

## Carlton Reeves

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**From:** Amy Totenberg  
**Sent:** Saturday, September 10, 2022 11:26 AM  
**To:** Carlton Reeves  
**Subject:** BOP unilateral gutting of a major FSA provision this week

Carlton,  
I know you must be totally snowed under with your major new responsibilities on the Sentencing Commission in addition to your normal judicial docket. But this new work must be exciting and rewarding too --- and certainly, is most important.

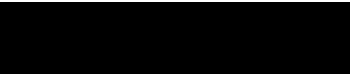
I was astonished to read in the attached Forbes Magazine article (attached) of BOP's most recent sentencing policy actions. Essentially, BOP has unilaterally gutted via issuance of a memorandum (on 9/8/22) the award of a substantial proportion or all of the additional credits toward release provided under the FSA for minimum security inmates based on their work in prison and enrollment in productive programs. Between this and the Eleventh Circuit's earlier decision in *United States v. Bryant*, 996 F.3d 1243 (2021) precluding district courts from considering broader factors for Compassionate Release that are allowed in some other Circuits, we are effectively in a pre-FSA posture here.

I hope the Sentencing Commission can turn its attention to both of these issues as soon as possible -- though I know that there are so many other important issues as well that are on the new Commission's plate. If I can be of any support or assistance to you at some juncture, please feel free to reach out.

I send you fond regards and all my best wishes for the extraordinary challenges you are taking on.

AMY

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PERSONAL FINANCE

# Bureau Of Prisons' Interpretation Of First Step Act Will Leave Thousands Of Inmates Incarcerated

Walter Pavlo Contributor

*I write and consult on federal criminal law and criminal justice.*

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US Attorney General Merrick Garland (L) swears in the new Bureau of Prisons (BOP) Director Colette ... [+] POOL/AFP VIA GETTY IMAGES

On Thursday September 8, 2022, federal prisoners across the country eagerly awaited the announcement of the Federal Bureau of Prisons' (BOP) auto-calculation of First Step Act credits. For many Low and Minimum security inmates, the announcement landed with a thud.

The [First Step Act \(FSA\)](#) was one of the most sweeping pieces of criminal justice reform in decades. Signed into law by President Donald Trump in December 2018, the law allowed eligible inmates, those with an unlikely chance of recidivism and low or minimum security, to earn credits toward an earlier release from prison. Those credits were to be earned by prisoners participating in certain needs-based educational programs and actively participating in productive activities, like a prison job. For every 30 days of successful participation, the prisoner could earn up to 15 days off their sentence up to a maximum of 12 months (365 days). That is what the law states, but the BOP added a new wrinkle stating that those with short sentences, who are also more likely to be minimum or low security,

will get no benefit of an earlier release.

A memorandum posted to federal prisoners on Thursday stated:

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“Eligible inmates will continue to earn FTC [Federal Time Credits] toward early release until they have accumulate 365 days OR are 18 months from their release date, whichever happens first [emphasis added by BOP]. At this point, the release date becomes fixed, and all additional FTCs are applied toward RRC/HC [Residential Reentry Centers / Home Confinement] placement.”

The effect will be that those prisoners with short sentences will get no reduction in their sentence, something that clearly goes against the BOP's own experts on FSA.

When a federal prisoner is sentenced, they receive 54 days of Good Conduct Time as soon as they are in federal custody. For someone sentenced to 21 months in prison, that means they would get 94 days of Good Conduct Time (54 days for 12 months then a prorated annual amount of 54 days for the other 9 months) immediately taken off their sentence. So long as the prisoner obeys the rules, their release date would be the 21 months less the 94 days. When FSA came along, the intent was to allow that same prisoner to earn additional days which could be applied to effectively reducing the sentence (a sooner transfer to supervised release, a type of probation). However, the new BOP memorandum takes that away from prisoners by setting what is an arbitrary 18 month, until release, cut-off for receiving FSAs to reduce the sentence. The result is going to be that thousands of federal inmates, many minimum security, will remain in prison for months longer than Congress intended when it passed the law.

The BOP is known for narrowly interpreting policies that could lead to prisoners being taken out of their correctional institution custody. In fact,

the BOP's initial interpretation how prisoner's earned FSA credits was so cumbersome and limiting that almost nobody would have realized a reduction in their sentence. Congressman Hakeem Jeffries (D-NY) comment in on the BOP's early interpretation of the type of participation needed to earn credits said that is, "...does not appear to be a good faith attempt to honor congressional intent." It is clear that Congress wanted fewer minimum security prisoners in prison.

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Prior to this memorandum, even the BOP had adopted the view that there was no restriction on when FSA credits would stop accumulating for earlier release from BOP custody. In the case of *Robert Stewart v Warden of FCI Talladega* (Northern District of Alabama, Case No.: 1:22-cv-00294), Stewart, a prisoner in the Talladega minimum security camp, stated that the BOP had incorrectly calculated the FSA credits and should have reduced his 21 month sentence. In that case, a BOP expert (Susan Giddings from BOP's Central Office) provided a calculation of the FSA credits Stewart had earned, 15 days per month, which was consistent with the [FSA Federal Register Final Rule](#), Stewart ended up winning his case. The judge ordered the BOP, which at the time did not have the auto-calculation tool, to re-calculate Mr. Stewart's FSA credits by hand every 60 days to assure he got everything he was entitled to under the law. On July 22, 2022, Stewart was released from BOP custody having earned 165 days of FSA credits that were applied to reduce his term of incarceration. For those federal prisoners in custody today, after this most recent BOP memorandum, will receive no FSA credits to reduce their sentence. It is unfair, arbitrary and beyond the intent that Congress had when it passed the law.

There are already so many requirements that make even minimum and low security inmates ineligible. There are a total of 68 criminal offenses that exclude inmates from being eligible from applying the FSA credits to reduce their sentence. Non-US citizens are not eligible. District of

Columbia offenders are ineligible as are any offender who does not have a period of supervised release. According to the Department of Justice, approximately 65,000 out of 131,386 federal prisoners, would be ineligible to earn FSA Time Credits under the FSA due to the inmate's crime of conviction alone (as of August 27, 2020). This new 18-month requirement will further restrict those eligible for earlier release.

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With this more restrictive condition, BOP is even going against the Department of Justice's intent of FSA which was to "transfer eligible inmates who satisfy the criteria in 3624(g) [awarding of FSA credits] to supervised release to the extent practicable, rather than prerelease custody [halfway house and home confinement]." The internal memorandum posted went on to state prisoners with "immigration issues" would not be eligible. One person who retired from the BOP said of the memorandum, "BOP is creating their own language and leaving the discretion in the hands of case managers to interpret who is eligible and who is not. They have completely disrespected the intent and FSA law states."

In Fiscal Year (FY) 2019, the cost of incarceration fee for a federal prisoner at a federal facility was \$107.85 per day; in FY 2020, it was \$120.59 per day. It costs less than half that to place a minimum security prisoner on home confinement and it costs nothing if the prisoner is not in custody at all. Thousands of prisoners will be affected by this unilateral decision by the BOP. For many prisoners, their date for returning to society has been prolonged by a memorandum that is both unfair and arbitrary.

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Walter Pavlo

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I founded Prisonology, an expert network firm of retired Bureau of Prisons professionals, to work with defendants and criminal defense lawyers on federal prison issues.

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