

April 21, 2020

The Honorable Charles E. Grassley
Chairman, Senate Judiciary Committee
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member, Senate Judiciary Committee
331 Hart Senate Office Building
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman, House Judiciary Committee
2141 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member, House Judiciary Committee
2056 Rayburn House Office Building
Washington, DC 20515

**Call for Urgent Action: Technical Amendment to the First Step Act to Give “Old Law”
Federal Prisoners Equal Access to Compassionate Release**

Chairman Grassley, Ranking Member Feinstein, Chairman Nadler, and Ranking Member Jordan:

Lawmakers are recognizing the catastrophic impact the coronavirus is having in our prison and detention systems, and its impact on the entire country. We thank Senators and Representatives for the attention they have given to the release of federally incarcerated people vulnerable to infection by COVID-19 in their March 23 and March 19 letters to Attorney General Barr and Bureau of Prisons Director Carvajal.¹ Today we ask you to help a small group of elderly and particularly vulnerable individuals who are currently denied access to the **First Step Act’s** compassionate release process. Unlike other prisoners, they cannot ask a court to release them.

We are writing to highlight the situation of a couple of hundred “old law” federal prisoners, and to urge you to allow them the same consideration for compassionate release that the First Step Act gives “new law” prisoners. No more than a few hundred of the 175,000 people currently in Bureau of Prisons (BOP) custody are still serving sentences for federal crimes committed before November 1987, when parole was abolished in the federal system. Grouped together, they are referred to as “old law” prisoners—people who depend on the U.S. Parole Commission to grant them release. Officially abolished in 1987, when the Federal Sentencing Guidelines became effective, the Parole Commission was to sunset in 1992. However, through repeated Congressional re-authorizations, it continues to exist and retains jurisdiction over these “old law” people, including with respect to compassionate release.

In 2018, Congress passed the **First Step Act**. The Act significantly reformed the compassionate release process, allowing a court to reduce a term of imprisonment for extraordinary and compelling circumstances. Under this provision, a court can reduce the term of imprisonment on a motion brought by the defendant or the BOP. In the current crisis, with the BOP overwhelmed with COVID-19 cases, the opportunity to file directly in court is critically important.

It is generally understood that the Compassionate Release statute, including the First Step Act reforms, does not apply to “old law” prisoners. Under this view, the Parole Commission has the

¹ Letter to Attorney General Barr and BOP Director Carvajal, March 23, 2020, signed by 14 Senators (Durbin, Grassley, Leahy, Lee, Klobuchar, Crapo, Whitehouse, Tillis, Blumenthal, Cramer, Warren, Hirono, Booker, Harris); Letter to Attorney General Barr, March 19, 2020, signed by House Judiciary Committee Chairman Nadler and Crime Subcommittee Chair Karen Bass.

sole authority to release them. The exclusive path for their release is through the Parole Commission. Even before the COVID-19 pandemic, the Commission visited each facility only two or three times each year and applied its own standards for release.

We ask that you adopt a technical amendment to the First Step Act so that the same compassionate release process, at the discretion of a federal court, is available to “old” and “new law” prisoners alike. We seek equal treatment, so that people convicted under the “old law” have access to the mechanisms you already put in place through the First Step Act. This is surely the right thing to do. An elderly and vulnerable prisoner is elderly and vulnerable regardless of the law under which they were convicted.

And it should go without saying that this is a critical moment. Time is of the essence, especially for the “old law” population. Because they were all convicted for offenses that took place in or before 1987, “old law” prisoners are among the most elderly in the federal system. Many are in their late 60s, 70s, even 80s; the youngest would be 52. All have all been incarcerated at least 30 years, have aged, and their health has deteriorated. Many have underlying health conditions like heart and lung disease, diabetes, and advanced cancer. Public health experts are referring to COVID-19 as a geriatric care emergency as they urge release of vulnerable people from prisons and jails.

Finally, some of us previously asked you to urge the Parole Commission to parole “old law” prisoners; they are uniquely vulnerable to infection from COVID-19 and, after serving so many years, pose no threat to public safety. While we still strongly advocate for their immediate release on parole, giving “old law” prisoners access to the First Step Act’s procedures would at least allow timely and individualized determinations of their suitability for release by the BOP or a court.

We thank you for considering our request. The text of our proposed technical amendment to 18 U.S.C. § 3582(c)(1) follows, as well as the full text of § 3582(c) with the amendment. Please contact Linda Evans (lindaevans101@gmail.com or 510-219-0297) if you have additional questions.

American Civil Liberties Union
CAN-DO Clemency Project
Center for Constitutional Rights
College and Community Fellowship
CURE International
Drug Policy Alliance
Due Process Institute
FAMM
Federal Public and Community Defenders
Justice Roundtable
Leadership Conference on Civil and Human Rights
NAACP Legal Defense and Educational Fund
National Association of Criminal Defense Lawyers
R Street Institute
The Sentencing Project
We Got Us Now

Proposed Legislative Language

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “_____ Act of _____”.

SEC. 2. EQUAL ACCESS TO COMPASSIONATE RELEASE.

Section 3582(c) of title 18, United States Code, is amended in subsection (1) by inserting after “in any case” the following: “, including—notwithstanding any other provision of law—any case involving an offense committed before November 1, 1987”.

18 U.S.C. Section 3582(c) With Proposed Amendment Highlighted and Underlined

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case, including—~~notwithstanding any other provision of law—any case involving an offense committed before November 1, 1987—~~

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant, after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.