news media that so far in 2020, 1,600 applications for compassionate release have been approved. For convenience, we will assume a continuation of the average 84-month reduction. While there is no information upon which to base a prediction of the number of grants of "compassionate releases" in coming years, influential federal appeals courts have expansively interpreted the FSA to authorize "compassionate release" for "*any* extraordinary and compelling reason for release that a defendant might raise" rather than the narrow band of health issues to which the BOP previously adhered, so it seems safe to assume more applications will be submitted and granted.

Retroactive and prospective increase of good time credits. The FSA requires the Federal Bureau of Prisons (BOP) to credit individuals with 54 days of "good time" for every year of their sentence rather than 47 days, a figure the BOP arrived at with a crabbed reading of existing law. In mid-July 2019, the Department of Justice announced that 3,100 individuals "will be released" as the result of the retroactive application of this provision.

There was, however, no sudden surge out of prison gates. About 900 of the total were foreign nationals who would be turned over to immigration for probable deportation. Many of the remaining 2,200 had already been released from prison facilities to halfway houses or home confinement. Still others whose release dates were advanced were not scheduled to be released for months or more. Whatever number was released easily melded into the approximately 3,500 federal inmates normally released each month from dozens of BOP facilities around the country.

To estimate the impact on prison use, consider that the average sentence imposed on 70,231 individuals sentenced to prison in federal courts in Fiscal Year 2019 was 46 months, or 3.8 years. The average reduction in the average sentence length due to the seven day per year increase in good time credits is 27 days, or about 0.9 months. This reduction benefits individuals sentenced in subsequent years. Reductions are realized at the end of a sentence, so individuals serving 20 or 30 years will not see their benefit --- of 4.6 and 7.0 months respectively – for decades to come.

In summary, the FSA's sentencing reforms resulted in release dates being advanced because of the FSA's recalculation of good time credits for something less than 2,200 individuals, about 1.3% of the total federal prison population, effective in July 2019. We can quantify the FSA's other reductions in prison use by multiplying the number of individuals whose incarceration was reduced for each provision of the FSA by the average number of months of the reduction.

The results are shown in Table I, below: more than 44,000 bed- or cell-years of what sentencing blog-master Douglas Berman celebrates as "scheduled human time in federal cages saved." Assuming that judges continue to apply the "safety valve" and that federal courts sentence something close to 70,000 individuals in the years to come, we can approximate that the FSA will further reduce prison use by about 8,500 bed- or cell years in the years to follow.

Table I. FIRST STEP ACT

Col. A Provision	Col. B Number of Individuals affected	Col. C Average reduction in months	Col D. Bed or Cell Years Col. B x Col. C / 12	Col. E. Repeats following year(s)
Reducing Sec. 851 Drug Recidivist Penalties as applied at sentencing	849	8	566	566
Expanded" Safety Valve"	1,369	24	2,738	2,738
Limits on "stacking" for multiple weapons offenses - single count	3,073	10	2,561	---
Limits on "stacking" for multiple weapons offenses - multiple count	215	127	2,275	---
Making the Fair Sentencing Act of 2010 retroactive	3,363	71	19,898	---
Compassionate Release	1,600	84	11,200	---
Retroactive and prospective 7 day increase in good time credits - less than 2,200 released and:	70,231	0.9	5,235	5,235
TOTAL			**44,473**	**8,539**

So, how does the FSA's savings of 44,473 bed- or cell-years stack up against savings from previous reforms?

The following paragraphs describe the number of individuals impacted and the average reduction in sentence for each of four major reforms which preceded the FSA.

Crack Cocaine Amendments of 2007. Between May and December 2007, at the close of the George Bush administration, the USSC promulgated amendments to the federal sentencing guidelines which retroactively lowered the recommended guidelines penalties for crack cocaine sentences. The USSC's purpose in reducing this disparity was to alleviate the notorious "100-1" drug quantity ratio in federal drug trafficking laws that made crack cocaine defendants subject to the same sentences as defendants trafficking in 100 times more powder cocaine. Reductions were not automatic; federal judges determined eligibility and the amount of sentence reduction, if any. The amendments did not affect the 100-1 ratio drug quantity ratio that congress had legislatively incorporated into mandatory minimum sentences.

In June 2011, the USSC reported that federal courts approved sentence reductions that averaged 26 months for 14,918 individuals and denied motions for reductions in almost 9,000 cases. The USSC had insufficient data to determine reductions for about 1,200 individuals sentenced to "time serve." The USSC noted that actual release dates would spread out more than three decades.

Fair Sentencing Act of 2010. Responding to a drive to further reduce racial disparity in sentences imposed for powder cocaine offenses compared to sentences imposed for crack

cocaine, congress increased the weights of crack cocaine that triggered five- and ten-year mandatory minimum sentences and eliminated a mandatory five-year sentence for simple possession. The legislation allowed the USSC to reduce recommended sentences prospectively but not retroactively for crack cocaine offenses, which the USSC did with amendments effective November 1, 2011. In a final updating report on the impact of these changes, issued in December 2014, the USSC reported that federal courts reduced sentences for 6,880 individuals by on average 30 months. The USSC had insufficient data to determine reductions for 830 individuals sentenced to "time serve."

Downward adjustment in drug sentences – "Drugs minus Two". In 2014, with the backing of the Obama White House and the concurrence of Congress, the USSC exercised its administrative authority to adjust downward the sentencing guidelines for federal drug crimes. Reductions in sentence had to be ordered by a federal judge. Releases from federal prison commenced on November 1, 2015. In a report issued in March 2020, the USSC reported that as of September 30, federal judges had used their authority under the USSC's new rules to reduce the sentences of 30,852 federal defendants by on average 25 months.

Clemency. With an initiative launched in 2014, President Obama used his Constitutional authority to commute the sentences of 1,696 individuals sentenced for drug offenses. According to the USSC, the average time by which sentences were reduced was 140 months.

We can quantify the reductions in prison use that resulted from these four reforms, as we did for reductions that resulted from provisions in the FSA, by multiplying the number of individuals who benefited by the average number of months by which the reform reduced incarceration. The results are shown in Table II, below.

Table II. Previous Federal Sentencing Reforms

Col. A Provision	Col. B Number of Individuals affected	Col. C Average reduction in months	Col D. Bed or Cell Years Col. B x Col. C 12	Col. E. Repeats following year(s)
Crack Cocaine Amendment of 2007 (does not include 1,230 cases for which data was lacking)	14,918	26	32,322	-
Fair Sentencing Act of 2010	6,880	30	17,200	-
Downward Adjustment in Drug Sentences --"Drugs minus Two"	30,852	25	64,275	-
"Clemency 2014" under President Obama	1,696	140	19,787	-
Subtotal: Obama Administration			*101,262*	
TOTAL			**133,584**	**0**

It should now be crystal clear that Trump has no basis upon which to claim that the FSA was the first successful federal sentencing reform in decades (or "ever") or that it was the largest:

- The Crack Cocaine Amendment of 2007, initiated in the George Bush administration, reduced federal prison use by almost three-quarters (73%) of the amount the FSA reduced prison use eleven years later.

- As shown in Table I, at 44,473 bed- or cell-years, the FSA resulted in less of a decrease in prison use than the 64,167 reduction in bed- or cell-years resulting from the USSC's downward adjustment of drug sentences ("Drugs minus Two"), shown in Table II.

- Three reforms of the Obama era, including the USSC's downward adjustment in drug sentences, reduced prison use by over 100,000 bed- or cell-years, more than doubling (227%) the FSA's first year reduction of 44,473 cell- or bed years.

- Obama's clemency initiative, the only sentence reduction which a President can unilaterally implement and which was not replicated by Trump, reduced bed- or cell-years by 19,787 years, or just under half (45%) of the 43,939 reduction in prison use that resulted from all of the FSA's provisions in its first year.

Benefits for Black Defendants

Trump's claim that the FSA benefited "the Black community" is true if it refers to Black incarceration. It is also true, that 92% of the beneficiaries of the provisions that made the Fair Sentencing Act of 2010 retroactive were Black. This claim is incorrect if it is meant to apply to the beneficiaries of the FSA's other provisions.

As shown in the upper portion of Table III, a smaller proportion of Black individuals benefited from the FSA's other provisions. Notably, only 16% of the beneficiaries of the FSA's expanded "safety valve" were Black.

It's also worth noting that previous reforms directed at reducing racial disparities in sentencing for crack cocaine also disproportionally benefited Black individuals, as indeed they were meant to do, by nearly the same amounts. As shown in the lower portion of Table III, Black individuals

TABLE III Black Share of Select Sentencing Reductions

Provisions of the First Step Act	% Black Beneficiaries
Reducing Sec. 851 Drug Recidivist Penalties as applied at sentencing	59.7%
Expanded" Safety Valve"	16.0%
Limits on "stacking" for multiple weapons offenses - single count	52.9%
Limits on "stacking" for multiple weapons offenses - multiple count	79.5%
Making the Fair Sentencing Act of 2010 retroactive	**91.6%**

Sentencing Reforms prior to the First Step Act	% Black Beneficiaries
Crack Cocaine Amendment of 2007	86.2%
Fair Sentencing Act of 2010	85.7%
Downward Adjustment in Drug Sentences --"Drugs minus Two" - - Crack Cocaine cases only	87.1%
"Clemency 2014" under President Obama	70.9%

comprised 86% - 87% of the beneficiaries of the three previous federal sentencing reforms targeting individuals sentenced for crack cocaine offenses.

Reentry

In addition to reducing the federal prison population, Congress intended that the FSA improve reentry and reduce recidivism. But the Trump administration's claim that, **"**The landmark First Step Act enacted commonsense criminal justice reform that is helping prisoners gain a new lease on life and is making America safer," is not being met. Nor is it likely to be met, a failing for which Congress, and COVID-19, are more responsible than Trump.

Reentry for federal prisoners has long been deficient. The reasons are well known. Many federal prisoners are incarcerated hundreds or thousands of miles from the communities to which they will return, making communication and release planning difficult for the individual. Although on paper required to do so, the BOP does not always forward reentry-related information to the halfway houses to which many individuals are released. Neither prisons nor halfway houses coordinate reentry planning with federal probation, the agency that will supervise most returning citizens after they leave half houses. There are exceptions: the BOP has a respected drug treatment program which, however, serves a fraction of the need; some individual wardens have gone to great lengths to assist with reentry, including by arranging for relevant training in needed skills, encouraging staff to provide reentry assistance, and welcoming federal probation officers who chose to do so to council prisoners prior to release; a few halfway houses diligently and creatively support individuals as they manage their reentry. But the exceptions are far from the rule. Internal audits commissioned by the Obama Department of Justice detailed deficiencies in federal reentry. More publicly, so too did the congressionally chartered bi-partisan Charles Colson Task Force on Federal Corrections it its final report issued in January 2016 after a year's study.

The Colson Task Force recommended steps to improve federal reentry. The essence of these were:

> 1) to remedy a shortage and scope of inmate programming, and
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> 2) to develop "strong, effective collaborations within correctional facilities (across functional areas of security, programming, and operations) and with outside stakeholders, including service providers and community supervision agencies, to assure a seamless transition."

The FSA did not follow the Colson Task Force's recommendations.

The FSA meagerly addresses the shortage of the BOP's inmate programming −which federal defenders reported were burdened with backlogs of 25,000 individuals wanting to participate in work programs, 15,000 waiting for education and vocational training, and 5,000 in need of drug treatment− by adding $75M additional funding for programs each year for five years.

Fatefully, as it has turned out, the FSA's drafters almost completely ignored the Colson Task Force's recommendations to improve communication between individuals who will be released

and their prison counselors, the BOP's contract halfway houses to which most returning prisoners will go upon release, federal probation which will supervise them, and community-based programs that meet the various needs of returning citizens as, day-to-day, they overcome obstacles and prepare for a future. Instead, they directed most of the FSA's resources to activities that occur within the confines of the BOP.

With the FSA, Congress instructed the Department of Justice and the BOP to build a "system" around structured risk assessments (scored questionnaires the answers to which are supposed to predict the likelihood that the individual will "recidivate") and "evidence-based" inmate programming. According to the House Report on its version of the FSA, the "system" is premised on the notion that risk and needs assessments in combination with "individual risk reduction incentives and rewards and risk and recidivism reduction" would improve the BOP's "effectiveness and efficiency," ultimately improving public safety by reducing recidivism among individuals released from the BOP. Over 22 of the Act's 56 printed pages instruct the Attorney General to put in place a "system" of empirically proven "evidence-based recidivism reducing programs" and "productive activities." Risk and needs assessments are to determine the risk of recidivism and violent or serious misconduct. The risk assessments' numerical scores would guide the assignment of individuals to "appropriate evidence-based recidivism reduction programs or productive activities." Scores assigned individuals in periodically administered risk assessments would also determine "when a prisoner is ready to transfer into prerelease custody or supervised release," essentially modifying sentence length.

A cottage industry of academics, foundations and non-profits have promoted risk assessments for years, originally to help trial courts make more objective, rational and rapid decisions about bail bonds or conditions of pre-trial release in criminal cases. In these contexts, risk assessments have produced marginally satisfactory results at least when compared to unguided and arbitrary judicial decisions uninformed by background information or investigated facts. And, corrections officials have long utilized risk and needs assessments as screening instruments to assign security classifications to new inmates, a useful tool when a minimum of information is available and a decision must be quickly made.

But the FSA's reliance on risk assessments comes at a time when some criminologists and other experts are expressing serious reservations about using them to predict violence or determine sentence length. According to research presented to congress by about 70 civil rights groups, risk assessments are likely to increase racial bias in decision-making. Four members of Congress penned a dissent from the House version of the FSA based on concerns about racial bias.

Congress attempted to address concerns about racial bias by requiring the Department of Justice to add "dynamic" factors to the questionnaire and to obtain a review of its risk assessment methodology from the National Institute of Corrections. In response, the DOJ initially added only four "positive dynamic factors" that could reduce the score out of a total of 17 factors in its risk assessment instrument. These four factors measured only two similar examples of constructive activity: participation in educational or vocational courses and participation in drug education. In comments provided to the review which the DOJ obtained, at least nine of 18 contributing experts and stakeholders opined that the DOJ's risk assessment tool would exacerbate racial bias. In September 2019, the Brennan Center wrote that the DOJ's risk

assessment tool was weighed down with racially biased factors such as drug arrests and arrests that didn't result in convictions. According to an updating report the Department of Justice published in January 2020, the Department was still wrestling with the design of its risk assessment instrument, having added and deleted factors, published a new instrument for review, all the while using a previous risk assessment instrument to assess individuals under the FSA.

As this writer sees it, the FSA's reliance on risk assessments is misplaced. Risk assessment instruments focus on the past. Scoring them tallies up what an individual has done or not done in an attempt to predict whether, after being released, he or she will again get into legal trouble. But what a person being released from prison really needs −and what will help that person avoid trouble− is proactive assistance that begins while the person is in prison and extends until the person has found his or her place in a community and, whenever possible, family. Obstacles and advantages are different for each person, so a risk assessment of some sort is in order. But the assessment should consist of determining what a person needs, what obstacles he or she confronts on the path back to community, and what strengths he or she has. The information should be used to shape the advice and assistance given each individual leaving federal prison at the start of a proactive, resourced problem-solving reentry process. One should expect results. I have seen it work.

Then there is the matter of inmate programs.

As part of the conditions of adding $75 million for inmate programs, the FSA required that the Attorney General certify that the BOP's programs were "evidence based" with documented rates of success. This is a high standard to meet, since few rigorously evaluated corrections-based inmate programs have been found to be successful in reducing recidivism – a finding recently reiterated in a December 2019 report prepared under the auspices of the Independent Review Committee created to advise in the FSA's implementation.

Barr charged ahead. In "PATTERN," a glossy color publication defining the parameters of the FSA-mandated program, he "certified" the BOP's inmate programs in an almost anecdotal way. PATTERN recounts that Barr, in company with Deputy Attorney General Jeffrey A. Rosen, spent July 8, 2019 touring FIC Edgefield in South Carolina in the company of United States Senators Lindsey Graham and Tim Scott. Barr "spoke with prison officials [about] vocational training, psychology, and education staff," spoke with prisoners, toured the prison's clothing and textile factory, received a presentation from a culinary arts program, and "learned about" the facility's residential and nonresidential drug treatment programs (RDAP and NRDAP). Rosen had previously visited FCI Englewood in Colorado with a similar agenda, uniquely observing a roofing and paving program. On the strength of these two visits and unspecified communications with advisors, experts and other federal agencies "the Attorney General identified the most effective evidence-based recidivism reduction programs and has included aspects of those programs in the Risk and Needs Assessment System." The implication was: "Mission accomplished."

Understaffed and underfunded, the inmate programming "identified" by the Attorney General is a long way away from fulfilling the role described for it in the FSA. Just how far has been difficult to determine. A December 2019 report from the Independent Review Committee

created by the FSA concluded that the BOP's programs cannot "responsibly" be described as "evidence-based (or genuine 'national models')" unless and until they are carefully studied and accredited – something that hasn't occurred for any of the BOP's inmate programs for over two decades. According to a June 2020 "Expert Brief" from the Brennan Center, the BOP has been less than transparent about the extent of its programming shortfalls even at Congressional oversight hearings. In its January 2020 updating report the Department of Justice attributed previous reports of low participation in inmate programs to incomplete record keeping, asserted that more individuals participated in programs than had been reported, and described plans to expand inmate programming, for which it had requested $116 Million from Congress but received only $75 Million.

Two months later, COVID-19 rendered the FSA's elaborate "system" inoperable. By March 2020, the pandemic had forced BOP facilities to go on lockdown, meaning individuals were unable to leave their cells. Contract employees and volunteers who staff inmate programs were barred from entry without special permission. They wouldn't have been allowed to meet in groups in any case. Inmates could no longer participate in programs which were to be the keys to their early release to halfway houses or home detention. In short, the pandemic made it impossible for the BOP to support the inmate programming central to the FSA's "system."

The pandemic has driven home the value of the Colson Task Force recommendations. Even more than at other times, during a pandemic no returning citizen should be released to the street without shelter or food, required to excessively ride public transportation, wait in lines to see their counselors, apply for jobs in the lobbies of public agencies and non-profits (many of which are closed to visitors) or participate in jobs skills or other class-room-type programs (most of which have shut down). Instead, individuals need to make connections with the agencies and community-based supports in advance of release and be tutored in how to live in an "on-line" world. An adequate reentry program in the time of a pandemic would help individuals leaving federal prison learn to take care of their health, become familiar with the use of the internet, reconnect with family and community in advance of the time they leave prison, make sure that they left prison with state identification, a place to live, contacts with potential employers, counseling in family reunification, and a pre-established relationship with support groups and treatment providers.

The FSA's inoperable system of risk assessments and "evidence-based programming" do not, at the moment, support Trump's claims, that the FSA is "helping prisoners gain a new lease on life." In large part, this failure is due to design flaws which were not Trump's responsibility. Congress will have to right this ship, with a "system" that relies less on passive risk assessments inside prison walls and more on active support and assistance for returning citizens across agency lines and back into communities if it wants to ensure that individuals leaving prison will successfully return to those communities.

The Cynical Aspect of Trump's Claims

Trump's claims to have advanced criminal justice reform more than any other president while he assails Biden for actions 26 years in the past are cynical. Trump has long been thought to be indifferent at best to criminal justice reform. Yet it is not just that Trump once called for the

death penalty for five youth even before they were convicted of committing rape in Central Park and then never acknowledged that they were subsequently exonerated, or that he is currently running a "tough on crime," "lock'em up" campaign that would criminalize political opponents and civil protests, or that his Attorney General is a pro-incarceration hawk. If Trump leaves office in January 2021, his words and attitude will cease to have consequences for justice reform.

But what could have consequences for federal sentencing reform is Trump's nomination of five new Commissioners to the USSC. This is Trump's second round of proposed nominations: his previous slate included William Otis, a former United States Attorney and government lawyer publicly opposed to sentencing reform, committed to the position that, "when we have more prison, we have less crime" and described by Kevin Ring of FAMM as "an ideologue who seems impervious to evidence and data." Congress never acted on Trump's first group of nominees and Otis is not included among the second. But criminal justice reform advocates fear that at least several of Trump's current nominees will adopt more punitive approaches to sentencing. One of them, the former U. S. Attorney for the Eastern District of Virginia Henry Hudson once declared that, "I live to put people in jail." Chief Judge K. Michael Moore of the Southern District of Florida is known in Miami as "More Time Moore" for the harsh penalties he metes out. And more generally, civil rights advocates worry that Trump has nominated a "slate that is all white, mostly male, and lacking in diverse experiences or backgrounds."

The USSC demonstrated its capacity to reduce the use of federal prisons with its downward adjustment of drug sentences, producing the largest reduction in federal prison use of any single reform to date. A semi-independent agency meant to be removed from political pressures, the USSC has the legal authority to further reduce federal incarceration. But the same authority can also be used to thwart reforms or even increase prison sentences and prison use.

Congress, which must confirm nominees to the USSC, needs to guard against a Commission dominated by sentencing hardliners who could stop the agency from introducing future reforms, and even reverse reductions that have been made.

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