UNITED STATES SENTENCING COMMISSION
HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES
FEBRUARY 23-24, 2023, WASHINGTON, D.C.

STATEMENT OF PAUL J. LARKIN
REGARDING PROPOSED REVISIONS TO THE COMPASSIONATE RELEASE PROVISIONS OF THE FIRST STEP ACT OF 2018

UNITED STATES SENTENCING COMMISSION
HEARING ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES
FEBRUARY 23-24, 2023, WASHINGTON, D.C.

STATEMENT OF PAUL J. LARKIN REGARDING PROPOSED REVISIONS TO THE COMPASSIONATE RELEASE PROVISIONS OF THE FIRST STEP ACT OF 2018

Thank you for the opportunity to submit this statement and to testify at your hearing. My name is Paul J. Larkin. I am the John, Barbara, and Victoria Rumpel Senior Legal Research Fellow at the Heritage Foundation. I note my title and affiliation for identification purposes only. I offer my statement and testimony in my individual capacity. Members of the Heritage staff submit written statements and testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for Heritage or its board of trustees. Nothing I write or say should be construed as representing the views of Heritage.*

INTRODUCTION

Compassion, like mercy, is a highly revered virtue.[1] In the criminal justice system, the issue of compassion arises when a prisoner suffers from a chronic and disabling or terminal illness. The question is whether a prisoner in those straits should be released early, perhaps to home or a hospice, so that he or she can cross the River Styx beyond prison walls. That has been a traditional justification for a chief executive to release a prisoner by commutation or parole.[2] To implement that

* The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2021, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2021 operating income came from the following sources: Individuals 82 percent; Foundations 12 percent; Corporations 1 percent; Program revenue and other income 5 percent. The top five corporate givers provided The Heritage Foundation with 1 percent of its 2021 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

[1] *See*, *e.g.*, *Psalms* 103:8 (King James) ("The Lord is merciful and gracious, slow to anger and plenteous in steadfast mercy."); *Isiah* 39:13 ("Sing, O heavens; and be joyful, O earth; and break forth into singing, O mountains: for the LORD hath comforted his people, and will have mercy upon his afflicted."); *Matthew* 5:7 ("Blessed are the merciful: for they shall obtain mercy."); *Luke* 6:36 ("Be ye therefore merciful, as your Father also is merciful."); *James* 5:11 ("Behold, we count them happy which endure. Ye have heard of the patience of Job, and have seen the end of the Lord; that the Lord is very pitiful, and of tender mercy."); *Qur'an* Surah 1:1 ("In the name of Allah, the Beneficent, the Merciful."); *id.* 2-114 (113 of 114 Surahs begin with the same phrase); John Milton, *Paradise Lost, Book X*, *in* 2 THE WORKS OF JOHN MILTON 307 (F. Patterson ed., 1931) (one should "temper . . . Justice with Mercie"); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988); Alwynne Smart, *Mercy*, 43 PHILOSOPHY 345 (1968). *See generally* Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 489-96 (2020).

[2] *See* James D. Barnett, *The Grounds of Pardon*, 61 AM. L. REV. 694, 733–34 (1927) ("There is a sort of prevailing notion among the people, or some classes of them, that any prisoner ought not

principle, more than 40 states have statutory provisions that authorize parole boards to release dying or gravely ill prisoners under "medical parole" or "geriatric parole."[3]

Section 603 of the First Step Act of 2018 contains a compassionate release provision that incorporates the classical understanding of that concept and expands on it.[4] That provision has become the subject of considerable discussion and litigation.[5] Some parties favor an expansive interpretation of that act. In their view,

---

to die in prison, but that he should be released whenever his illness is believed to be fatal. Such people argue that the public interests cannot suffer if the prisoner should be allowed to die outside of the prison walls, and that the dictates of humanity require that himself and his friends should be spared the alleged disgrace of such an ending of his life.") (footnote omitted) (quoting New York Governor David Hill); *see also*, *e.g.*, Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 906-12 (2016) [hereafter Larkin, *Revitalizing Clemency*].

[3] *See*, *e.g.*, ALA CODE §§ 14-14-1 to 14-14-7 (West 2023); ALAS. STAT. ANN. §§ 33.16.085 & 33.15.087 (West 2023); ARIZ. REV. STAT. §§ 31-233(B) (West 2023); ARK. CODE ANN. §§ 12-29-404 (West 2023); CAL. PENAL CODE § 3550 (West 2023); COLO. REV. STAT. ANN. §§ 17-1-102(7.4), (7.5)(a), 17-1-105(7.5)a & 17-22.5-403.5 (West 2023); CONN. GEN'L STAT. ANN §§ 54-131d to 54.131g & 54-131k (West 2023); DEL CODE ANN. §§ 4346(e) (West 2023); D.C. CODE § 24-463 to 24-465 (West. 2023); FLA. STAT. ANN. §§ 947.149 (West 2023); GA. CONST. art. 4, § 2, ¶ II (West 2023); GA. CODE ANN. § 42-9-43(b) (West 2023); HAW. REV. STAT. ANN. § 353-63.5(c)(3) (West 2023); IDA. CODE ANN. § 20-1006 (West 2023); IND. ADMIN CODE § 220 IAC 1.1-4-1.5 (West 2023); KS. STAT. ANN. § 22-3729 (West 2023); KY. REV. STAT. ANN. §§ 439.3405 (West 2023); LA. STAT. ANN. § 574.20 (West 2023); 30 ME. REV. STAT. ANN. § 1659-A(8) (West 2023); MD. ANN. CODE § 7-309 (West 2023); MASS. GEN'L LAWS ANN. § 119A (West 2023); MICH. COMPILED LAWS ANN. §§ 791.234, 791.235(10)-(11) & 791.265b (West 2023); MISS. CODE ANN. §§ 47-7-4v (West 2023); VERNON'S MO. ANN. STATS. § 217.250 (West 2023); MT. CODE ANN. § 46-23-210 (West 2023); NEB. REV. STAT. ANN. §§ 83-1,110.2 to 83-1,110.3 (West 2023); NEV. REV. STAT. ANN. §§ 209.3925 (West 2023); N.H. REV. STAT. § 651-A:10-a (West 2023); N.J. STAT. Ann § 30:4-123.51e (West 2023); N.M. STAT. ANN. § 31-21-25.1 (West 2023); MCKINNEY'S CONSOL. LAWS ANN. of N.Y. §§ 259-r to 259-s (West 2023); N.C. GEN'L STAT. ANN. §§ 15A-1369 to 15A-1369.5 (West 2023); N.D. CENTURY CODE ANN. §§ 12-59-08 (West 2023); BALDWIN'S OHIO REV. CODE ANN. § 2967.05 (West 2023); OKLA. STAT. ANN. §§ 332.18 (West 2023); OR. REV. STAT. ANN. § 144.122(1)(b)-(c) (West 2023) 42 PURDON'S PA. CONSOL. STATS. ANN. § 9777 (West 2023); R.I. GEN'L LAWS ANN. §§ 13-8.1-1 to 13-8.1-4 (West 2023); S.C. LAWS ANN. §§ 24-21-715 (West 2023); S.D. CODIFIED LAWS §§ 24-15A-55, 24-15A-64 to 24-15A-67 (West 2023); VERNON'S TEX. STAT. ANN. § 508.146 (West 2023); VT. STAT. ANN. §§ 502a (West 2023); VA. CODE ANN. § 53.1-40.02b (West 2023); WASH. REV. CODE ANN. § 9.94A.728(1)(c) & (d) (West 2023); W. VA. DIV. OF CORRECTIONS AND REHABILITATION, FY 2022 ANNUAL REP. 31 (Dec. 2022); WIS. STAT. ANN. § 301.113(9g) (West 2023); WY. STAT. ANN. §§ 7-13-424 (West 2023). *See also* TINA CHU, VERA INST. OF JUST., IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE Fig. 3, at 7 (Apr. 2010); Jessica Conklin, *The Brief But Complicated Life of the Medical Parole Statute*, 64-Fall B. B.J. 17 (2020). *See generally* Lindsey E. Wylie et al., *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCHOL. PUB. POL'Y & L. 216, 219-25 (2018).

[4] Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018). For an excellent discussion of the provenance of that law, see Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791 (2019).

[5] For commentary, see, for example, Michael Doering, *One Step Forward: Compassionate Release Under the First Step Act*, 2020 WIS. L. REV. 1287; Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743 (2022); Jessica L. Leach, *When Compassion Meets the Law: Sentencing Disparities as Extraordinary and Compelling Reasons Warranting Compassionate Release*, 14 ELON L.J. 287 (2022); Siobhan A. O'Carroll, *"Extraordinary and Compelling Circumstances: Revisiting the Role*

Section 603 empowers the U.S. Sentencing Commission to promulgate Guidelines or Policy Statements that effectively authorize U.S. district courts to release prisoners before the completion of their sentences on a host of nontraditional grounds.[6] Among them would be disparities between the sentences that different offenders received for the same crime.[7] Also, they argue that Section 603 even authorizes district courts effectively to adopt a "second look" process for reconsidering a prisoner's sentence. In theory, that interpretation of Section 603 would also empower district courts to release prisoners because of so-called "mass incarceration" supposedly afflicting the federal criminal justice system,[8] even though that ground is entirely unrelated to the traditional basis for treating gravely ill or dying prisoners with compassion.

The argument goes as follows.[9] The Sentencing Reform Act of 1984 instructs the U.S. Sentencing Commission to "promulgat[e] general policy statements regarding the sentencing modification provisions" in that act.[10] Those policy statements "shall describe what should be considered extraordinary and compelling reasons for sentence reduction," and must include "criteria to be applied and a list of specific examples."[11] The Sentencing Reform Act of 1984 did not define the meaning of the term "extraordinary and compelling reasons," but Congress did make it clear that "[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason."[12] Accordingly, the argument goes, the Sentencing Reform Act of 1984 provision empowers the Sentencing Commission to define the "extraordinary and compelling" justifications that, *atop* proof of rehabilitation,

---

of Compassionate Release in the Federal Criminal Justice System in the Wake of the First Step Act, 98 WASH. U. L. REV. 1543 (2021). For discussions of the case law, see, for example, Leach, *supra*, at 290-92; O'Carroll, *supra*, at 1561-62.

[6] *See*, *e.g.*, Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 101 (2019); Leach, *supra* note 5, at 292; RJ Vogt, *How Courts Could Ease the White House's Clemency Backlog*, Law360 (Aug. 25, 2019), https://www.law360.com/access-to-justice/articles/1191991/how-courts-could-ease-the-white-house-s-clemency-backlog (quoting former U.S. Justice Department Pardon Attorney Margaret C. Love).

[7] *See* Hopwood, *supra* note 6, at 109 ("One example of an extraordinary and compelling reason for a sentence reduction is when a person in prison was sentenced under a provision that Congress has since found too punitive and amended, although not made retroactively applicable."), 110 ("Other examples of people presenting extraordinary and compelling reasons could be those receiving a long sentence for offenses that society no longer considers dangerous. Those serving long or life without parole sentences for marijuana trafficking offenses are the first to come to mind. Another group of people presenting extraordinary and compelling reasons might be those sentenced to harsh mandatory minimum sentences, even though the facts of their crimes made them far less culpable than someone committing a run-of-the-mill offense.") (footnote omitted); Leach, *supra* note 5, at 292 (arguing that "all sentencing disparities resulting from non-retroactive law changes" support compassionate release").

[8] *See*, *e.g.*, RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (2016).

[9] *See*, *e.g.*, Hopwood, *Second Looks*, *supra* note 6, at 101–02.

[10] 28 U.S.C. § 994(t) (2018).

[11] *Id.*

[12] *Id.* (emphasis added).

permit a district court to grant a prisoner an early release. A host of justifications can qualify, some argue, such as the ones noted above.

In my opinion, such interpretations stretch the text of the First Step Act of 2018 beyond its breaking point. That interpretation would enable district courts effectively to resentence a prisoner if they disagreed with the original sentence. District courts also could release a prisoner if they found the conditions of confinement unsettling even if not unconstitutionally "cruel and unusual."[13] District courts could effectively grant inmates parole even though President has traditionally exercised that authority under the Article II Pardon Clause to exonerate an offender or commute his sentence[14] or an executive branch parole board authorized by statute has used it to release an offender from prison into the custody of parole officials before the completion of his sentence.[15]

In my opinion, Section 603 plays an important, but far less momentous role in the criminal justice process. It carries forward the traditional justification for a chief executive or parole board to release a prisoner before completion of term of imprisonment, whether by commutation or parole: namely, that an elderly prisoner

---

[13] The Eighth Amendment prohibits the imposition of "cruel and unusual punishments." U.S. CONST. amend. VIII. The conditions under which a prisoner is lawfully confined can violate that ban. *See*, *e.g.*, Brown v. Plata, 563 U.S. 493, 510-11, 517-26 (2011) (ruling that prison overcrowding can violate the Eighth Amendment); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (ruling that "deliberate indifference to serious medical needs of prisoners" would be unconstitutional).

[14] *See* U.S. CONST. art. II, § 2, cl. 1 (vesting in the President "a Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment."); Schick v. Reed, 419 U.S. 256 (1974); Biddle v. Perovich, 274 U.S. 480 (1927); *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855) (upholding the President's power to commute a sentence even though the Pardon Clause does not expressly grant that authority). *See generally* Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1 (2013).

[15] In a 2013 article, I argued that parole in fact was still available to federal prisoners today. See Paul J. Larkin, *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013). My argument went as follows: Congress abolished parole only because it made the U.S. Sentencing Guidelines mandatory. That is clear because (1) the Senate-passed bill contained mandatory guidelines, (2) the House-passed bill had discretionary guidelines, and (3) the Conference Committee adopted the Senate version of the bill. Once the Sentencing Reform Act of 1984 became law, numerous defendants challenged the act and Sentencing Guidelines on a variety of separation of powers grounds. The Supreme Court granted review in *Mistretta v. United States*, 488 U.S. 361 (1989), to resolve that issue. Both Mistretta and the United States argued that, if the act and guidelines were held unconstitutional, the provisions in the act abolishing parole should be severed from the remainder of the statute because Congress would never have abolished parole without substituting mandatory guidelines in its place. *See* Brief for Respondent at 54-61, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-1904 & 87-7028); Brief for the United States at 60, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-1904 & 87-7028). As the federal government put it, "[t]he abolition of parole was inseparably linked to the promulgation of the Sentencing Guidelines." *Id.* The Supreme Court upheld the constitutionality of the act and guidelines in *Mistretta* and therefore did not reach the severability issue. Sixteen years later, however, the Court held in *United States v. Booker*, 543 U.S. 220 (2005), that mandatory U.S. Sentencing Guidelines were unconstitutional under a different provision of the Constitution, the Sixth Amendment Jury Trial Clause. None of the several opinions in *Booker*, however, discussed the parole severability issue. Properly applied, the severability doctrine would remove the abolition of parole from the remainder of the Sentencing Reform Act of 1984, for the reasons given by the offender and the United States in their briefs in *Mistretta*. *See* Larkin, *supra*, at 321-26.

should be released early either because he or she suffers from a chronic, disabling infirmity or because he suffers from terminal illness that will soon take him across the great divide.[16] Section 603 also permits the Sentencing Commission to fill out the meaning of the terms in that law, but it does not authorize the federal courts to construct an entirely new sentencing apparatus based on the undefined phrase "extraordinary and compelling circumstances." The First Step Act of 2018 leaves for Congress the responsibility to decide what, if any, other justifications are sufficiently weighty to overcome the finality of a sentence.[17]

Section 603 empowers the Sentencing Commission to devise Policy Statements that assist district courts decide how to resolve a prisoner's request for compassionate release. The Sentencing Reform Act of 1984 authorized such relief, but only if the Federal Bureau of Prisoners asked a district court to grant it.[18] The First Step Act of 2018 sought only to ensure that a prisoner could independently ask a district court for an early release on that ground. That law did not also empower the Sentencing Commission or district court judges to act like "junior varsity" chief executives[19] and release a prisoner early for whatever reason the Commission or court thought was "extraordinary." It certainly did not authorize either of those two bodies to engage in sentencing or prison reform under the guise of being "compassionate."

I would like to make three points. *First*, the Sentencing Reform Act of 1984 granted district courts only limited authority to revise a sentence; that power was cabined to instances of what historically has been known as "compassionate release"—viz., the release of a terminally ill prisoner so that he need not die within a prison's walls; and what authority it did offer district courts was conditioned on the Federal Bureau of Prisons (BOP) filing a motion in district court to enable the court to consider the merits of a prisoner's application for compassionate release.[20]

---

[16] *See* Barnett, *supra* note 2, at 733–34. The Sentencing Commission adopted Policy Statements in 2006, 2007, and 2018 that, by and large followed that approach. *See* Leach, *supra* note 5, at 293-94. The Commission's Policy Statement would have allowed release of a prisoner if he suffered from a terminal illness; if, due to age, was incapable of caring for himself in prison; and if the death or incapacitation of the prisoner's only family member left him the only person able to care for a minor child. U.S. SENT'G COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 1 B1.13 n.1(A)(i)-(iii) (2006). Under what came to be known as a "catch-all clause," the commission also would have allowed extraordinary release if, "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described" elsewhere in the guidelines. *Id*. § 1B1.13 n.1(D).

[17] *See* Paul J. Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 415-21 (2020) [hereafter Larkin, *Clemency's Future*].

[18] The Sentencing Reform Act was Chapter II, §§ 211-39, of the Comprehensive Crime Control Act of 1984, which in turn was Title II of Pub. L. No. 98-473, Tit. II, 98 Stat. 1837, 1987 (1984) (codified as amended at as amended, 18 U.S.C. § 3551 *et seq.* (2018) and 28 U.S.C. §§ 991-998 (2018)). The Sentencing Reform Act of 1984 was Chapter II, §§ 211-39 (codified, as amended at 18 U.S.C. § 3551 *et seq*. (2012) and 28 U.S.C. §§ 991-98 (2012)) of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, which in turn, was Title II of an appropriations act for Fiscal Year 1985, Joint Resolution, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[19] Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

[20] *See* U.S. DEPT OF JUST. OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, I-2013-006, at 1 ("[O]n average, only 24 inmates are released each year through the BOP's compassionate release program."), 11 ("[A]pproximately 13 percent

Second, BOP often failed to act at all, or at least in a timely manner, to permit district courts to consider a prisoner's compassionate release application. In response, Congress eliminated the BOP's role as doorkeeper in the First Step Act of 2018 so that a prisoner can seek relief without the BOP's approval. *Third*, the First Step Act does not also empower district courts to engage in a de novo reconsideration of a prisoner's sentence for reasons unrelated to a severe and chronic or terminal medical condition, nor does it authorize the U.S. Sentencing Commission to create a new sentencing scheme that would enable or encourage district courts to resentence a prisoner or to release him for reasons that have traditionally been done by the President under his or her Article II Pardon Clause authority to commute a sentence. The Sentencing Commission has only the authority that Congress granted it,[21] and the First Step Act did not grant this Commission or the federal courts a commutation power. Under settled principles of statutory interpretation and administrative law, this Commission cannot assume it in the absence of clear statutory authorization.[22]

I. THE SENTENCING REFORM ACT OF 1984 AND A DISTRICT COURT'S POWER TO REVISE A SENTENCE OF IMPRISONMENT

At common law, a trial judge could revise a sentence only during the same term of court in which the judge imposed it.[23] Once that term ended, a sentence became final, and the only power to modify it was in the hands of the Crown, which could alleviate a punishment by granting clemency. The Sentencing Reform Act of 1984 eliminated a trial court's term-of-court power to revisit a sentence. The act made all sentences final and not subject to revision by any federal court.[24]

Nonetheless, Congress gave district courts limited authority to shorten a prisoner's sentence if "extraordinary and compelling reasons" warranted a reduction.[25] The text of the Sentencing Reform Act of 1984 did not define that term

---

(28 of 208) of the inmates whose release requests had been approved by a Warden and Regional Director died before their requests were decided by the BOP Director.") (Apr. 2013); Larkin, *Clemency's Future*, *supra* note 17, at 415-21; Larkin, *Revitalizing Clemency*, *supra* note 2, at 906-12.

[21] *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *infra* note 17.

[22] Larkin, *Clemency's Future*, *supra* note 17, at 415-21, *see*, *e.g.*, W. Va. v. EPA, 142 S. Ct. 2587 (2022); Nat'l Ass'n of Indep. Business v. OSHA, 142 S. Ct. 661 (2022); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021); Utility Air Reg'y Group v. EPA, 570 U.S. 302 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[23] *See* United States v. Benz, 282 U.S. 304, 306–07 (1931) ("The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be 'in the breast of the court' making them, and subject to be amended, modified, or vacated by that court."); Basset v. United States, 76 U.S. 38, 41 (1869) ("This control of the court over its own judgment during the term is of every-day practice.") (footnote omitted).

[24] *See* 18 U.S.C. § 3582(b)–(c) (2018).

[25] *See* 98 Stat. 1998 (codified at 18 U.S.C. § 3582(c)(1)(A) (1988)):

> (c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

or offer examples of the justifications for an early release.[26] Relief for dying prisoners, however, had been a longstanding justification for releasing an offender from prison via clemency or parole.[27] The Sentencing Reform Act of 1984 gave a district court that authority.[28]

But there was a catch. The Sentencing Reform Act of 1984 also made clear that a district court could not grant a prisoner relief *unless* the BOP first filed a motion in federal district court asking the court to reduce his sentence.[29] The courts deemed that restriction as jurisdictional.[30] The effect was to make the BOP the gatekeeper for compassionate release, in all likelihood to avoid a flood of such requests.[31] The Bureau of Prisons historically interpreted its compassionate release authority narrowly, limiting release to prisoners who were near death.[32] Perhaps because it feared the public backlash that would result from releasing a prisoner who "miraculously recovered" or who committed a post-release crime,[33] the BOP rarely

---

> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

[26] The Senate report accompanying the bill did supply an example. The report explained that this provision was designed to enable the Federal Bureau of Prisons (BOP) to release a prisoner suffering from a terminal illness so that he would not have to die within prison walls. *See* S. REP. NO. 98-225, 98th Cong. 121 (1983) (stating that the provision would enable a district court to shorten a prisoner's term of confinement, "regardless of the length of [the prisoner's] sentence," in the "unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner").

[27] *See supra* note 5.

[28] *See* Larkin, *Revitalizing Clemency*, *supra* note 2, at 415-21.

[29] *See* 18 U.S.C. § 3582(c)(1)(A)(i).

[30] *See*, *e.g.*, Fernandez v. United States, 941 F.2d 1488, 1493 (11th Cir. 1991); Turner v. U.S. Parole Comm'n, 810 F.2d 612, 618 (7th Cir. 1987); William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 Md. L. Rev. 850, 866 (2009) ("Federal courts have uniformly rejected attempts to appeal the denial of a motion for compassionate release. In fact, there is no published case granting compassionate release reduction outside of a motion by the Director. Instead, the cases stand for the proposition that a district court does not have jurisdiction to address a sentence reduction motion under Section 3582(c)(1)(A) in the absence of a motion by the Director.").

[31] *See* Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 816 (1994) ("There is a federal statutory provision for compassionate release, but it is a tool for the Bureau of Prisons to use and not an alternative available to the prisoner himself.").

[32] *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CHANGE NOTICE NO. 5050.46, PROGRAM STATEMENT CONCERNING COMPASSIONATE RELEASE; PROCEDURES OF IMPLEMENTATION of 18 U.S.C. 3582(c)(1)(A) & 4205(g) (1998), https://web.archive.org/web/20100331124854/http://www.bop.gov/policy/progstat/5050_046.pdf [https://perma.cc/85WW-RNH5] (indicating that prisoners can receive compassionate release only for extraordinary or extremely grave medical circumstances) [hereinafter BOP, COMPASSIONATE RELEASE PROGRAM STATEMENT]; Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 190 n.74 (2005).

[33] It has happened. *See* Timothy Curtin, Note, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15

opened the gate. In fact, as the Justice Department Inspector General noted in 2013, between 2006 and 2011, the BOP's miserly application of its compassionate release authority had untoward consequences for 28 prisoners. They died before the BOP resolved compassionate release petitions that had been approved by federal wardens.[34]

II. THE FIRST STEP ACT OF 2018

In 2018, Congress decided that the BOP had abused its gatekeeper role and revised the Sentencing Reform Act of 1984. The First Step Act of 2018 authorizes a prisoner to apply for relief after exhausting his administrative remedies or 30 days after the warden receives his petition. District courts are no longer barred from ruling on a prisoner's compassionate relief request when the BOP disagrees. The district court now may overrule the BOP.

Congress achieved that result through Section 603(b) of the First Step Act of 2018. It provides as follows:

> **SEC. 603. FEDERAL PRISONER REENTRY INITIATIVE REAUTHORIZATION; MODIFICATION OF IMPOSED TERM OF IMPRISONMENT.**
>
> * * * * *
>
> (b) INCREASING THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE.—Section 3582 of title 18, United States Code, is amended—
>
> (1) in subsection (c)(1)(A), in the matter preceding clause
>
> (i), by inserting after ''Bureau of Prisons,'' the following: ''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,'';
>
> (2) by redesignating subsection (d) as subsection (e); and
>
> (3) by inserting after subsection (c) the following: ''(d) NOTIFICATION REQUIREMENTS.—
>
> (1) TERMINAL ILLNESS DEFINED.—In this subsection, the term 'terminal illness' means a disease or condition with an end-of-life trajectory.
>
> (2) NOTIFICATION.—The Bureau of Prisons shall, subject to any applicable confidentiality requirements—
>
> (A) in the case of a defendant diagnosed with a terminal illness—

ELDER L.J. 473, 499–500 (2007) (describing the case of a 65 or 66-year-old double amputee confined to a wheelchair who, within three weeks of receiving a compassionate release, along with two accomplices used a sawed-off shotgun to rob a bank); *cf.* TINA CHIU, VERA INST., IT'S ABOUT TIME, AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 8 (2010) ("A commonly cited reservation [about expanding compassionate release] is that offenders placed in nursing homes may prey upon an already vulnerable population.").

[34] OFFICE OF THE INSPECTOR GEN'L, U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS COMPASSIONATE RELEASE PROGRAM iii, 34–35, 40 (2013); *see also* Berry, *supra* note 30 at 868; Larkin, *Revitalizing Clemency*, *supra* note 2, at 907–12 & nn.267–69.

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) accept and process a request for sentence reduction that has been prepared and submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

(3) ANNUAL REPORT.—Not later than 1 year after the date of enactment of this subsection, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

(G) for each request, the time elapsed between the date the request was received by the warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.[35]

The current iteration of Section 3582(c) of Title 18 provides in part as follows:

(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—

[35] 132 Stat. at 5239-41.

> (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.[36]

The Commission now proposes to modify the sentencing guidelines and policy statements that would apply to Section 3582(c) petitions. The question is: How far does that law reach? The next section addresses that issue.

III. A DISTRICT COURT'S REVISED COMPASSIONATE RELEASE AUTHORITY

Any analysis of what the text of the First Step Act of 2018 means must begin—and ordinarily end—with its text.[37] Numerous components of Section 603 of that

---

[36] 18 U.S.C. § 3882(c).

[37] *See* BedRoc Ltd. LLC v. United States, 541 U.S. 176, 183 (2004) (noting that, because "the preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there, . . . our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citation and punctuation omitted); *see also*, *e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help clear up not create ambiguity about a statute's original meaning.") (punctuation omitted); Chicago v. Env'tal Defense Fund, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . . ."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("Statutes are not exercises in private language. They should be read, like a contractual offer, to find their reasonable import. They

law make it clear that the sentencing revision authority it contains addresses only the type of end-of-life release petitions that the BOP had mishandled since 1984. It does not go further and authorize a district court to resentence a prisoner anew or release him because of the sentences that others have received, the conditions of his confinement, or any other such reason.

Section 603(b) defines the term "terminal illness" as "a disease or condition with an end-of-life trajectory."[38] It directs the BOP no later than seventy-two hours after a prisoner is "diagnosed with a terminal illness" to notify his "attorney, partner, and family members that they" may ask a district court to modify the prisoner's sentence.[39] It requires the BOP no later than seven days after a prisoner is diagnosed with a terminal illness to "provide the [prisoner's] partner and family members (including extended family) with an opportunity to visit the [offender] in prison."[40] Section 603(b) also instructs the BOP to process "the request" for relief submitted on behalf of a prisoner "who is physically or mentally unable to submit a request for sentence reduction" by the prisoner's "attorney, partner, or family member."[41] It demands that the BOP "regularly and visibly post" in prisoner handbooks, other publications, and "medical and hospice facilities" information regarding the availability of relief.[42] Section 603(b) also instructs the BOP to prepare an annual report for the Senate and House Judiciary Committees detailing a variety of information regarding the BOP's implementation of those requirements, including "for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence."[43] Finally, Section 603(b) requires the BOP to inform Congress annually regarding the number of notifications and visits that occurred regarding "a terminally ill [prisoner]," and the number of occasions in which the BOP denied "visits to terminally ill prisoners" for security or other reasons.[44] Section 603 is literally brimming with references to the problem created by BOP's failure to afford terminally ill prisoners the opportunity to face the abyss without being surrounded by prison guards. In short, Section 603(b) carried forward the tradition of showing compassion for a dying prisoner by releasing him from a penitentiary before the completion of his sentence to enable him to cross over in the company of whatever family and friends he might have on the outside or at least to die a free man.[45]

---

are public documents, negotiated and approved by many parties in addition to those who write the legislative history and speak on the floor. The words of the statute, and not the intent of the drafters, are the 'law.'").

[38] 132 Stat. at 5239.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 5239-40.

[42] *Id*. at 5240.

[43] *Id*.

[44] *Id*. at 5240-41.

[45] *See Larkin, Clemency's Future, supra* note 17, at 415-21; Larkin, *Revitalizing Clemency*, *supra* note 2, at 907–12.

Closely related to Section 603(b) is its companion subsection, Section 603(a).[46] Section 603(a) reauthorized and amended the Second Chance Act of 2007.[47] That statute was originally designed to ease the release from Bureau of Prisons facilities to home confinement or medical-care facilities of "elderly offenders" until "the expiration of the prison term to which the offender was sentenced."[48] Section 603(a) added to that act a provision also allowing for the release of an "eligible terminally ill offender," someone who has been determined by a BOP-approved physician to be "diagnosed with a terminal illness" or is "in need of care at a nursing home, intermediate care facility, or assisted living facility" and was not convicted of a crime of violence or certain specified offenses.[49] When read together with Section 603(b), Section 603(a) reinforces the conclusion that Congress sought to limit early release to offenders who were approaching the end of their lives. In fact, Section 603(a) is more restrictive than Section 603(b), because the former exempts certain offenders, such as violent criminals or sex offenders, from its early release authorization.[50]

---

[46] The two provisions must be read together. *See*, *e.g*., King v. Burwell, 576 U.S. 473, 486 (2015) ("Our duty, after all, is to construe statutes, not isolated provisions.") (punctuation omitted).

[47] Pub. L. No. 110-199, 122 Stat. 657 (codified as amended at 34 U.S.C. 60541 (2018)).

[48] *Id*. at 5238-39; 34 U.S.C. 60541(e).

[49] *Id*.

[50] 34 U.S.C. § 60541(g) provides in part as follows:

> **(g) Elderly and family reunification for certain nonviolent offenders pilot program**
>
> **(1) Program authorized**
>
> **(A) In general**
>
> The Attorney General shall conduct a pilot program to determine the effectiveness of removing eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities and placing such offenders on home detention until the expiration of the prison term to which the offender was sentenced.
>
> **(B) Placement in home detention**
>
> In carrying out a pilot program as described in subparagraph (A), the Attorney General may release some or all eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities to home detention, upon written request from either the Bureau of Prisons or an eligible elderly offender or eligible terminally ill offender.
>
> **(C) Waiver**
>
> The Attorney General is authorized to waive the requirements of section 3624 of Title 18 as necessary to provide for the release of some or all eligible elderly offenders and eligible terminally ill offenders from Bureau of Prisons facilities to home detention for the purposes of the pilot program under this subsection.
>
> * * * * *
>
> **(5) Definitions**
>
> In this section:
>
> **(A) Eligible elderly offender**
>
> The term "eligible elderly offender" means an offender in the custody of the Bureau of Prisons--
>
> **(i)** who is not less than 60 years of age;

What that text does not say—and sometimes that is probative too[51]—is that the federal district courts are now open for the business of resentencing offenders, commuting their sentences, and answering for themselves all of the questions that we would have expected Congress to answer—or even just to have debated or acknowledged—were it to have completely jettisoned the finality that sentences ordinarily receive under the Sentencing Reform Act of 1984. Consider the numerous issues that Congress would have needed to address if the First Step Act of 2018 were to have created a new second-look process. As I have previously explained:

> There are different ways to structure a second-look system. Devising an appropriate option, however, would require Congress and the president to resolve a host of substantive and procedural issues. For example, who would perform the second look—the original sentencing judge, other Article III judges, Bureau of Prisons officials, an independent commission appointed for this purpose, or someone else? What standard(s) would the second-look decisionmaker apply to decide whether a sentence is too long and what, instead, would be a just punishment? Must the original sentence be "shocking to the conscience," clearly unjust, simply unjust, or merely erroneous? Should a court give any weight to the president's decision to reject a commutation petition? Would every prisoner be eligible for a

---

> **(ii)** who is serving a term of imprisonment that is not life imprisonment based on conviction for an offense or offenses that do not include any crime of violence (as defined in section 16 of Title 18), sex offense (as defined in section 20911(5) of this title), offense described in section 2332b(g)(5)(B) of Title 18, or offense under chapter 37 of Title 18, and has served $^{2}/_{3}$ of the term of imprisonment to which the offender was sentenced;
>
> **(iii)** who has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described in clause (ii);
>
> **(iv)** who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described in clause (ii);
>
> **(v)** who has not escaped, or attempted to escape, from a Bureau of Prisons institution;
>
> **(vi)** with respect to whom the Bureau of Prisons has determined that release to home detention under this section will result in a substantial net reduction of costs to the Federal Government; and
>
> **(vii)** who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.

[51] *See* Kimbrough v. United States, 552 U.S. 85, 106 (2007) (concluding that Congress's failure to reject a Sentencing Guidelines proposal can, in some circumstances, be informative); Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (in the course of ruling that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, applies to the election of state court judges, noting that "Congress' silence in this regard can be likened to the dog that did not bark." (quoting A. Doyle, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335 (1927))); Harrison v. PPG Indus., Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

> second look or only ones serving longer than a particular term (say, ten years) or past a certain age (say, sixty-five)? Does every prisoner merit a second look or are there some crimes or offenders that do not? If the latter, which ones—espionage, violent crimes, sexual offenses, crimes against minors or the elderly, repeat offenders, and so forth? Could a second look modify a mandatory minimum sentence? What if that sentence is life imprisonment, the only sentence other than the death sentence for some federal crimes, such as murder in the first degree? How often could a prisoner apply for relief? Why limit a prisoner to only one shot? Should there be exceptions for remarkable acts in prison—say, saving a guard's life, or donating a kidney—after a prisoner's first application failed? Should a prisoner denied relief be allowed to appeal that decision? Should the government be able to appeal a reduction in a prisoner's sentence? If so, what would be the standard of appellate review—clear error, abuse of discretion, or de novo? Would there be some form of post-release supervision similar to parole or supervised release? Can the decisionmaker impose conditions on the released prisoner? If so, what conditions? Suppose a released prisoner reoffends or violates a condition of his release. Can, should, or must the decisionmaker revoke his release? If not, the second-look mechanism is better than parole for prisoners, but not for the government, so why should the public be willing to go along with it? If yes, what is the difference between a second look and parole? I see none. If there is no distinction, why the charade? I could add more questions, but you get the point.[52]

It is dubious in the extreme that Congress snuck a second-look provision or clemency power into a revision of the compassionate relief section of the Sentencing Reform Act of 1984 without making that approach clear or even addressing any of the issues noted above that one would expect Congress to discuss before throwing open final judgments to amendment. Yet, that is precisely what some people claim Congress did. According to former Justice Department Pardon Attorney Margaret Colgate Love, Section 603(b) is "the hidden, magical trapdoor in the First Step Act that has yet to come to everyone's attention" that can be used as a second-look vehicle.[53] How likely is it that Congress intended to create a "hidden, magical trapdoor" that would allow every prisoner to claim that his sentence is unduly long or his confinement unduly onerous? Nil. Does that matter? Yes. As Justice Scalia once put it, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[54] That proposition is equally appropriate in the case of the First Step Act. In sum, what Congress did and did not say in Section 603 powerfully militates against transforming that provision into a broad remedial resentencing statute or a judicial commutation power.

To be sure, Section 3582(c) of Title 18 contemplates that district courts can release a prisoner before he or she completes the original sentence if there are "extraordinary and compelling reasons" justifying an early release. And, yes,

---

[52] Larkin, *Clemency's Future*, *supra* note 17, at 413-14 (footnotes omitted).
[53] RJ Vogt, *supra* note 6.
[54] Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 468 (2001).

Section 3582(c) contemplates that district courts can release a prisoner if he is 70 or more years old, has already served 30 years' in prison, and the BOP finds that he does not pose a threat to the safety of an individual or the community. But those two scenarios share a "family resemblance" to each other.[55] They speak to the traditional understanding of "compassionate release"—viz., releasing a prisoner from a penitentiary when he is (to steal a line from Bob Dylan) knocking on heaven's door. The justifications proposed by prison reform advocates and now proposed by the Sentencing Commission for an early release are far removed from that scenario. That is important because the Supreme Court has made it clear on numerous occasions that courts should not try to smuggle adventurous interpretations of statutory provisions into anodyne terms. The Court made that point in 2000 in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*,[56] the Court has reiterated that principle on several later occasions,[57] and the Court made it again most recently in its 2022 decision in *West Virginia v. EPA*.[58] Yet, as explained below, that is what the Sentencing Commission's proposed guidelines revisions seek to do.

IV. THE U.S. SENTENCING COMMISSION'S 2023 AMENDMENTS TO THE GROUNDS FOR A PRISONER'S EARLY RELEASE

The Sentencing Commission has proposed several particular amendments revising the list of "extraordinary and compelling reasons" for an early release. The paragraphs below address whether those amendments are consistent with the Sentencing Reform Act of 1984, as modified by the First Step Act of 2018.

1. The first proposed guidelines revision would make the overall list of "extraordinary and compelling reasons" for early release into a "Sentencing Guideline," rather than as a "Policy Statement."[59] It is unclear whether a revision like that makes a difference as to the substance of the release justification, and the Commission's proposal does not suggest that there is one. After all, in 1993 the Supreme Court ruled in *Stinson v. United States* that the Sentencing Commission's commentary interpretating its guidelines should be treated in the same way as an agency's construction of its own regulations: namely, as the Supreme Court held in

---

[55] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65-71 (4th ed. G.E.M. Anscombe transl. 1998) (1953).

[56] 529 U.S. 120 (2000).

[57] *See*, *e.g.*, Nat'l Ass'n of Indep. Business v. OSHA, 142 S. Ct. 661 (2022); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021); Utility Air Reg'y Group v. EPA, 570 U.S. 302 (2014); King v. Burwell, 576 U.S. 473, 484-86 (2015); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[58] 142 S. Ct. 2587 (2022).

[59] U.S. Sent'g Comm'n, Proposed Amendments to the Sentencing Guidelines (Preliminary) 2 (Jan. 12, 2023) [hereafter 2023 Proposed Guidelines Amendment] ("The proposed amendment would also revise the list of 'extraordinary and compelling reasons' in §1B1.13 in several ways. [¶] First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C) (with the revisions described below), add two new categories, and revise the 'Other Reasons' category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under any of the circumstances, or a combination thereof, described in such categories.").

Bowles v. Seminole Rock & Sand Co., an agency's reading of its own rules is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[60] As relevant here, the rule would be that the Sentencing Commission's commentary on the guidelines should be deemed binding absent a conflict with the guidelines' text.[61] Under *Stinson*, there would seem to be no material difference between a Sentencing Guideline and a Policy Statement.[62]

Perhaps the Commission proposed this change because of post-*Stinson* developments in administrative law. Since the Supreme Court decided *Stinson*, the issue of what weight, if any, a court should give to an agency's interpretation of its own rules has been the subject of enormous controversy. Numerous commentators have argued that the *Seminole Rock* canon of regulatory construction on which *Stinson* is based is mistaken and should be abandoned.[63] The Court granted review to redecide that issue in *Kisor v. Wilkie*,[64] but that case did not produce a majority opinion resolving the matter.[65] The Court has not returned to it since then, and it remains a live issue.

In my opinion, an agency's interpretation of its own rules should be subject to de novo review in the courts. An agency's interpretation should be treated with the same respect that a court would afford the views of a scholar such as John Henry Wigmore or Arthur Corbin, but a court must nevertheless independently decide

---

[60] 325 U.S. 410, 414 (1945).

[61] 508 U.S. 36, 44-45 (1993):

> Although the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule. Brief for United States 13–16. The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, see *Mistretta v. United States,* 488 U.S., at 371–379, and through the informal rulemaking procedures in 5 U.S.C. § 553, see 28 U.S.C. § 994(x). Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency's interpretation of its own legislative rules. As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).

See also Neal v. United States, 516 U.S. 284, 293 (1996) (noting that, under *Stinson*, the Sentencing Commission's commentary, "The commentary, which is the authoritative construction of the Guidelines absent plain inconsistency or statutory or constitutional infirmity . . . .").

[62] Subsequent to *Stinson* the Supreme Court held that the guidelines are discretionary, not mandatory, United States v. Booker, 543 U.S. 220 (2005), and that district courts have considerable flexibility in their application of the guidelines to the facts of a particular case, *see*, *e.g*., Kimbrough v. United States, 552 U.S. 85, 101-02 (2007). That would not affect the holding in *Stinson*.

[63] *See*, *e.g*., Paul J. Larkin, Jr. & Elizabeth Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 629-31 & nn.21-24 (2019) (collecting authorities).

[64] 139 S. Ct. 2400 (2019).

[65] *See*, *e.g*., Paul J. Larkin, Jr., *Agency Deference After* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105 (2020).

whether an agency's interpretation of a rule is the correct one.[66] Perhaps the Sentencing Commission feared that a Supreme Court decision overturning *Seminole Rock* and *Stinson* would eliminate the deference that a court would afford the Commission's commentary. The Commission, however, has not offered that explanation.

2. The second proposed revision would add two new categories of medical conditions qualifying for an early release: (a) one for conditions that require long-term or specialized care that is not being, or cannot be, timely provided, but that would not qualify as a terminal illness; (b) the other—which could be called the Covid-19 justification—is for the outbreak of an infectious disease or declaration of a public health emergency posing an increased risk of "severe medical complications or death" if not mitigated in an adequate or timely manner.[67] Those proposals go too far, however, because the circumstances they seek to address are well beyond traditional *sentencing* factors.

Proposed Amendment 2 addresses the site of a prisoner's confinement and the conditions of his medical care. It would empower a district court to shorten a prisoner's sentence if the court finds that doing so is necessary to safeguard a prisoner's health. Neither one is a feature of the sentencing process that Congress entrusted to district courts and the Sentencing Commission.

On the contrary, Section 4001 of Title 18 vests in the U.S. Attorney General "[t]he control and management of Federal penal and correctional institutions, except military or naval institutions,"[68] and Section 3621 of that title vests the U.S. Attorney General and BOP Director with the power to decide where a prisoner

---

[66] *See* Kisor v. Wilkie, 139 S. Ct. at 2424-43 (Gorsuch, J., concurring in the judgment); Larkin, *supra* note 65, at 121-26; Larkin & Slattery, *supra* note 63, at 647.

[67] *See* 2023 Proposed Guidelines Amendments, *supra* note 59, at 2:

> Second, the proposed amendment would add two new subcategories to the "Medical Condition of the Defendant" category at new subsection (b)(1). The first new subcategory is for a defendant suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner. The other new subcategory is for a defendant who presents the following circumstances: (1) the defendant is housed at a correctional facility affected or at risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be mitigated in a timely or adequate manner.

[68] Section 4001 of Title 18 provides in part as follows:

> **(b)(1)** The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
>
> **(2)** The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

should be confined.[69] In fact, Congress specified that "[n]otwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is

[69] Section 3621 of Title 18 provides in part as follows:

> **(a) Commitment to custody of Bureau of Prisons.**--A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.
>
> **(b) Place of imprisonment.—**The Bureau of Prisons shall designate the place of the prisoner's imprisonment, and shall, subject to bed availability, the prisoner's security designation, the prisoner's programmatic needs, the prisoner's mental and medical health needs, any request made by the prisoner related to faith-based needs, recommendations of the sentencing court, and other security concerns of the Bureau of Prisons, place the prisoner in a facility as close as practicable to the prisoner's primary residence, and to the extent practicable, in a facility within 500 driving miles of that residence. The Bureau shall, subject to consideration of the factors described in the preceding sentence and the prisoner's preference for staying at his or her current facility or being transferred, transfer prisoners to facilities that are closer to the prisoner's primary residence even if the prisoner is already in a facility within 500 driving miles of that residence. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering--
>
> **(1)** the resources of the facility contemplated;
>
> **(2)** the nature and circumstances of the offense;
>
> **(3)** the history and characteristics of the prisoner;
>
> **(4)** any statement by the court that imposed the sentence--
>
> **(A)** concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
>
> **(B)** recommending a type of penal or correctional facility as appropriate; and
>
> **(5)** any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.
>
> In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse. Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person. Notwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court.

See also, e.g., 18 U.S.C. § 3081 ("The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions."); 34 U.S.C. § 60541 (West 2023); 28 C.F.R. § 522.20 (2023)

not reviewable by any court."[70] The Attorney General and BOP Director also have the responsibility to ensure that a prisoner receives appropriate medical care, as both the Constitution and federal statutory law require.[71] Section 4051(h)(1) is quite explicit in that regard, stating that "[t]he [BOP] Director shall ensure that all prisoners receive adequate health care."[72] The Sentencing Commission lacks the authority to substitute a district court's prisoner health-care judgments for those of the specified Executive Branch officials. Instead, Congress gave the Commission the ability to offer recommendations in that regard. The Sentencing Reform Act of 1984 specifies that "[t]he Commission and the Bureau of Prisons shall submit to Congress *an analysis and recommendations*"—not, I should add, *a Sentencing Guideline, Policy Statement, or other commentary*—"concerning maximum utilization of resources to deal effectively with the Federal prison population."[73]

This proposed amendment would substitute the judgment of a district court for that of the Attorney General and BOP Director, which exceeds the Sentencing Commission's guidelines-setting authority under the Sentencing Reform Act of 1984. In that law, as the Supreme Court noted in *Mistretta* and *Neal*, the Sentencing Commission cannot promulgate guidelines that conflict with any act of Congress.[74] The First Step Act of 2018 did not modify those laws, nor does it allow a court to alter the place of a prisoner's confinement by releasing an offender if the court believes that the Attorney General or BOP Director has made an incorrect judgment about a prisoner's health. Though well intentioned, this proposal exceeds the Sentencing Commission's authority.

("Bureau of Prisons staff screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met."); Tapia v. United States, 564 U.S. 319, 331 (2011); United States v. Perez-Asencio, Case No. 18CR3611-H, 2019 WL 626175 (S.D. Cal. Feb. 14, 2019).

[70] 18 U.S.C. § 3621(b).

[71] *See supra* note 13; Estelle v. Gamble, 429 U.S. 97, 104 (1976); 18 U.S.C. §§ 4005(a) ("Upon request of the Attorney General and to the extent consistent with the Assisted Suicide Funding Restriction Act of 1997, the Federal Security Administrator shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions."), 4006(a) (payment of medical expenses), 4014 (HIV testing), 4042(a)(2) (stating that the Attorney general and BOP Director shall "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise."), 4045 (granting the BOP Director the authority to "order an autopsy and related scientific or medical tests to be performed on the body of a deceased inmate" when "necessary to . . . protect the health of safety of other inmates"), 4048 (authorizing the BOP Director to set fees for prisoner health care).

[72] 18 U.S.C. § 4051(h)(1).

[73] 28 U.S.C. § 994(q).

[74] 28 U.S.C. 994(b)(1) (2018) ("The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code."); Mistretta v. United States, 488 U.S. 361, 374-75 (1989) ("noting that "Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code . . ."); Neal v. United States, 516 U.S. 284, 293 (1996) (noting that, under *Stinson*, the Sentencing Commission's commentary "is the authoritative construction of the Guidelines absent plain inconsistency or statutory or constitutional infirmity . . . .").

3. Proposed Amendment 3 would revise the "Family Circumstances" category in three ways: (a) it would treat an adult child in the same manner as a minor if the adult is "incapable of self-care because of a mental or physical disability or a medical condition," (b) it would allow for release of a prisoner to care for an incapacitated parent if the inmate is the "only available caregiver," and (c) it would treat "any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member" for purposes of early release.[75] That proposal takes a step down a path that has no non-arbitrary end.

The traditional compassionate release justification for an early release is that *the prisoner* soon would die. A major problem with this commission proposal is that it begins a game of dominoes that has no end in sight other than the release of virtually every prisoner. How should a court decide whether someone outside of prison is "similar in kind to a family member"? Through the prisoner's own declaration? ("He is my life-long and best friend.") Through expert opinion? ("John Doe Prisoner and John Doe Civilian are emotionally close.") If so, whose "expert opinion" counts? A psychiatrist? A psychologist? A sociologist? A member of the public? The outsider's own opinion? Or should a court rely on visitor logs? If so, what number of visits count? If the "quality" of a visit counts, how is that measured? Either approach invites arbitrary decision-making. I could go on, but you get the point. This amendment starts the Sentencing Commission and the courts down a path that has but one result: any prisoner who knows someone on the outside that he, she, or a district court judge, with a straight face, could deem "similar in kind to a family member" would qualify. Federal law does not authorize that result.

4. Proposed Amendment 4 would add two new categories: (a) prisoners who have suffered serious bodily injury from physical abuse or sexual assault by a correctional officer while in federal custody, and (b) prisoners who are confined for a term of imprisonment that is "inequitable in light of changes in the law."[76] The

---

[75] *See* 2023 Proposed Guidelines Amendments, *supra* note 59, at 2-3:

> Third, the proposed amendment would modify the "Family Circumstances" category at new subsection (b)(3) in three ways. First, the proposed amendment would revise the current subcategory relating to the death or incapacitation of the caregiver of a defendant's minor child by making it also applicable to a defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. Second, the proposed amendment would add a new subcategory to the "Family Circumstances" category for cases where a defendant's parent is incapacitated and the defendant would be the only available caregiver for the parent. Third, the proposed amendment brackets the possibility of adding a more general subcategory applicable if the defendant presents circumstances similar to those listed in the other subcategories of "Family Circumstances" involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

[76] *See* 2023 Proposed Guidelines Amendments, *supra* note 59, at 3:

> Fourth, the proposed amendment brackets the possibility of adding two new categories: (1) Victim of Assault ("The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in

first of those factors bears no relationship to the offense or offender criteria that the Sentencing Reform Act of 1984 directs the Sentencing Commission to consider when devising its guidelines.[77] Assault of a prisoner by a federal correctional officer is a crime and should be treated in the same manner as every other crime. It might make sense to transfer a prisoner to a different facility if he or she is the victim of a crime, but that is a decision for the Attorney General and BOP Director to make,

---

custody."); and (2) Changes in Law ("The defendant is serving a sentence that is inequitable in light of changes in the law.").

[77] *See* 28 U.S.C. § 994(c) and (d):

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

not a court. It also makes no sense to shorten a prisoner's *sentence* for that reason. That basis exceeds the Commission's authority.

As for the other ground added in Proposed Amendment 4: Put aside the utter indeterminacy of the term "inequitable." While it makes sense for *Congress* to apply retroactively any sentencing amendments that would shorten a prisoner's term of confinement, it is improper for the *Sentencing Commission* to make that judgment for Congress by presuming that every sentencing amendment must be applied retroactively if doing so would benefit a prisoner. Any such presumption would be inconsistent with the General Saving Act, Section 109 of Title 1, which provides that the repeal of an act does not automatically apply retroactively to eliminate any liability incurred under the prior law.[78] That statute applies to the release provisions of federal law.[79] Here, too, the Commission's proposal exceeds its statutory authority.

5. Proposed Amendment 5 would create additional options for classifying a prisoner as eligible for an early release.[80] In essence, the options would make a prisoner eligible for early release if he or she "presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances" elsewhere identified" or if, due to post-sentencing events, "it would be inequitable to continue the defendant's imprisonment." Again, the amorphous terms "similar in nature and consequence" and "inequitable" invite each district

---

[78] 1 U.S.C. § 109 (2018) provides as follows:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

[79] See Warden v. Marrero, 417 U.S. 653, 659-64 (1974) (parole).

[80] *See* 2023 Proposed Guidelines Amendments, *supra* note 59, at 3:

> Fifth, the proposed amendment would revise the provision currently found in Application Note 1(D) of §1B1.13. Three options are provided. All three options would redesignate this category as "Other Circumstances" and expand the scope of the category to apply to all motions filed under 18 U.S.C. § 3582(c)(1)(A), regardless of whether such motion is filed by the Director of the BOP or the defendant. Option 1 would provide that this category of extraordinary and compelling reasons applies in cases where a defendant presents any other circumstance or a combination of circumstances *similar in nature and consequence* to any of the circumstances described in new subsection (b)(1) through [(3)][(4)][(5)] of §1B1.13. Option 2 would provide that that this category applies if, as a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence. Option 3 would track the language in current Application Note 1(D) of §1B1.13 and apply if the defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

court to decide individually what factors justify an early release. They are but a lawyer's trick, a way of authorizing district courts to resentence offenders as they see fit, just without the honesty of actually saying that. Congress rejected that approach in the finality provisions of the Sentencing Reform Act of 1984, and the First Step Act of 2018 did not undo what Congress did 34 years earlier.

CONCLUSION

The Sentencing Commission's proposals might be reasonable ones for Congress to consider, but they exceed the authority that the Commission has to devise Sentencing Guidelines and Policy Statements.