

Threading the Needle: The FIRST STEP Act, Sentencing Reform, and the Future of Criminal Justice Reform Advocacy



MOLLY GILL*

Vice President of
Policy, FAMM

I. Introduction

Shortly after Donald Trump's election to the presidency, a journalist contacted me and asked for my opinion on the prospects for passing criminal justice reform legislation in Congress. On one hand, I said, this new President had described our historically low crime rates as an era of "violence in our streets and . . . chaos in our communities."¹ On the other hand, I mused, "If it takes a Richard Nixon to go to China, we may have just elected the ultimate Richard Nixon on criminal justice reform." If anyone could sign a criminal justice reform bill into law without the fear of being labeled "soft on crime," it would be President Trump.

Then President Trump selected Jeff Sessions as Attorney General, seemingly guaranteeing that this administration would not be one to sign criminal justice reforms into law.² In 2016, then Senator Sessions (R-AL) had almost single-handedly ensured³ that the Sentencing Reform and Corrections Act (SRCA)⁴ never received a vote in the U.S. Senate, despite its wide bipartisan support and the leadership of Senate Judiciary Committee Chairman Chuck Grassley (R-IA) and criminal justice reform champion Dick Durbin (D-IL) at the bill's helm. Exactly as expected, when SRCA was reintroduced⁵ and passed by the Senate Judiciary Committee again in 2017,⁶ some deemed the bill unpassable.⁷

But prison reform—the subject of the second half of SRCA—has long been of interest to some in the Trump administration. Trump's son-in-law, Jared Kushner, awoke to the need for prison reform after his father spent time in federal prison.⁸ An odd couple from the U.S. House of Representatives, Doug Collins (R-GA) and Hakeem Jeffries (D-NY), introduced the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act with the hope of passing an incremental reform package.⁹ The bill improved and built on the prison reforms in SRCA but included no sentencing reforms. Weeks before the House vote on the FIRST STEP Act, Senators Grassley and Durbin publicly insisted that if a criminal justice reform bill were to pass, it must include sentencing reforms like those in SRCA.¹⁰ The FIRST STEP Act later passed in the House of Representatives by a bipartisan vote of 360 to 59.¹¹ Both Jeffries and Collins insisted in floor speeches that the bill was indeed a "first

step" and that sentencing reform would continue to be necessary,¹² but their words did not reassure some advocates or win over Grassley and Durbin. The stage was set for either compromise or gridlock in the Senate.

II. Disagreement over the FIRST STEP Act

The FIRST STEP Act also split the criminal justice reform advocacy community into two disagreeing camps. Opponents mourned the bill's lack of sentencing reforms and criticized its reliance on risk assessment tools to determine a prisoner's risk of reoffending and, consequently, ability to redeem time credits earned for completing rehabilitative programs in prison. Opponents of the FIRST STEP Act argued that risk assessment tools would have a racially disparate impact, making Whites the most likely beneficiaries of the bill's earned time credit benefits.¹³ Opponents also questioned whether Attorney General Sessions could be trusted to implement the bill's reforms¹⁴ and whether the funds authorized for prison programs would ever materialize in the appropriations process.¹⁵

The FIRST STEP Act's supporters pointed to the bill's safeguards against the use of a risk assessment tool that would create racial disparities in its application,¹⁶ and they highlighted the bill's improvements on the prison reform portions of SRCA.¹⁷ Most importantly, the FIRST STEP Act included a handful of reforms that the bill's supporters had been advocating for decades and that would directly and immediately benefit federal prisoners and their families. These reforms included the following.

A. Good Time Credit

Federal law¹⁸ permits prisoners to earn up to fifty-four days per year of "good time" credit for following prison rules, but this has been interpreted by both the Federal Bureau of Prisons (BOP) and the U.S. Supreme Court such that prisoners actually earn only forty-seven days per year.¹⁹ The FIRST STEP Act fixes this discrepancy and increases good time credits by seven days for each year of the sentence imposed, for all federal prisoners except those serving life sentences.²⁰ The bill applies that reform both prospectively and retroactively, bringing approximately 180,000 prisoners²¹ home a week sooner for each year of their sentence, if they comply with all prison rules.

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A person serving a ten-year sentence, for example, would get an extra week off for each year already served with good behavior, plus an extra week off for each year served with good behavior going forward. For prisoners and their families, good time credit reform would be a significant victory for criminal justice reform, with real, immediate, and meaningful benefits.

B. Increased Use of Home Confinement

The FIRST STEP Act would require²² the BOP to put low-risk, low-needs people in home confinement for the maximum amount of time allowed (up to six months or 10% of the person's sentence, whichever is less)²³ at the end of their sentences. Some people leaving prison do not need the services of a halfway house and can go straight to home confinement to live with their families while they reenter society. Yet historically the BOP has not fully utilized home confinement.²⁴

C. Compassionate Release

The FIRST STEP Act reforms the BOP's use of compassionate release²⁵ for sick and elderly prisoners, a process that has been notoriously broken for decades.²⁶ Reforms would allow prisoners to appeal denials of compassionate release to federal courts after all other BOP remedies have been exhausted or at least thirty days have passed since the request was submitted; require annual data reporting on the BOP's use of compassionate release; and create an expedited timeline for BOP consideration of compassionate release requests from terminally ill prisoners, among other reforms.²⁷

D. 500-Mile Placement Rule

The FIRST STEP Act would require the BOP to place people in prisons no more than 500 driving miles from home unless security designation, programming or health-care needs, or bed space limits prevent it.²⁸ Studies have found that about one in four federal prisoners are incarcerated more than 500 miles from home.²⁹ Long distances make it difficult and expensive for spouses, parents, and children to visit a loved one in prison, fraying ties that can help prevent recidivism.³⁰

E. More Rehabilitative Programming and Funding

The FIRST STEP Act authorizes \$250 million over five years³¹ for more rehabilitative programming in federal prisons, where most prisoners currently lack meaningful educational, job training, mental health, and drug treatment programs.³² Funding is also essential because the BOP has recently been cutting the number of staff that provide rehabilitative programming and classes.³³ Without adequate funding and staff, prison reform is impossible.

III. Salvaging the FIRST STEP Act with Sentencing Reform?

Just when the August congressional recess arrived and it seemed the FIRST STEP Act would die the same death as

similar bills before it, President Trump announced that he would be willing to sign a FIRST STEP Act that included sentencing reforms.³⁴ This sparked negotiations among Senators Grassley and Durbin and other key lawmakers. Another breakthrough came when Senate Majority Leader Mitch McConnell (R-KY) promised to give the FIRST STEP Act a floor vote in the Senate after the November 2018 elections if the bill could win 60 votes.³⁵ As of this writing,³⁶ the challenge in Congress is that of threading a needle: the final criminal justice reform bill must include enough sentencing reforms to win over FIRST STEP Act opponents like Grassley and Durbin, but not so much sentencing reform that the bill would be vetoed by President Trump or too easily killed by Attorney General Sessions, still outspokenly opposed to sentencing reform.³⁷ Sentencing reforms that are on the table for negotiation include the following provisions from SRCA.

A. Reform of 18 U.S.C. § 924(c) "Stacking"

Federal law requires consecutive five-, seven-, ten-, and thirty-year mandatory minimum sentences for possessing, brandishing, or discharging a gun in the course of a drug trafficking crime or a crime of violence, and consecutive twenty-five-year sentences for each subsequent conviction.³⁸ This "stacking" of penalties—required even when all of the criminal charges arise from one offense or course of conduct in a single indictment³⁹—results in absurd punishments like the forty-year sentence Frederick Turner, a low-level and first-time drug offender, received for merely delivering a gun to a confidential informant during his addiction-driven involvement in a drug conspiracy.⁴⁰

SRCA's reform provision would clarify that the twenty-five-year sentences for second or subsequent § 924(c) offenses may be applied only when the prior § 924(c) conviction was already final prior to the commission of the current offense.⁴¹ At the October 2015 markup of SRCA, then Senator Sessions said, "I think the stacking issue is a problem. . . . I would support reform of the stacking provisions somewhat like you have it in the bill today."⁴² Of all the sentencing reforms proposed as additions to the FIRST STEP Act, stacking reform is arguably the least controversial.

B. Reform of 21 U.S.C. §§ 841, 851 Mandatory Minimums for Repeat Offenders

Current law requires mandatory twenty-year and life-without-parole sentences for drug offenders with prior drug convictions, if the prosecutor files an information seeking such sentences.⁴³ In addition to their excessive length, these sentences are problematic because they are frequently applied to people whose prior convictions are old, stemmed from drug addiction, were for non-trafficking offenses, or did not actually result in a prison sentence.⁴⁴ The U.S. Sentencing Commission found that § 851 enhancements were applied inconsistently, with wide geographic variations in eligibility, filing, withdrawal, and ultimate application of the enhancement among offenders. For example,

five federal districts sought § 851 enhancements against more than 50% of eligible drug trafficking offenders, while nineteen districts sought no § 851 enhancements against eligible offenders.⁴⁵ Additionally, while § 851 enhancements had a significant impact on all racial groups, they impacted Black offenders most significantly.⁴⁶

SRCA's reforms would reduce the mandatory life-without-parole sentence to a mandatory minimum twenty-five-year sentence for a third drug offense and reduce the mandatory twenty-year sentence to a mandatory minimum fifteen-year sentence for a second drug offense under §§ 841 and 851. In SRCA, these reforms would be retroactively applicable. Also, SRCA would limit the types of prior drug offenses that can trigger §§ 841 and 851 sentences to those for which the person served more than one year in prison and for which the release from imprisonment was within fifteen years of the commission of the current offense.⁴⁷

C. Safety Valve Expansion

One of the only exceptions to mandatory minimum drug sentences, the "safety valve,"⁴⁸ is so narrow that many low-level offenders with minimal criminal records are excluded from relief and receive disproportionate punishments.⁴⁹ Old and minor offenses, including those for which a person served no prison or jail time, can disqualify a person from safety valve eligibility. Examples include careless driving, trespassing, insufficient funds check, and disorderly conduct; all count in the guidelines calculation if the sentence was a term of probation of more than one year.⁵⁰ In FY 2016, 22% of drug offenders qualified for the safety valve,⁵¹ yet the U.S. Sentencing Commission also found that a "significant portion of offenders who performed relatively low-level functions did not qualify under the safety valve provision. For example, a significant portion of Couriers (31.9%), Mules (28.8%), and Employees/Workers (33.9%) did not qualify for the safety valve in fiscal year 2016," and these offenders received longer sentences.⁵²

The SRCA reforms would expand the existing safety valve's criminal history prong to make eligible those who do not have more than four criminal history points (excluding any one-point prior offenses), a prior three-point offense, or a prior two-point violent offense, as calculated under the guidelines. The safety valve would also apply if the court found that the person lacked prior convictions for serious violent felonies and the criminal history score overrepresented the seriousness of the defendant's record or likelihood of reoffending.⁵³ SRCA would also create a new safety valve specifically for the ten-year mandatory minimum sentences for drug trafficking, with an extensive and rigid list of eligibility criteria.⁵⁴

D. Fair Sentencing Act Retroactivity

The Fair Sentencing Act of 2010 (FSA) reduced the weight disparity between crack and powder cocaine mandatory minimum sentences from a ratio of 100:1 to 18:1 but did

not apply this reform retroactively.⁵⁵ As of October 2017, according to a U.S. Sentencing Commission analysis, 3,147 crack cocaine offenders remained in federal prisons serving mandatory minimum terms that Congress, the President, and the country have repudiated as unfair and racially discriminatory.⁵⁶ SRCA's provisions would allow crack cocaine offenders sentenced before August 3, 2010, to petition courts for sentences in line with the FSA's reforms.⁵⁷

IV. Conclusion: Threading a Needle, or Waiting for Perfection?

Passing any legislation in Congress in an election year is a challenge with long odds of success, but regardless of what happens to the FIRST STEP Act, the bill's journey highlights important future challenges and disagreements the criminal justice reform community must face and resolve, namely:

1. Must criminal justice reform legislation be comprehensive (i.e., include both sentencing and prison reforms) before Congress can pass it? If so, what else must comprehensive criminal justice reform include? If only comprehensive criminal justice reform is acceptable, how long should advocates—and, more importantly, prisoners and their families—be willing to wait for Congress to pass it?
2. Must Congress pass a criminal justice reform bill only when there is an administration in power that will implement it effectively? Again, if so, how long should people be willing to wait for reform before such an administration arises?
3. Is the use of risk assessment tools always barred unless they are certain not to create or exacerbate racial disparities? If so, what is the level of certainty required before allowing the use of a particular tool in reform legislation? What safeguards, if any, are sufficient to make a risk assessment tool an acceptable inclusion in a criminal justice reform bill? If risk assessment tools are rejected unconditionally, what are the alternative policies Congress should pursue instead?

The future passage of federal criminal justice reform may not depend on who lives in the White House. Instead, it may depend on whether the criminal justice reform community—and its allies in Congress—are willing to accept an incremental bill like the FIRST STEP Act without sentencing reforms, support reform even if the current Department of Justice is hostile to its implementation, or try out a risk assessment system that ultimately may or may not produce racial disparities. The answers to these questions will decide how long taxpayers, lawmakers, and, most importantly, incarcerated people and their families must wait for criminal justice reform. In the meantime, as of this writing, there is a slim chance to thread the needle—if enough people hold steady to make the effort a success and the postelection environment permits people to reach an agreement.

Notes

- * FAMM is a national, nonpartisan, nonprofit criminal justice reform organization in Washington, D.C. See www.famm.org. The author thanks Doug Berman and Shon Hopwood for the invitation to contribute this article.
- ¹ *Full Text: Donald Trump 2016 RNC Draft Speech Transcript*, Politico (July 21, 2016), <https://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974>. Later, President Trump referred to crime in America as “American carnage.” See The White House, Inaugural Address (Jan. 20, 2017), <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/> (“This American carnage stops right here and stops right now”).
- ² Ed Kilgore, *Sessions as Attorney General Means Criminal-Justice Reform Is Dead*, NY Mag. (Nov. 18, 2016), <http://nymag.com/daily/intelligencer/2016/11/sessions-as-ag-means-criminal-justice-reform-is-dead.html>.
- ³ *Id.* (“[W]ith the 2016 elections pending, the junior U.S. senator from Alabama began raining on the criminal-justice-reform parade, attacking pending Senate legislation on both traditional war-on-drugs grounds, and the new claim that America was being subsumed in a new ‘crime wave.’ ”)
- ⁴ S. 2123, 114th Cong. (2015).
- ⁵ S. 1917, 115th Cong. (2017).
- ⁶ U.S. Senate Judiciary Committee, Executive Business Meeting on S. 1917, the Sentencing Reform and Corrections Act (Feb. 15, 2018), <https://www.judiciary.senate.gov/meetings/02/15/2018/executive-business-meeting>.
- ⁷ Eli Watkins, *Rebuffing Sessions, Senators Advance Criminal Justice Reform Bill*, CNN (Feb. 15, 2018), <https://www.cnn.com/2018/02/15/politics/sentencing-prison-reform-senate-grassley-sessions/index.html> (“Senate Majority Whip John Cornyn, a Texas Republican who is one of the lawmakers backing the prison reform approach, opposed the comprehensive package and said he did not think sentencing reform would make it into law given the current political landscape”).
- ⁸ Jordyn Phelps, *Inside Jared Kushner’s Personal Crusade to Reform America’s Prisons*, ABC News (Apr. 8, 2018), <https://abcnews.go.com/Politics/inside-jared-kushners-personal-crusade-reform-americas-prisons/story?id=53901143>.
- ⁹ H.R. 5682, 115th Cong. (2018).
- ¹⁰ Press Release, Office of Senator Dick Durbin, Grassley, Durbin: Sentencing Reform Necessary for Senate Consideration of Criminal Justice Reform (May 9, 2018), <https://www.durbin.senate.gov/newsroom/press-releases/grassley-durbin-sentencing-reform-necessary-for-senate-consideration-of-criminal-justice-reform> (“We are encouraged to see our House colleagues continue a serious discussion about necessary reforms to our nation’s criminal justice system. However, as we move forward, reforms to federal sentencing laws must be a central part of this discussion”).
- ¹¹ 164 Cong. Rec. H4302–19 (daily ed. May 22, 2018), <https://www.congress.gov/congressional-record/2018/05/22/house-section/article/H4302-2>.
- ¹² *Id.* at 4313 (comments of Rep. Jeffries (D-NY): “You will not just take one legislative magic wand and wipe it away in one shot. It will require sustained effort, sustained intensity, sustained commitment, and a meaningful first step. That is what this bill represents”); *id.* at 4312 (comments of Rep. Collins (R-GA): “I want to see sentencing reform, too. I am on record as saying I do. I am on record as continuing past this to actually do that”).
- ¹³ See, e.g., Letter to Members of Congress from the Leadership Conference on Civil and Human Rights, “Vote No on the FIRST STEP Act” (May 21, 2018) at 1, 3, http://civilrightsdocs.info/pdf/policy/letters/2018/Short_Oppose%20FIRST%20STEP%20Act_5.21.18_FINAL.pdf (claiming that “‘risk assessments’ will further embed racism into the meting out of resources that could change prisoners’ lives—like access to treatment, work, and most importantly, the ability to earn time off of a sentence”). The letter was also signed by 108 other advocacy groups.
- ¹⁴ *Id.* at 2 (“Attorney General Jeff Sessions is a well-known, long-time opponent of sentencing and prison reform. It would be unwise and harmful to vest so much discretion in an Attorney General so hostile to meaningful justice reform”).
- ¹⁵ *Id.* at 2–3.
- ¹⁶ See H.R. 5682 § 101(a), 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5682/text> (requiring the Attorney General to “on an annual basis, review and validate the risk and needs assessment system, which review shall include . . . an evaluation of the rates of recidivism among similarly classified prisoners to identify any unwarranted disparities, including disparities among similarly classified prisoners of different demographic groups, in such rates”).
- ¹⁷ See, e.g., FAMM, The FIRST STEP Act (H.R. 5682): Good for Families, Prisoners, and Public Safety (May 2018), <https://famm.org/wp-content/uploads/FAMM-FIRST-STEP-Factsheet.pdf>.
- ¹⁸ 18 U.S.C. § 3624(b)(1) (2018).
- ¹⁹ *Barber v. Thomas*, 560 US 474 (2010).
- ²⁰ H.R. 5682 § 102(b).
- ²¹ Federal Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (showing a federal prison population of 183,488 inmates as of August 9, 2018).
- ²² H.R. 5682 § 402.
- ²³ 18 U.S.C. § 3624(c)(2).
- ²⁴ U.S. Dep’t of Justice, Office of the Inspector General, Audit of the Federal Bureau of Prisons’ Management of Inmate Placements in Residential Reentry Centers and Home Confinement (Nov. 2016), <https://oig.justice.gov/reports/2016/a1701.pdf> (“BOP is underutilizing direct home confinement placement as an alternative to [halfway house] placement for transitioning low-risk, low-need inmates back into society. . . . BOP placed only 6 percent of even those lower risk inmates directly into home confinement, despite BOP policy and guidance stating that direct home confinement placement is the preferred placement for low-risk, low-need inmates”).
- ²⁵ 18 U.S.C. § 3582(c)(1)(A)(i).
- ²⁶ See FAMM & Human Rights Watch, *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* (Nov. 2012), <https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons>.
- ²⁷ H.R. 5682 § 403(b). This section of the bill is identical to the GRACE Act, S. 2471, 115th Cong. (2018).
- ²⁸ *Id.* at § 401.
- ²⁹ Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* 40 (Jan. 2016), <https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf>.
- ³⁰ *Id.* at 39–40.
- ³¹ H.R. 5682 § 104.
- ³² See generally Kevin Ring & Molly Gill, *Using Time to Reduce Crime: Federal Prison Survey Results Show Ways to Reduce Recidivism* (June 2017), https://famm.org/wp-content/uploads/Prison-Report_May-31_Final.pdf (finding in a survey of approximately 2,000 federal prisoners that most reported little access to or availability of job training, education, computer training, mental health treatment, and drug treatment provided by qualified prison staff).

- ³³ See Taylor Dolven, *Trump's Cuts to Federal Prison System "Decimates" [sic] Jobs*, Vice News (Feb. 13, 2018), https://news.vice.com/en_ca/article/wj4jbm/trumps-cuts-to-federal-prison-system-decimates-jobs.
- ³⁴ Alexander Bolton, *Trump Gives Thumbs Up to Prison Sentencing Reform Bill at Pivotal Meeting*, The Hill (Aug. 3, 2018), <http://thehill.com/homenews/senate/400176-trump-gives-thumbs-up-to-prison-sentencing-reform-bill-at-pivotal-meeting>.
- ³⁵ Alexander Bolton, *GOP Loads Up Lame-Duck Agenda As House Control Teeters*, The Hill (Oct. 11, 2018), <https://thehill.com/homenews/senate/410882-gop-lame-duck-agenda-grows-as-house-control-teeters>.
- ³⁶ November 1, 2018.
- ³⁷ U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks Calling for a Legislative Fix to the Armed Career Criminal Act (Aug. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-calling-legislative-fix-armed-career-criminal> (calling for the maintenance and expansion of lengthy mandatory minimum sentences). Regarding Sessions's comments, Senator Grassley responded the next day by telling reporters, "With all that I have done to help Sessions, to keep the president from firing him, I think Sessions ought to stay out of it." Jordain Carney, *Grassley: Sessions Should 'Stay out of' Criminal Justice Debate after I Helped Him Keep His Job*, The Hill (Aug. 2, 2018), <http://thehill.com/homenews/senate/400114-grassley-sessions-should-stay-out-of-criminal-justice-debate-after-i-helped>.
- ³⁸ 18 U.S.C. § 924(c) (2018).
- ³⁹ Deal v. United States, 508 US 129 (1993).
- ⁴⁰ See Rachel Weiner, *Judge Laments 40-Year Sentence for Meth Dealer as "Excessive" and "Wrong,"* Wash. Post (July 2, 2018), https://www.washingtonpost.com/local/public-safety/judge-laments-40-year-sentence-for-meth-dealer-as-excessive-and-wrong/2018/07/02/f1319b4c-7bd0-11e8-93cc-6d3becdd7a3_story.html?noredirect=on&utm_term=.70627609d295. Reagan appointed Judge T. S. Ellis regretted imposing Turner's forty-year sentence. As early as 2015, Judge Ellis wrote to the Senate Judiciary Committee, "I urge Congress to clarify that language in § 924(c)(1)(C) in order to prevent unjust applications in instances where a prior § 924(c) conviction has not yet been given an opportunity to have a deterrent effect. Moreover, fairness demands that Congress make the change explicitly retroactive." See Letter from Judge T. S. Ellis III to Senator Chuck Grassley and Congressman Robert Goodlatte (Dec. 1, 2015) at 2, <https://www.politico.com/f/?id=00000164-6faa-d85b-a776-ffb22630001>.
- ⁴¹ S. 1917 Tit. I § 104, 115th Cong. (2017).
- ⁴² U.S. Senate Judiciary Committee, Executive Business Meeting, Oct. 22, 2015, <https://www.judiciary.senate.gov/meetings/executive-business-meeting-10-22-15>.
- ⁴³ 21 U.S.C. §§ 841, 851 (2018).
- ⁴⁴ See, e.g., Human Rights Watch, *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> (describing the case of Sandra Avery, who received a life-without-parole sentence for a drug offense based on three fifteen-year-old drug possession offenses for which she never served prison time).
- ⁴⁵ U.S. Sentencing Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders 6* (July 2018), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.
- ⁴⁶ *Id.* at 32.
- ⁴⁷ S. 1917 Tit. I § 101, 115th Cong. (2017).
- ⁴⁸ 18 U.S.C. § 3553(f) (2018). The safety valve is a strict five-part test, all parts of which must be met for the person to qualify for a sentence below the applicable mandatory minimum:
1. The person did not have more than one criminal history point, as calculated under the U.S. Sentencing Guidelines;
 2. The person did not play a leadership role in the offense;
 3. The person did not possess or use a gun in relation to the offense;
 4. The offense did not result in death or serious bodily injury to any other person; and
 5. The person pleads guilty and fully discloses their involvement in the offense. *Id.*
- ⁴⁹ See, e.g., Famm, Shirley Schmitt, <https://famm.org/stories/shirley-schmitt-never-sold-single-ounce-profit/> (describing a case in which a woman who never sold drugs for profit received a ten-year mandatory minimum prison term and was disqualified from the safety valve because of prior convictions for drug and drug paraphernalia possession, neglect of livestock, and purchase of pseudoephedrine over the limit, for none of which she served jail or prison time).
- ⁵⁰ U.S.S.G. § 4A1.2 (2018).
- ⁵¹ U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System 6* (Oct. 2017), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.
- ⁵² *Id.* at 7.
- ⁵³ S. 1917, Tit. I § 102.
- ⁵⁴ *Id.* at Tit. I § 103 (giving a five-year rather than a ten-year mandatory minimum sentence to an offender who does not have a prior conviction for a "serious drug felony" or a "serious violent felony"; was not a leader, organizer, manager, or supervisor in the offense; did not act as an importer or exporter, high-level distributor or supplier, wholesaler, or manufacturer, unless the person was a minor or minimal participant, as defined in the sentencing guidelines; did not use or possess a gun; pled guilty; and did not sell drugs to or with a person under age eighteen; and no death or serious bodily injury resulted to any person during the offense).
- ⁵⁵ Pub. Law 111-220 (Aug. 3, 2010).
- ⁵⁶ Letter from Glenn R. Schmitt, U.S. Sentencing Comm'n, to Congressional Budget Office (Mar. 9, 2018) at 4, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf.
- ⁵⁷ S. 1917, Tit. I § 105.