

The 2018 Debate over Statutory Reforms to the Federal Criminal Justice System

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Significant talk about significant federal criminal justice reform has been prevalent both inside and outside the Beltway in recent years. But, as noted in this space five years ago, “big talk about federal sentencing reform has long been a lot easier and a lot more common than big action.”¹ That comment, prompted by the relatively modest criminal justice reforms engineered during the Obama administration, still rings true nearly two years into the Trump administration.

But by early 2018, even the deepest cynic had reason to believe that big action on federal criminal justice reform was on the horizon. In February, the Senate Judiciary Committee voted in favor of the Sentencing Reform and Corrections Act (SRCA), a bill with consequential sentencing and prison reform provisions. In May, the House of Representatives passed overwhelmingly a prison bill known as the FIRST STEP Act. Following up on a “State of the Union” promise,² President Trump expressed his eagerness to receive and sign a “prison reform” bill.³ With legislative action supported on both sides of the political aisle and at both ends of Pennsylvania Avenue, the prospects for enacting significant criminal justice reform in 2018 seemed very bright.

And yet, it seems nothing in Washington is uncontroversial. As big action on federal criminal justice reform became ever more likely, the big talk quickly turned to what form a successful bill should or must take. Because the President expressed vocal support only for “prison reform,” some advocates urged Congress to move forward with bills like the FIRST STEP Act that did not include sentencing provisions. Other would-be reformers asserted that only a bill that also included sentencing provisions would be truly meaningful and consequential. Enactment of more modest legislation, some feared, would slow or even halt the broader movement for significant changes in the federal criminal justice system.

This Issue of *FSR* provides a snapshot of the discussion and debate over the direction and scope of federal statutory reform proposals through 2018. As of this writing, in early November 2018, meaningful lawmaking in this area is still just a possibility rather than an achieved reality; the momentum for reform that built through the first part of the year was halted by campaign dynamics as members of Congress turned their attention to the 2018 midterm elections.⁴ But with President Trump reportedly embracing (in August) a compromise proposal that would add some SRCA provisions to the FIRST STEP Act,⁵ and with Senate Majority Leader Mitch McConnell pledging to consider taking up criminal justice reform after the midterms,⁶ there remain reasons to be optimistic that all the big reform talk reflected in this Issue might yet produce big reform action before the end of 2018.

The materials in this Issue of *FSR* include both original commentary and primary documents that provide a flavor of the terms of the debate, in Congress and beyond, as political realities shifted from not believing any reform was possible during the Trump administration to strategizing just what kinds of reform should be prioritized. Georgetown Law Professor Shon Hopwood, a leading advocate for federal reforms, solicited original commentaries for this Issue that canvass the major provisions of key bills working their way through Congress in 2018. Authored by some of the leading policy advocates involved on all sides of the conversation, these articles showcase why the scope and focus of statutory reform has engendered spirited debate. For example, Ames Grawert and Priya Raghavan of the Brennan Center for Justice give voice to the concern that any “bill that excludes sentencing reform would amount to a step backwards and risk undermining the broader strategy to end mass incarceration.” Other materials

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highlight why different advocates, seeing an ever-urgent need for federal prison reforms as soon as possible, are willing to embrace any good bill, even if they are eager for it to be better. And Professor Hopwood's own contribution to this Issue—along with an article by Jack Donson and Keramet Reiter on how the Federal Bureau of Prisons approaches solitary confinement—serves as a reminder that any of the currently viable bills would still only constitute, at best, a modest modification to a federal criminal justice and prison system that many view as in need of wholesale revision.

The vagaries of the current political winds suggest it is possible, perhaps even likely, that future Issues of the *Federal Sentencing Reporter* will be covering the consequences of a soon-to-be-enacted federal criminal justice reform bill. If potential change becomes statutory reality soon, this Issue will still serve as an important reminder of all the hard work and vigorous debate that preceded reform. And if significant legislative action continues to remain out of reach, this Issue will serve as yet another testament to why federal criminal justice reform has always proven so frustratingly difficult.

Notes

¹ Douglas A. Berman, *A Cynic's Guide to All the Federal Sentencing Reform Buzz*, 26 Fed. Sent'g Rep. 73, 74 (2013).

² See Donald J. Trump, 2018 State of the Union Address (Jan. 30, 2018), at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> (stating "this year we will embark on reforming our prisons to help former inmates who have served their time get a second chance").

³ See Gregory Korte, *Trump Pushes for Prison Reform at White House Summit. Will Some Reform Lead to More?*, USA Today, May 18, 2018.

⁴ See Sophie Tatum et al., *Criminal Justice Overhaul Is Tabled—for Now*, CNN, Aug. 23, 2018.

⁵ See Alexander Bolton, *Trump Gives Thumbs Up to Prison Sentencing Reform Bill at Pivotal Meeting*, The Hill, Aug. 3, 2018.

⁶ See Alexander Bolton, *McConnell Looking at Criminal Justice Reform after Midterms*, The Hill, Oct. 10, 2018.