

THE FIRST STEP ACT

AN ARGUMENT FOR FEDERAL COURTS

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I. Introduction

When former President Donald J. Trump signed the First Step Act of 2018, it was celebrated as once-in-a-generation criminal justice reform. While some of the law's provisions had an instant impact, others have proved virtually meaningless. The First Step Act's time-credit system is an example of one of those provisions.

The First Step Act's time-credit system allows incarcerated people to earn time off their sentence by participation in evidence-based recidivism reduction programs and productive activities. Even

though President Trump signed the law nearly three years ago, the Bureau of Prisons hasn't awarded a single time credit yet.

Over the past three years, courts across the country have rubber-stamped the BOP's outright refusal to award time credits. According to these courts, their hands are figuratively tied because they simply have no jurisdiction over these kinds of claims. These courts are wrong, and there's a straightforward legal framework that already exists for incarcerated people to get the time credits they've earned.

II. The BOP isn't phasing in First Step Act time credits.

Thousands of Americans in BOP custody have participated in and successfully completed evidence-based recidivism reduction programs and productive activities since Congress passed the First Step Act in December 2018. Despite successfully completing these programs and activities, these men and women have not received any time credits under the time-credit system put into place by the First Step Act. According to the BOP, "FSA Time Credits (FTC) may only be earned for completion of assigned evidence-based recidivism reduction programs or productive activities authorized by BOP and successfully completed on or after January 15, 2020."

Assuming that the BOP will, in fact, provide First Step Act time credits for programs and activities completed on or after January 15, 2020, a glaring problem still remains: The BOP will not award any of those time credits until

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after January 15, 2022. This date marks the statutorily mandated deadline for the BOP to finish the "phase-in" process of the First Step Act's time-credit system.

So far, the BOP's approach has succeeded in undermining the First Step Act's time-credit system. This has left Americans who would otherwise be eligible for release to home confinement based on their successful completion of programs and activities under the First Step Act sitting behind bars while the BOP simply sits and waits.

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III. Most federal courts won’t push back on the BOP at all.

The BOP’s power to undermine the First Step Act’s time-credit system is expansive. Even the most high-profile supporters of the First Step Act in Congress seem reluctant to hold the BOP accountable for its implementation of what could have been criminal justice reform that made a tangible difference. Most federal courts have adopted the BOP’s approach as law without virtually any discussion at all. See, e.g., *Savla v. Marske*, No. 21-CV-422-WMC, 2021 WL 4129315, at *2 (W.D. Wis. Sept. 9, 2021) (recognizing that “many cases have concluded that federal courts lack subject matter jurisdiction to review claims challenging the BOP’s application of these provisions of the First Step Act until January 15, 2022”).

While other federal courts have held that the BOP must begin

awarding—i.e., phasing in—First Step Act time credits now, these courts are in the minority. See, e.g., *Goodman v. Ortiz*, No. CV 20-7582 (RMB), 2020 WL 5015613, at *6 (D.N.J. Aug. 25, 2020) (holding that a prisoner who had successfully completed programs and activities was entitled to First Step Act time credits before January 15, 2022, and ordering “the BOP to immediately apply” those time credits); *O’Bryan v. J.W. Cox*, No. CIV 21-4052, 2021 WL 3932275, at *4 (D.S.D. Sept. 1, 2021) (holding that a prisoner who had successfully completed programs and activities was entitled to First Step Act time credits before January 15, 2022, and ordering the BOP to immediately apply those time credits). For the most part, however, federal courts are routinely sending one message: Until January 15, 2022, you’re out of luck.

IV. But the framework is there for a much-needed legal battle.

Federal law limits the BOP's authority to release the individuals in its custody to home confinement in the final year of their sentence. Specifically, 18 U.S.C. § 3624 limits home-confinement eligibility to "the shorter of 10 percent of the term of imprisonment ... or 6 months." These limitations apply to First Step Act time credits. So, to put it bluntly, the BOP is putting up a wide-reaching fight over peanuts. But there is a legal framework under existing federal law that allows incarcerated people, their friends and family, and advocates to fight back.

a. Federal Question Jurisdiction

The United Supreme Court has long made it clear that, "where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court ... must

entertain the suit." *Bell v. Hood*, 327 U.S. 678, 681-682, 66 S.Ct. 773, 90 L.Ed.2d 939 (1946). In this sense, "[f]ederal courts have long exercised the traditional powers of equity, in cases within their jurisdiction, to prevent violations of constitutional rights." *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005). This authority is reflected in 28 U.S.C. § 1331, which grants jurisdiction to federal district courts over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arise[s] under the Constitution or laws of the United States, or treaties made ... under their authority."

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“Section 1331 thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law,” the Tenth Circuit has said. *Simmat*, 413 F.3d at 1232. “No more specific statutory basis is required.” *Id.*; see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Texas L.Rev. 113, 147-148 (1998) (explaining that “a litigant having no other statutory authority for judicial review may unabashedly point to Section 1331 as the basis for injunctive relief against agency officers...”).

While litigants use to face “difficult[y] with grounding claims for affirmative injunctions requiring federal officers to take action required by the Constitution” because of sovereign immunity, “Congress passed legislation in 1976 to waive sovereign immunity in most suits for nonmonetary relief....” *Simmat*, 413 F.3d at 1233 (citing 5 U.S.C. § 702). Because “[s]overeign immunity is ... not a bar to [a prisoner’s] action for injunctive

relief against” government officials, courts have the authority to issue affirmative injunctions requiring government officials to act.

b. First Step Act Application

The United States Supreme Court has already held that prisoners have a constitutionally protected liberty interest in time credits that they earn under federal law. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 555-558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (holding that prisoners have a constitutionally protected liberty interest in good-time credits that they have earned); *Sandin v. Conner*, 515 U.S. 472, 483-484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995) (following *Wolff* to hold that state and federal law may create liberty interests in time credits that are protected by the Due Process Clause of the U.S. Constitution).

In fact, some federal courts have already held that prisoners have a constitutionally protected interest in First Step Act time credits. See, e.g., *Poulson v. Warden, FCI*

Schuykill, No. 19-17642 (RMB), 2019 WL 5734110, at *2 (D. N.J. Nov. 5, 2019) (holding that federal courts have habeas jurisdiction over “challenges to the BOP’s calculation of” “good time credits and earned time credits” because those challenges allege that the prisoner “is in custody in violation of the Constitution or laws or treaties of the United States” as required by 28 U.S.C. § 2241(c)(3)). And, as federal courts have also recognized, those who have successfully completed programs

and activities are excused from exhausting their administrative remedies in these situations. As one federal court recently recognized in the context of First Step Act time credits in *Sutton v. Moser*, No. 2:19-CV-210, 2019 WL 2743959, at *4 (W.D. Pa. July 1, 2019), when a litigant is “challenging the legality of BOP regulations or presenting an issue of statutory construction,” federal caselaw “exclude[es] him from the exhaustion requirement.”

This is the framework available to prisoners who have successfully completed evidence-based recidivism reduction programs and productive activities since the First Step Act’s enactment, and it’s available to them now.

Until then, the BOP will have rendered the First Step Act’s time-credit system completely meaningless, and almost every federal court in the country will endorse that meaninglessness.