



A Brief Examination of the FIRST STEP Act

Immigration concerns with the criminal justice reform bill

By Dan Cadman

Introduction

From time to time we at the Center for Immigration Studies have examined various aspects of criminal justice, incarceration, and sentencing reform bills introduced into Congress, filtered through the lens of their impact on illegal immigration and criminal aliens.

In doing so, we have often found that the collateral impact of such bills on alien criminals, drug smugglers, and illegal border-crossers and reentrants hasn't been fully considered.¹

The latest such effort to come to our attention is the "FIRST STEP Act", introduced by Reps. Doug Collins (R-Ga.) and Hakeem Jeffries (D-N.Y.) in the House, with a companion measure introduced by Sens. John Cornyn (R-Texas) and Sheldon Whitehouse (D-R.I.) in the Senate.²

According to some media sources, although the attorney general is not enthusiastic about the contents of the bill, presidential advisor and son-in-law Jared Kushner has thrown his support behind it and, if passed, it could very well be signed into law by the president.³

Highlights of the Bill

There are four separate titles within the FIRST STEP Act:

- Title I — Recidivism Reduction
- Title II — Bureau of Prisons Secure Firearms Storage
- Title III — Restraints on Pregnant Prisoners Prohibited
- Title IV — Miscellaneous Criminal Justice

Titles II and III are of little moment to this examination. Titles I and IV, however, are.

Title I. Takes on various aspects of existing federal incarceration practices and policies with the idea of substantially altering them. For instance, the bill would provide significant benefits to federal prisoners who participate in various "evidence-based recidivism reduction programs" that are intended to minimize the risk that prisoners will reoffend upon release. It does so by requiring that such programs be examined and further defined by the attorney general, in consultation with the director of the Federal Bureau of Prisons, the director of the Administrative Office of the U.S. Courts, the director of the Office of Probation and Pretrial Services, and the directors of the National Institutes of Justice and Corrections.

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Chief among the benefits that accrue from participation in the resulting programs is that prisoners would earn “good time” toward sentence reductions — 10 days for every 30 days of sentence, and an additional five days for every 30 if they are assessed twice in a row as “not having increased” their recidivism risk. In other words, prisoners could potentially cut their sentencing time in half through these programs. Many observers might see it as a low bar to cut sentences in half simply because prisoners don’t become *more* incentivized to reoffend, but that is a general statement not applicable to removable aliens, as explained below.

Prisoners would also earn free telephone and videoconferencing privileges (30 minutes per day; 510 minutes per month) via participation in the recidivism reduction programs.

The kinds of programs envisioned under recidivism reduction, include in part the following:

- Social learning and communication, interpersonal, anti-bullying, rejection response, and other life skills;
- Family relationship building;
- Structured parent-child interaction and parenting skills;
- Classes on morals or ethics;
- Academic classes;
- Cognitive behavioral treatment;
- Mentoring;
- Vocational training;
- Faith-based classes or services;
- Civic engagement and reintegrative community services; and
- Prison jobs.

Title IV. Under the catch-all “Miscellaneous” provisions, establishes two new mandates.

First, there is a presumptive standard (subject to certain caveats such as prisoner classification and facility availability) that federal prisoners should be incarcerated at penal facilities no farther than 500 miles from their “primary residence”.

Second, Title IV also provides that “The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs *on home confinement* for the maximum amount of time permitted.” (Emphasis added.)

Immigration Enforcement Concerns Raised by the Bill

Title I Concerns. First, there is nothing prohibiting federal prisoners who are excludable or deportable aliens from participating in the recidivism reduction programs in Title I of the bill — which does address inadmissible or deportable aliens, but *only* to specify that they cannot accrue “good time” reductions; otherwise, except as noted below, they are indistinguishable from other prisoners for purposes of eligibility or participation.⁴

Second, though the bill specifically categorizes certain prisoners who may not participate in the programs, they are prohibited on the basis of the crimes for which they are incarcerated, and *not* on the basis of excludability or deportability under the immigration laws. This leads to some significant logistical and methodological flaws in the logic of the bill.⁵ Here are a few examples.

Prisoners who have been convicted of peonage/slavery/human trafficking laws are generally prohibited from participating in the reform programs (see line 23, p. 14 – line 2, p. 15) *unless* the convictions were for violations of:

- 18 U.S.C. Section 1592, which has to do with unlawfully holding or destroying passports or identity documents with the intention of keeping an individual in a state of bondage. Some of the more egregious cases of bondage prosecuted by U.S. attorneys in recent years have been of wealthy individuals, often aliens themselves, who hold their foreign servants or employees hostage and in conditions of peonage by keeping their passports, among other things.⁶ Yet such individuals, if convicted only under this statute, would be entitled to enter such “recidivist reduction” programs.

- 18 U.S.C. Section 1593A, which has to do with persons who profit from peonage, slavery, or trafficking in humans. Why should acting as a middle-man slaver and trafficker who profits from moving victims into bondage not on its face be a disqualifier, particularly given the active involvement of alien cartel and transnational gang members who operate on both sides of the Mexico-U.S. Border?⁷
- 18 U.S.C. Section 1594, which involves attempts or conspiracies to engage in criminal acts of peonage, slavery, and trafficking — including for offenses that would themselves be a cause for disqualification. Does it make sense that one who attempts or conspires to violate such a law would be entitled to participate in these prisoner “reform” programs?
- 18 U.S.C. Section 1596, which authorizes extraterritorial jurisdiction for federal peonage, slavery, and human trafficking offenses. It defies logic that such individuals should be entitled to preferential participation in recidivist reduction and other programs.

All of these specific exclusions from the disqualifying offenses, which leave the offenders (including deportable and excludable aliens) free to participate in reduction programs, are both puzzling and troubling.

It is also noteworthy that the separate-but-related federal offenses of alien smuggling; or aiding aggravated felons to enter illegally; or importing aliens for an immoral purpose — to which charges human traffickers often plead or for which they are convicted when moving gang members across borders; or aliens for impressment into forced labor or sex slavery — are nowhere mentioned as disqualifying offenses in this bill.⁸

The long list of disqualifying offenses is also peculiar in regard to aliens incarcerated for the crime of illegal reentry to the United States after having been previously removed.⁹ In other words, aliens who have repeatedly reentered the United States illegally are free to participate. The *only* aliens incarcerated for this crime who are prohibited from participating in the reduction programs are those who have also been previously convicted of three misdemeanors, or drug crimes, or crimes of violence, or aggravated felonies.

Note also that the bill’s language would allow aliens to participate if they are serving time for reentry after removal but have “only” two misdemeanor convictions. Consider though that those convictions might very well have been for DUI or DWI offenses, meaning the prisoner could be an alien who has repeatedly driven on our roadways while under the influence of drugs or alcohol, and quite possibly without a license, registration, or vehicle insurance — and all of this prior to being arrested, charged, and convicted for a federal offense serious enough to land him in prison.

Since an alien who has reentered the United States after being formally removed has, by his very conviction, evidenced a proclivity toward recidivism, does it make sense that he or she should be permitted to take one of the scarce slots that will likely be the norm for such programs? How many times must an alien break the law before he surrenders his place on the list of available “recidivist reduction” programs to others more worthy?

The existence of all these lapses in the legislative language will not persuade close readers of the bill that it has been carefully thought out or drafted with sufficient care.

Title IV Concerns. Section 401 amends the language of the existing statute to require placement of federal prisoners within 500 miles of their primary residence.¹⁰ There is no language to specify that the provision is inapplicable to inadmissible or deportable aliens. But exactly what does “primary residence” mean in such a context? Furthermore, if the intent is to provide an environment that will allow a prisoner ready access to his community for purposes of post-release integration, how does that make sense in the context of an alien the immigration authorities have already signaled that they wish to remove entirely from the United States?

Section 402 of the bill levies a similar mandate by amending existing law to require that “The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”¹¹ Once again, though, there is no overt qualifier in the legislative language to specify that removable aliens are ineligible for this perquisite, although placing a criminal alien whose removal may be imminent into a home environment would be a clear invitation to flee.

Conclusion

That this bill doesn't fully account for the adverse consequences of making the programs and policies it requires available to removable aliens is a significant lapse. It could potentially have adverse downstream results in the effectiveness of existing immigration mechanisms designed to remove criminal aliens from the United States.

Furthermore, although the bill doesn't address funding, one can imagine that the recidivism restructuring programs will be costly to the American taxpayer, and likely unavailable to the full universe of potential federal prisoner candidates. That being the case, should they not be reserved for American citizens whose future, upon release, is destined to be within our communities? Isn't that the population that recidivism reduction programs should be focused upon?

End Notes

¹ See, e.g., Dan Cadman, "['Criminal Justice Reform' for Alien Felons](#)", Center for Immigration Studies blog, April 7, 2016, "[More on Sentencing and Criminal Justice 'Reform'](#)", Center for Immigration Studies blog, April 24, 2017; and "[Sentencing for Reentry after Deportation](#)", Center for Immigration Studies blog, April 27, 2017.

² The full title is the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act". Text of the House version of the enrolled bill can be seen [here](#). Mark-up by the House Judiciary Committee was scheduled for May 9, but the outcome of the mark-up is unavailable as of this writing. See [here](#).

³ Ryan J. Reilly, "[This Jared Kushner-Backed Bill Could Be 2018's Last Shot At Federal Prison Reform](#)", *Huffington Post*, April 9, 2018.

⁴ See, specifically, lines 12 – 16 on p. 11 of the bill.

⁵ The "ineligible prisoner" language in the bill begins at line 13 on p. 12, and continues through line 18 on p. 20.

⁶ See, for instance, "[Varsha Sabhnani Sentenced to 132 Months' Imprisonment for Her Conviction in Long Island 'Slave Case'](#)", U.S. Attorney's Office, Eastern District of New York, June 26, 2008; Paul Vitello, "[From Stand in Long Island Slavery Case, a Snapshot of a Hidden U.S. Problem](#)", *The New York Times*, December 3, 2007; and Jim Masters, "[Woman convicted of sex trafficking in 2013 case](#)", *Chicago Tribune*, February 10, 2017.

⁷ Andrew Arthur, "[MS-13 and Sex Trafficking](#)", Center for Immigration Studies blog, February 22, 2018.

⁸ These offenses can be found in the Immigration and Nationality Act (INA) at Section 274, [8 U.S.C. § 1324](#); Section 277, [8 U.S.C. § 1327](#); and Section 278, [8 U.S.C. § 1328](#), respectively.

⁹ See lines 5–10, on p. 19, relating to INA Section 276, [8 U.S.C. § 1326](#).

¹⁰ The existing statute is [18 U.S.C. § 3621](#).

¹¹ The affected statute in this instance is [18 U.S.C. § 3624\(c\)\(2\)](#).