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**“EXTRAORDINARY AND COMPELLING”
CIRCUMSTANCES:
REVISITING THE ROLE OF
COMPASSIONATE RELEASE
IN THE FEDERAL CRIMINAL JUSTICE SYSTEM
IN THE WAKE OF THE *FIRST STEP ACT***

INTRODUCTION

In 2018, Steve Cheatham was serving his prison sentence for three bank robberies.¹ That fall, Steve was diagnosed with advanced-stage cancer.² Steve petitioned the Bureau of Prisons (“BOP”) for compassionate release, a reduction in sentence available to terminally ill prisoners.³ In practice, the BOP has denied or delayed the vast majority of such petitions: between 2013 and 2017, the BOP granted only six percent.⁴ Steve’s wife, Marie, closely followed the progress of federal criminal justice reform, hoping that new legislation could provide a mechanism for Steve’s release.⁵ At the end of 2018, a criminal justice reform bill did pass. The new law allowed Steve to bring his petition for compassionate release directly to a judge, rather than proceeding through the BOP’s administrative process. The next day, the judge signed the order to allow Steve to return home.⁶ But Marie’s joy was short lived—Steve died later the same afternoon in a prison hospice facility.⁷

Compassionate release is a “safety valve” in the criminal justice system that allows for the release of prisoners in “extraordinary and compelling” circumstances.⁸ As Steve’s story illustrates, though, bureaucratic delays and unwarranted denials by the BOP have caused qualifying prisoners to die behind bars.⁹ These failures affect the oldest and frailest people in the prison

1. Mitch Smith, *A New Law Made Him a ‘Free Man on Paper,’ but He Died Behind Bars*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/criminal-justice-reform-steve-cheatham.html> [<https://perma.cc/4DFR-MFTQ>].

2. *Id.*

3. *Id.*

4. Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html> [<https://perma.cc/5TDY-F5JA>].

5. Smith, *supra* note 1.

6. *Id.*

7. *Id.*

8. Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT’G REP. 188, 188 (2000).

9. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., PUB. NO. I-2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM i (2013) [hereinafter INSPECTOR GEN.].

system,¹⁰ a population segment that is rising as a consequence of mass incarceration.¹¹ Harsh sentencing laws with mandatory minimums, arising out of “tough on crime” and “war on drugs” policies of the 1980s, have led to the increasing warehousing of aging prisoners.¹² Currently, the number of federal inmates exceeds 150,000.¹³ Of those inmates, over 9,000 are over sixty years old.¹⁴ These inmates are especially likely to be eligible for compassionate release, some due to age alone, and others due to age-related infirmities.¹⁵ As the average age of prisoners increases, so do the costs of incarceration.¹⁶ Failures in compassionate release raise both humanitarian and fiscal concerns as federal prisons increasingly incarcerate ailing, elderly inmates who do not pose a risk to public safety.¹⁷

Lawmakers have recently revitalized compassionate release as part of a larger effort to address mass incarceration, through the First Step Act of 2018.¹⁸ Previously, the BOP served a gatekeeping role for all compassionate

10. Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles> [<https://perma.cc/6SCN-8629>].

11. Much has been written about the failures of criminal justice reform and about the phenomenon of mass incarceration. See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113 (2018) (“In recent years, there has been a growing bipartisan consensus that the uniquely American policy of mass incarceration is both fiscally and morally unsustainable.”); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019). By its design, compassionate release is a strictly limited form of relief available only to inmates in exceptional circumstances. As such, the mechanism cannot curb the penological crisis arising out of mass incarceration.

12. ACLU, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY ii (2012), https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport201206131.pdf; Hope Reese, *What Should We Do About Our Aging Prison Population?*, JSTOR DAILY (July 17, 2019), <https://daily.jstor.org/what-should-we-do-about-our-aging-prison-population/> [<https://perma.cc/6SCN-8629>].

13. *Population Statistics*, FED. BUREAU OF PRISONS (last updated Feb. 18, 2021), https://www.bop.gov/mobile/about/population_statistics.jsp [<https://perma.cc/KA5F-UZAE>].

14. *Inmate Statistics: Inmate Age*, FED. BUREAU OF PRISONS (last updated Feb. 20, 2021), https://www.bop.gov/about/statistics/statistics_inmate_age.jsp [<https://perma.cc/QT3E-DTCT>].

15. Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 941 (2018).

16. Chris Feliciano Arnold, *The Dying American Prisoner*, THE ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/politics/archive/2019/12/compassionate-release-lets-prisoners-die-free/603988/> [<https://perma.cc/2LXD-7RK7>]. In 2016, the Bureau of Prisons spent \$1.3 billion for the provision of inmate health care. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-379, BUREAU OF PRISONS: BETTER PLANNING AND EVALUATION NEEDED TO UNDERSTAND AND CONTROL RISING INMATE HEALTH CARE COSTS 15 (2017), <https://www.gao.gov/assets/690/685544.pdf> [<https://perma.cc/TRN3-KLSV>]; William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 885 (2009).

17. Compassionate release can be justified by weighing the benefit to the state in reducing a prisoner’s sentence against the penological benefits foregone by not enforcing the full sentence, including proportionality, rehabilitation, incapacitation, and deterrence. Berry, *supra* note 9, at 882. Compassionate release provides cost savings for the BOP, assists with prison population management, and additionally actually results in lower recidivism than for inmates with no reduced sentences. INSPECTOR GEN., *supra* note 9, at iii–iv; see also Thompson, *supra* note 10 (describing bipartisan support for compassionate release as a way to reduce the federal prison population and save taxpayer money).

18. Pub. L. No. 115-391, 132 Stat. 5194 (2018).

release petitions.¹⁹ Now inmates may bring their petitions directly to sentencing courts after exhausting the administrative remedies available through the BOP.²⁰ This change has increased the number of inmates who benefit from compassionate release.²¹ Notably, however, this change has also led to adversarial litigation of compassionate release petitions.²²

This Note considers the constitutional implications and policy concerns arising from the updated compassionate release mechanism. Part I of this Note traces the statutory development of compassionate release in the federal prison system. Part II examines the place of compassionate release within the federal constitutional scheme. Part III turns to the policy concerns surrounding representation by appointed counsel of compassionate release petitioners. Finally, Part IV proposes expanding the guiding definitional boundaries of compassionate release and concludes by arguing for an independent body in the executive branch to handle administrative compassionate release petitions.

I. STATUTORY DEVELOPMENT OF COMPASSIONATE RELEASE

In the 1980s, lawmakers responded to public calls for a tougher stance on crime through a series of criminal justice reforms.²³ The Comprehensive Crime Control Act of 1984 included a major overhaul of federal sentencing through its constituent part, the Sentencing Reform Act (“SRA”).²⁴ The SRA’s purpose was to reduce unwarranted sentencing disparity²⁵ and to create “certain and effective sentencing.”²⁶ To this end, the SRA instituted determinate sentencing through sentencing guidelines, abolished parole, and authorized the creation of the Sentencing Commission.²⁷ The Sentencing Commission’s sentencing guidelines constrained judicial

19. Bryant S. Green, *As the Pendulum Swings: The Reformation of Compassionate Release to Accommodate Changing Perceptions of Corrections*, 46 U. TOL. L. REV. 123, 125 (2014).

20. 18 U.S.C. § 3582(c)(1)(A).

21. Press Release, Dep’t of Just., Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System (July 19, 2019), <https://www.justice.gov/opa/pr/departments-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and> [https://perma.cc/A699-MQDG].

22. See discussion *infra* Part III.

23. Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL’Y 1, 3 (2013) [hereinafter Larkin, *Reconsidering Early Release*].

24. Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

25. Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069, 1073 (2004).

26. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 188 (1993).

27. Howell, *supra* note 25, at 1073–74.

discretion in order to reduce unwarranted sentencing disparity.²⁸ In practice, these reforms increased the average length of imposed sentences and increased the federal prison population.²⁹ Overall, since the SRA, the trend in the criminal justice system has been to send an increasing number of offenders to prisons while, concurrently, returning a decreasing number of inmates to society through early release mechanisms.

To counteract the increased rigidity in the criminal justice system under the SRA,³⁰ lawmakers inserted two exceptions under which sentencing courts can modify terms of imprisonment.³¹ Both exceptions require the court to consider the sentencing factors set forth in section 3553(a),³² and only allow a reduction if it is consistent with “applicable policy statements” by the Sentencing Commission.³³ One exception applies only to inmates whose sentences were based on a sentencing range that was subsequently lowered by the Sentencing Commission.³⁴ Under this exception, the sentencing court may reduce the term of imprisonment upon motion of the Director of the BOP, upon its own motion, or upon the motion of the defendant.³⁵

In contrast, the other exception—the compassionate release mechanism—applies to all inmates. Through this “safety valve,”³⁶ sentencing courts can reduce an inmate’s term of imprisonment if “extraordinary and compelling” circumstances warrant such a reduction.³⁷ Compassionate release does not depend on good behavior in prison or rehabilitation; instead, the mechanism allows sentencing judges to consider a prisoner’s complete circumstances and to determine whether such circumstances warrant a reduction in sentence. When originally created, the

28. *Id.* at 1074.

29. *Criminal Justice Facts*, THE SENTENCING PROJECT <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/TGN2-63VS>].

30. Howell, *supra* note 25, at 1070.

31. Price, *supra* note 8, at 188 (“While one of Congress’s goals was to ensure the finality of sentences, Congress also recognized that sometimes other considerations are important enough to warrant changing a sentence that has otherwise become final.”).

32. Such factors include the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence imposed to reflect the seriousness of the offense and to protect the public. 18 U.S.C. § 3553.

33. 18 U.S.C. § 3582(c)(2). The statute also authorizes the court to modify a term of imprisonment if expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure. 18 U.S.C. § 3582(c)(1)(B). Rule 35 authorizes the court, on motion of the government, to reduce the sentence to reflect substantial assistance provided to the government after the defendant’s sentence became final. FED. R. CRIM. P. 35(b)(1).

34. 18 U.S.C. § 3582(c)(2).

35. *Id.*

36. S. REP. NO. 98-225, at 121 (1983), as reprinted in 1984 U.S.C.A.N. 3182, 3304.

37. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 994(s), 98 Stat. 1987, 2023; Price, *supra* note 8, at 188.

sentencing courts could review compassionate release petitions only upon motion of the BOP.³⁸

Because lawmakers intended compassionate release to introduce flexibility into an otherwise rigid sentencing scheme, the standard—“extraordinary and compelling”—is broadly phrased and subject to variable interpretations. The Sentencing Commission’s policy guidelines provide guidance to sentencing courts. The Sentencing Commission has articulated a variety of qualifying circumstances, including the inmate’s medical condition, age, family circumstances, and any other extraordinary or compelling circumstances.³⁹

Due to the BOP’s gatekeeping role for compassionate release,⁴⁰ however, the BOP’s interpretation of the “extraordinary and compelling” standard controlled which compassionate release petitions came before sentencing courts. The BOP used a narrower interpretation of the compassionate release standard than is authorized by the broad statutory language, and, indeed, a narrower standard than that articulated by the Sentencing Commission’s policy statement.⁴¹ The BOP effectively restricted the use of the compassionate release mechanism to prisoners who were terminally ill.⁴² This approach eschewed many of the categories of prisoners whose particular circumstances otherwise qualified for compassionate release, as defined by the Sentencing Commission.⁴³

The BOP’s narrow interpretation, as well as bureaucratic deficiencies, resulted in few compassionate release petitions coming before sentencing courts.⁴⁴ A Human Rights Watch report found that the BOP filed an

38. § 3582(c)(1)(A), 98 Stat. at 1998–99.

39. U.S. SENT’G GUIDELINES MANUAL § 1B1.13, cmt. n.1 (U.S. SENT’G COMM’N 2018). Qualifying circumstances fall under four categories. First, the medical condition of the prisoner, including terminal illness, other serious medical conditions, impairment, or mental or physical deterioration due to aging that impairs the prisoner’s ability to function. Second, when the prisoner is at least sixty-five years old, is experiencing deterioration due to aging, and has served either at least ten years or seventy-five percent of the term of imprisonment. Third, family circumstances such as death or incapacitation of the caregiver of the defendant’s minor children or of the prisoner’s spouse. Fourth, any other circumstances that are “extraordinary and compelling.” *Id.*

40. Courts regularly found that the BOP had no legal duty to bring a motion for an inmate’s compassionate release. Green, *supra* note 19, at 142.

41. The Sentencing Commission actually expanded its guidelines for compassionate release eligibility in 2016 in response to the BOP’s narrow definition and failure to use its discretion to bring compassionate release petitions before sentencing courts. Press Release, U.S. Sent’g Comm’n, U.S. Sentencing Commission Approves Significant Changes to the Federal Sentencing Guidelines (Apr. 15, 2016), <https://www.ussc.gov/about/news/press-releases/april-15-2016> [<https://perma.cc/DBC5-5EN8>].

42. Berry, *supra* note 16, at 853.

43. *Id.*

44. *Id.* at 868. For instance, in 2011, the BOP filed only thirty motions for early release. Between 1992 and 2012, the average number of prisoners who received compassionate release was fewer than two dozen per year. HUMAN RTS. WATCH & FAMILIES AGAINST MANDATORY MINIMUMS, THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS 2 (2012) [hereinafter HUMAN RTS. WATCH].

“extraordinarily small” number of petitions in relation to the federal prison population, and that the number had not grown commensurate with the number of federal prisoners.⁴⁵ Overall, the report found that the BOP’s rigid criteria resulted in significantly fewer requests for judicial consideration than the Sentencing Commission’s policy statement would allow.⁴⁶ Other bureaucratic deficiencies contributed to the rare exercise of compassionate release. In an internal review, the Office of the Inspector General found that the BOP did not provide guidance to its staff about the criteria for compassionate release, resulting in ad hoc decision-making,⁴⁷ and failed to implement any timeliness standards for review of compassionate release petitions.⁴⁸ It further determined that the BOP’s compassionate release program was “poorly managed and implemented inconsistently” and had likely resulted in eligible prisoners not being considered for release.⁴⁹

In 2018, lawmakers addressed failures in compassionate release in the First Step Act,⁵⁰ remarkably bipartisan legislation designed to reduce the federal prison population.⁵¹ Proponents of the First Step Act lauded it as a success for the movement to end mass incarceration, although some critiqued it for failing to fully address systematic issues.⁵² The First Step

45. HUMAN RTS. WATCH, *supra* note 44, at 35.

46. *Id.* at 2–3, 7, 27.

47. INSPECTOR GEN., *supra* note 9, at i.

48. *Id.* at ii.

49. *Id.* at i; *see also* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 105–06 (2019). The BOP responded to the Office of the Inspector General’s report, but only minimally. Until 2013, on average, only twenty-four inmates were released each year via compassionate release. Following the report, that average increased to eighty-three inmates between August 2013 and September 2014. *Public Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sent’g Comm’n* 63–74 (2016) (statement of Michael E. Horowitz, Inspector Gen., Dep’t of Just.).

50. NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

51. The New York Times characterized the First Step Act as a push by an “unlikely coalition of liberals and conservatives” including “the American Civil Liberties Union, the American Conservative Union, the Koch brothers and the liberal Center for American Progress.” Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [<https://perma.cc/R4SF-KP5Z>]; *see also* Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [<https://perma.cc/M4BA-P36U>].

52. *See, e.g.*, Zak Cheney-Rice, *The First Step Act Deserves Your Skepticism*, NEW YORK: INTELLIGENCER (Dec. 20, 2018), <http://nymag.com/intelligencer/2018/12/first-step-act-skepticism.html> [<https://perma.cc/H2CH-GK7Z>]; Natasha Lennard, *The First Step Act Is Not Sweeping Criminal Justice Reform — and the Risk Is That It Becomes the Only Step*, THE INTERCEPT (Dec. 19, 2018, 6:18 AM), <https://theintercept.com/2018/12/19/first-step-act-criminal-justice-reform-bill/> (“To call the First Step Act limited would be an understatement. The legislation could make a crucial material difference to the lives of thousands of incarcerated people—something that should not be dismissed—but it would hardly make a dent in America’s mass incarceration problem.”) [<https://perma.cc/2GTX-MZXY>]. For a full discussion of how the First Step Act was passed, *see* Ames Grawert & Tim Lau, *How the FIRST STEP*

Act has three main components: correctional reform through the establishment of a new assessment system at the BOP; sentencing reform related to some federal offenses; and the reauthorization of the Second Chance Act.⁵³ In addition to these components, the First Step Act included some other criminal justice-related provisions.⁵⁴ One of these provisions sought to increase the use and transparency of compassionate release.⁵⁵ For instance, the First Step Act included new requirements regarding notification to petitioners and the creation of annual reports.⁵⁶ Most significantly, the First Step Act authorized inmates to petition sentencing courts directly for compassionate release, after exhausting administrative remedies.⁵⁷ Since the First Step Act’s enactment, many more inmates have received compassionate release than otherwise would have without the reform.⁵⁸

II. COMPASSIONATE RELEASE WITHIN THE FEDERAL CONSTITUTIONAL SCHEME

A sentencing court may not modify a term of imprisonment once it is imposed.⁵⁹ Compassionate release is an exception to this rule.⁶⁰ However, unlike the other exceptions that relate to procedural rules⁶¹ and to generally applicable changes in the sentencing guidelines,⁶² compassionate release involves a substantial exercise of discretion. Previously, the judicial

Act Became Law — and What Happens Next, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/3UW9-QGSN>].

53. JAMES, *supra* note 50, at 1.

54. *Id.* at 1.

55. *Id.* at 18.

56. First Step Act of 2018, Pub. L. No. 115-391, § 603(d), 132 Stat. 5194, 5239.

57. *Id.* § 603(b)(1), 132 Stat. at 5239. An inmate gains the authority to directly petition the sentencing court in the occurrence of one of two conditions: either the prisoner exhausts “all administrative rights to appeal a failure of the [BOP] to bring a motion on the [inmate’s] behalf,” or thirty days lapse from the BOP’s receipt of the prisoner’s request. *Id.* The thirty-day exhaustion requirement is not jurisdictional and can be waived. *United States v. Haney*, 454 F. Supp. 3d 316, 319–22 (S.D.N.Y. 2020). Many district courts have waived this requirement because of the “serious and imminent harm” posed by the COVID-19 pandemic. *United States v. Smith*, No. 15-cr-30039, 2020 U.S. Dist. LEXIS 98878, at *12 (C.D. Ill. June 5, 2020) (collecting cases).

58. Press Release, Dep’t of Just., *supra* note 21. Between December 21, 2018, when the First Step Act was signed into law, and July 19, 2020, 124 compassionate release petitions were granted, as compared to thirty-four total in 2018. *Id.* Of the compassionate release petitions that have been granted since the Act’s enactment, only around half were granted by the BOP and in the other half the prisoners won release from federal courts. Jody Godoy, *Courts Bolster Compassionate Release Under First Step*, LAW360 (July 19, 2019, 4:13 PM), <https://www.law360.com/articles/1180220/courts-bolster-compassionate-release-under-first-step> [<https://perma.cc/R42J-B29N>].

59. 18 U.S.C. § 3582(c).

60. *Id.* § 3582(c)(1)(A).

61. *Id.* § 3582(c)(1)(B).

62. *Id.* § 3582(c)(2).

branch's authority to reduce inmates' sentences was subject to the BOP's consent.⁶³ Now, the First Step Act empowers the judicial branch to utilize its discretion on compassionate release petitions and disempowers the executive branch by removing the BOP's gatekeeping function.⁶⁴ Legal scholars are increasingly recognizing the potentially large import of the updated compassionate release mechanism as an avenue for judicial "second looks" at sentences.⁶⁵

The updated compassionate release mechanism raises the constitutional question of whether, under the separation of powers doctrine,⁶⁶ the judicial branch has the authority to reduce, at any time, an inmate's lawfully imposed sentence despite the opposition of the executive branch.⁶⁷ On the one hand, in support of judicial authority, compassionate release resembles straightforward judicial modification of a sentence. In *United States v. Benz*,⁶⁸ the Supreme Court distinguished judicial and executive power over sentences and held that a sentencing court may constitutionally modify a sentence imposed during the same term:

We find nothing in the suggestion that the action of the district court in reducing the punishment after the prisoner had served a part of the imprisonment originally imposed was a usurpation of the pardoning power of the executive. The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.⁶⁹

63. See *supra* notes 38, 40 and accompanying text.

64. For a discussion of the historical and separation of power argument regarding compassionate release, see Green, *supra* note 19, at 145.

65. See *infra* notes 94–96 and accompanying text; see also Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT'G REP. 76, 78 (2019) ("Although the First Step Act's amendment to § 3582(c)(1)(A) has received little public attention, several commentators have stressed its importance."); Hopwood, *supra* note 49, at 106–07; Todd Bussert, *What the FIRST STEP Act Means for Federal Prisoners*, THE CHAMPION, May 2019, at 32 (describing the removal of the BOP's gatekeeping function as a "sea change").

66. Broadly, separation of powers is the principle that the three branches of government operate separately and fulfill different functions. While the legislative branch can grant authority to the other two branches as necessary to carry out its legislation, it is constrained by the constitutional division of powers. For a historical treatment of the development of the separation of powers doctrine, see M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

67. See *United States v. Becks*, No. 8:18CR81, 2019 WL 3820933, at *1 (D. Neb. Aug. 14, 2019).

68. 282 U.S. 304 (1931).

69. *Id.* at 311 (emphasis omitted).

In this case, the Court found that an amendment reducing a sentence was an exercise of the judicial function “to render judgment” that in no way infringed on the executive function “[t]o carry the judgment into effect.”⁷⁰ However, the Court was considering a reduction in the sentence during the same term in which the sentence was imposed.⁷¹

In contrast, reduced sentences via the compassionate release mechanism do not occur during the same term in which the sentences were imposed. Rather, in the vast majority of cases, compassionate release applies to inmates years and even decades after the original conviction. The decision to grant compassionate release also is based on judgment about the inmate’s current circumstances, not judgment about the propriety of the originally proposed sentence. The purpose of compassionate release as well as the passage of time suggests that compassionate release reductions in sentence are more like an exercise of the executive power to “cut short a sentence by an act of clemency.”⁷²

Clemency is a firmly rooted function of the executive branch.⁷³ Clemency is “a determination late in the criminal justice process by an executive authority to mitigate some consequences of a sentence.”⁷⁴ The function of clemency is to recognize the imperfection of the criminal justice system as well as the complexity of circumstances surrounding an individual criminal actor.⁷⁵ The pardon power is a form of clemency⁷⁶ with deep historical roots.⁷⁷ The Constitution provides that “[t]he President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”⁷⁸ In the Federalist Papers, Alexander Hamilton justified the pardon power as tempering legislative determinations of punishment: “The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”⁷⁹

70. *Id.*

71. *Id.* at 306.

72. *Id.* at 311.

73. For a discussion of the historical development of the clemency power, see Larkin, *supra* note 23, at 5–7.

74. RONALD L. GOLDFARB & LINDA R. SINGER, *AFTER CONVICTION* 316 (1973).

75. *Id.* at 317.

76. Other forms of clemency include commutation, reprieve, and amnesty. *Id.* at 316.

77. For a complete discussion of the history of the pardon power, as well as the pardon power’s connection to the federal system of parole, see Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010).

78. U.S. CONST. art. II, § 2, cl. 1; *see also* United States v. Klein, 80 U.S. 128, 147, (1871) (“It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted [sic] the power of pardon; and it is granted without limit.”).

79. THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Historically, courts have understood the pardon power to encompass the power to commute an otherwise valid sentence.⁸⁰ In *Ex parte Wells*,⁸¹ the President commuted a sentence of death to a sentence of life imprisonment.⁸² The Supreme Court found that was a valid exercise of the pardon power, grounding its reasoning in the historical use of the pardon power to create alternative sentences, thereby reading the pardon power broadly as “extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination.”⁸³ Thus, the power to commute is vested in the same authority as the power to pardon.⁸⁴ Commutation decisions are not subject to judicial review,⁸⁵ though the clemency process can trigger due process review by the courts.⁸⁶ Federal courts further may not enjoin the executive to grant a pardon or provide their own equitable relief.⁸⁷

So, in support of executive authority, compassionate release resembles clemency that arises out of the executive pardon power.⁸⁸ As a “safety valve” provision, compassionate release conceptually operates outside of the statutory framework that prescribes the proper sentence lengths. By design, sentence commutation through a mechanism like compassionate release frustrates congressional policy because it counteracts the punishment prescribed by the SRA and the Sentencing Commission.⁸⁹ Compassionate release is similar to parole⁹⁰ in that they are both “creature[s] of the legislature.”⁹¹ Initially, it was within Congress’ prerogative to

80. *Lupo v. Zerst*, 92 F.2d 362, 365 (5th Cir. 1937) (“The constitutional power to grant reprieves and pardons includes the power to grant commutations on lawful conditions.”).

81. 59 U.S. 307 (1855).

82. *Id.* at 317.

83. *Id.* at 314.

84. GOLDFARB & SINGER, *supra* note 74, at 343–44.

85. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (“Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”).

86. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 701–02 (2012).

87. Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 288 (2010) (citing *United States v. Murray*, 275 U.S. 347, 356 (1928) (finding federal district courts do not have inherent authority to grant probation, which would “confer very comprehensive power on the district judges in the exercise of what is very like that of executive clemency”)).

88. For a discussion of “second look” provisions in the federal criminal justice system that traces their development from the pardon power, to parole, to compassionate release, see Hopwood, *supra* note 49, at 107–09.

89. See Morison, *supra* note 87, at 302–03 (“The purpose of the Pardon Clause is precisely to function as a limited check on Congress’ legislative authority by empowering the President to alleviate the legal consequences of a criminal offense . . . in spite of the existing statutory framework. This remains true, by definition, even if such action frustrates congressional policy, which is a calculation committed by the Constitution to the President’s political judgment . . .”).

90. Parole previously existed in the federal system.

91. HAROLD J. KRENT, *PRESIDENTIAL POWERS* 212 (2005).

establish systems of parole and compassionate release.⁹² In designing those systems, though, the legislative branch was essentially codifying a traditional function of the executive.⁹³

Some commentators have espoused this interpretation of the updated compassionate release mechanism as a form of clemency. Legal scholar Shon Hopwood characterizes the updated compassionate release mechanism as a “second look” provisions in the federal justice system,⁹⁴ arguing that the First Step Act empowers federal sentencing courts with an equitable power to correct fundamentally unfair sentences.⁹⁵ Margaret Love, a former Justice Department Pardon Attorney, advanced a similar interpretation of the First Step Act, wherein the “clemency-by-judge” compassionate release mechanism is “the hidden, magical trapdoor in the First Step Act that has yet to come to everyone’s attention,” which further “obviate[s] the need for the clemency process to take care of the great majority of commutation cases.”⁹⁶

Most courts have implemented the First Step Act without raising this constitutional issue, and, to the extent that it has been raised, courts find it acceptable in the constitutional scheme. One district court noted briefly that the change in law allowing inmates to bring petitions directly is “constitutionally suspect,” due to its infringement on the Article II power of the executive branch to grant reprieves and pardons.⁹⁷ Another district court, in addressing the constitutionality of the updated compassionate release mechanism, construed the First Step Act as granting the judicial branch only limited authority to release inmates via compassionate release. The court reasoned that judicial action is, notably, cabined by the “intricate sentence-adjustment scheme” and judicial responsibility to maintain fairness in sentencing.⁹⁸

92. *Id.* at 198.

93. Parole, however, like compassionate release, historically derives from the pardon power. The modern system of parole evolved from English measures including conditional pardons, indentures, and allowing criminals to be transported to British colonies. GOLDFARB & SINGER, *supra* note 74, at 257. In the United States, the adoption of parole was preceded by the use of the conditional pardon and reduction in sentences for “good time” by state governors. *Id.* at 262. The paroling authority was exercised by the governor, or by administrative boards developed to make decisions related to parole. *Id.* at 264.

94. Hopwood, *supra* note 49, at 107–09.

95. *Id.* at 102–03.

96. RJ Vogt, *How Courts Could Ease the White House's Clemency Backlog*, LAW360 (Aug. 25, 2019, 8:02 PM), <https://www.law360.com/articles/1191991/how-courts-could-ease-the-white-house-s-clemency-backlog> [<https://perma.cc/7YVQ-C5BR>]. *But see* Paul J. Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 418 (2020) [hereinafter Larkin, *The Future of Presidential Clemency Decision-Making*] (finding that the statutory text and congressional intent foreclose interpreting the updated compassionate release mechanism as a broad remedial resentencing statute).

97. *United States v. Becks*, No. 8:18CR81, 2019 WL 3820933, at *1 (D. Neb. Aug. 14, 2019).

98. *United States v. Brown*, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019).

A brief review of the analytic frameworks of formalism and functionalism sheds light on the general lack of discussion of the constitutional issue in case law. Formalism “relies on strict textual interpretation and a belief in the determinacy of constitutional language.”⁹⁹ Thus, formalists advocate for the strict enforcement of separation of powers principles based on the text of the Constitution. Functionalism, on the other hand, deemphasizes the strict separation of the branches in favor of the principle of checks and balances in a system of overlapping power.¹⁰⁰ While this division into two categories of analysis oversimplifies the separation of powers jurisprudence, the two terms convey summarily the two primary approaches to separation of powers questions.¹⁰¹

From a formalistic approach, compassionate release is best understood as a subset of the commutation power, which is in turn a subset of the pardon power. Compassionate release, like the other mechanisms falling under the pardon power, is an exercise of the politically accountable executive branch that tempers the legislatively proscribed and judicially determined punishment. Historically and conceptually, then, under a strict separation of powers doctrine, compassionate release should best be kept as an executive prerogative.

From a functionalist approach, however, the statutory scheme likely provides adequate checks and balances to allow some overlapping power in regard to compassionate release. From this view, judicial authority to modify sentences and executive authority to commute sentences can coexist in the realm of compassionate release as a legitimate legislative solution.¹⁰² This approach is bolstered by the practical realities of compassionate release. The updated mechanism empowering the judicial branch arose only out of the executive branch’s near abdication of responsibility for implementing compassionate release as legislatively designed.¹⁰³ Further, compassionate release affects only a small number of federal inmates,¹⁰⁴ and it serves compelling social and moral purposes.¹⁰⁵

99. Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 584 (1991).

100. *Id.* at 585.

101. The Supreme Court has oscillated between both methods of analysis and applied both to questions on a case-by-case basis. *Id.* at 585–89.

102. Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 526 (2010).

103. *See supra* notes 40–49 and accompanying text.

104. *See supra* note 58.

105. *See supra* notes 9–17 and accompanying text.

III. REPRESENTATION FOR COMPASSIONATE RELEASE PETITIONS

Following a functionalist approach and taking the updated compassionate release mechanism as constitutional, the next question becomes one of policy. Namely, whether allowing inmates to petition sentencing courts directly is the best implementation of compassionate release. By allowing an inmate to petition a sentencing court directly for compassionate release, the First Step Act created an adversarial process for compassionate release where none existed before: on one side, the petitioning inmate, and on the other, the DOJ defending the BOP’s administrative denial of the petition. This new form of compassionate release petitioning raises questions of legal representation and equity among inmates.

As an initial matter, there is no right to counsel for inmates petitioning for compassionate relief within the immediate statutory scheme. The First Step Act’s modification of the compassionate release provision does contemplate the assistance of counsel for inmates seeking judicial review. For instance, under the added notification requirements, the First Step Act requires the BOP to notify, in addition to the inmate’s family members, the “defendant’s attorney.”¹⁰⁶ The modified statute also anticipates motions filed by the defendant’s attorney.¹⁰⁷ However, the statute does not provide a right to appointed counsel.

A comparison to an adjacent statutory provision is illuminating. Compassionate release is one of two exceptions to the rule that sentencing courts may not modify lawfully imposed sentences.¹⁰⁸ Sentencing courts may also reduce an inmate’s sentence when there is a change in the sentencing guidelines.¹⁰⁹ Both of these exceptions are located in the same place in the statutory scheme. They have similar requirements as to what the court must consider before exercising its discretion in reducing a sentence.¹¹⁰ Under both these provisions, an inmate can directly petition the court for a sentence reduction.¹¹¹ For the second exception, the courts have uniformly found that there is no constitutional right to counsel after a

106. 18 U.S.C. § 3582(d)(2) (requiring notification of the defendant’s attorney “in the case of a defendant diagnosed with a terminal illness” and “in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction”).

107. *Id.* § 3582(d)(3)(K).

108. Compassionate release is codified at 18 U.S.C. § 3582(c)(1).

109. *Id.* § 3582(c)(2); *see also supra* text accompanying notes 32–35.

110. For both exceptions, courts must consider the sentencing factors set forth in 3553(a) and any applicable policy statements by the Sentencing Commission. 18 U.S.C. § 3582.

111. *Id.*

defendant's direct appeal has closed.¹¹² Courts have also determined that an inmate has no statutory right to counsel when petitioning due to a change in the sentencing guidelines.¹¹³

Turning to other potential sources of the right to counsel, first, the Sixth Amendment of the Constitution does not provide a right to counsel for compassionate release petitioners. The Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”¹¹⁴ In the landmark decision *Gideon v. Wainwright*,¹¹⁵ the Supreme Court held that all criminal defendants facing serious charges are entitled to representation, regardless of ability to afford an attorney.¹¹⁶ The Sixth Amendment guarantee attaches only to “critical stages” of a criminal proceeding,¹¹⁷ when the presence of counsel is “necessary to preserve the defendant's basic right to a fair trial as affected by his right . . . to have effective assistance of counsel at the trial itself.”¹¹⁸ Courts have generally found that post-trial motions to reduce a sentence are not critical stages of the prosecution such that the Sixth Amendment would apply.¹¹⁹

Arguably, the compassionate release petition *is* a critical stage of a criminal case where the constitutional right to counsel should apply.¹²⁰ The Supreme Court has extended the right to counsel to some post-sentencing

112. *United States v. Webb*, 565 F.3d 789, 794 (11th Cir. 2009) (“The notion of a statutory or constitutional right to counsel for § 3582(c)(2) motions has been rejected by all of our sister circuits that have addressed the issue, and we agree with this consensus.” (citing *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999); *United States v. Townsend*, 98 F.3d 510, 512–13 (9th Cir. 1996); *United States v. Whitebird*, 55 F.3d 1007, 1010–11 (5th Cir. 1995); *United States v. Reddick*, 53 F.3d 462, 464–65 (2d Cir. 1995)); *see also* *United States v. Brown*, 565 F.3d 1093, 1094 (8th Cir. 2009); *United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009)).

113. *See, e.g.*, *United States v. Forman*, 553 F.3d 585, 590 (7th Cir. 2009); *Legree*, 205 F.3d at 730; *Townsend*, 98 F.3d at 512–13; *Whitebird*, 55 F.3d at 1011; *Reddick*, 53 F.3d at 463–65.

114. U.S. CONST. amend. VI.

115. 372 U.S. 335 (1963).

116. *Id.* at 334.

117. *United States v. Wade*, 388 U.S. 218, 224 (1967) (“In recognition of [the] realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings.”).

118. Meredith B. Halama, Note, *Loss of A Fundamental Right: The Sixth Amendment as a Mere “Prophylactic Rule”*, 1998 U. ILL. L. REV. 1207, 1211 (emphasis omitted) (quoting *Wade*, 388 U.S. at 227).

119. *United States v. Legree*, 205 F.3d 724, 729 (4th Cir. 2000) (“[A]s a general matter that there is no right to a hearing and assistance of counsel on a motion for reduction of sentence.” (citing *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995)); *see also* *Patrick v. State*, 108 P.3d 838, 844 (Wyo. 2005) (“A motion for sentence reduction is by its very definition a motion seeking post-conviction relief.”)).

120. *United States v. Robinson*, 542 F.3d 1045, 1052 (5th Cir. 2008) (revisiting the question of whether a § 3582(c) motion triggers either a statutory or constitutional right to an attorney given “new complexities” in evaluating such motions).

proceedings related to the underlying judgment.¹²¹ Sixth Amendment jurisprudence shows that the effective assistance of counsel is crucial in providing a defendant the right to be heard.¹²² Allowing inmates to petition sentencing courts directly provides, in theory, a right for their cases to be heard. Without counsel, the right to petition may be elusive, especially for inmates with mental or physical handicaps.¹²³ Unlike motions based on subsequent changes to sentencing guidelines, compassionate release petitions involve complex factual allegations and supporting documentation. Appointed counsel would serve a well-functioning adversary system by lessening the imbalance between the petitioner and the government.¹²⁴ However, it is unlikely the constitutional guarantee of counsel extends to post-conviction compassionate release proceedings.

The next potential source of Ca right to counsel is in the Criminal Justice Act (CJA).¹²⁵ Prior to the CJA’s passage, judicial decisions had been gradually expanding the scope of the Sixth Amendment right to counsel.¹²⁶ The CJA resulted from the growing recognition that providing a meaningful right to counsel for criminal defendants required dedicated resources.¹²⁷ The CJA created a robust system of federally funded public defense of criminal defendants.¹²⁸ Currently, there are eighty-one federal defense organizations, serving ninety-one out of ninety-four federal judicial districts.¹²⁹ In 2013,

121. *Mempa v. Rhay*, 389 U.S. 128, 135–36 (1967) (holding the right to counsel extended to the imposition of a new sentence during a parole revocation proceeding).

122. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

123. *See, e.g., Halbert v. Michigan*, 545 U.S. 605, 607 (2005) (“Persons in [the defendant’s] situation, many of whom have little education, learning disabilities, and mental impairments, are particularly handicapped as self-representatives.”).

124. Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana*, 71 LA. L. REV. 345, 348 n.11 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”)).

125. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A).

126. *See Johnston v. Zerbst*, 304 U.S. 458 (1938) (holding counsel must be appointed for federal criminal defendants); *Powell v. Alabama*, 287 U.S. 45 (1932) (extending the right to appointed counsel to state capital prosecutions); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding the Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states); *see also* Paul D. Hazlehurst, *A Federal Public Defender’s Perspective*, 62 FED. LAW. 50, 52 (2015) (describing judicial developments expanding the right to counsel).

127. Hazlehurst, *supra* note 126, at 52.

128. A 1970 amendment to the CJA authorized districts to establish defender organizations. *Defender Services*, U.S. COURTS, <https://www.uscourts.gov/services-forms/defender-services> [https://perma.cc/EHG9-4NP3]. The CJA authorized two types of offices: federal public defender organizations are staffed by salaried federal employees, while community defender organizations are nonprofits governed by a board of directors. Both types of offices receive funding from the federal judiciary. Hazlehurst, *supra* note 126, at 52.

129. *Defender Services*, *supra* note 128.

the federal defense system provided representation for over 230,000 defendants.¹³⁰

The CJA provides that “[a] person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.”¹³¹ Arguably, under the CJA, a post-conviction reduction in sentence constitutes an “ancillary matter,” and inmates are thus entitled to counsel for their petitions.¹³² However, the federal judiciary has defined “ancillary matters” narrowly to proceedings that are closely related to the principal criminal charge.¹³³ Guidelines on administering the CJA suggest that a petition for compassionate release is not covered by the term “ancillary matters.”¹³⁴ To be ancillary, the matter must have “arose from” the same facts and circumstances as the original charge.¹³⁵ The scope of representation in an ancillary matter should extend only to the part related to the “principal criminal charge.”¹³⁶ Finally, representation in an ancillary matter is only compensable as part of the representation in the principal case for which counsel has been appointed; it is not considered a separate appointment.¹³⁷ Generally, appellate courts have held that “ancillary matters” refers to matters involved in “defending the principal criminal charge,” and not to post-conviction proceedings.¹³⁸

Considered under this judicial interpretation, compassionate release petitions cannot be construed as ancillary matters. Compassionate release petitions require a showing that a prisoner’s circumstances meet the statutory criteria of “extraordinary and compelling” circumstances meriting compassionate release.¹³⁹ As such, these petitions necessarily involve a different set of facts and different legal issues than those underlying the principal criminal charge. In some cases, compassionate release petitions

130. *Criminal Justice Act: At 50 Years, a Landmark in the Right to Counsel*, U.S. COURTS (Aug. 20, 2014), <https://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel> [<https://perma.cc/9VY9-Y5KF>]. Nationwide, federal defenders receive sixty percent of CJA appointments, while the remaining forty percent are handled by CJA panel attorneys, court-appointed private lawyers who handle the cases for an hourly fee. *Defender Services*, *supra* note 128.

131. 18 U.S.C. § 3006A(c).

132. *See, e.g.*, *United States v. Whitebird*, 55 F.3d 1007, 1010 (5th Cir. 1995).

133. JUD. CONF. OF THE U.S., 7 GUIDE TO JUDICIARY POLICY: DEFENDER SERVICES § 210.20.30(b) (2019) [hereinafter GUIDE TO JUDICIARY POLICY], https://www.uscourts.gov/sites/default/files/vol_07.pdf [<https://perma.cc/U97X-BV2Z>].

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (finding the right to counsel “extends only through the defendant’s first appeal” (citing *Coleman v. Thompson*, 501 U.S. 722, 755–57 (1991))).

139. *See supra* notes 36–39 and accompanying text.

may be brought by the same defender who was appointed to represent the prisoner in the principal criminal charge, for instance, when the qualifying circumstances arise within one or two years of the original conviction. However, in many—if not most—cases, the qualifying circumstances for compassionate release will arise many years or even decades after the original conviction. In those cases, representation by a defender will require a separate appointment, which alone disqualifies the compassionate release petition from being an ancillary matter.¹⁴⁰

While there is likely no right to appointed counsel for compassionate release petitions,¹⁴¹ petitioning inmates may have recourse available by appealing to judicial discretion. District courts have some discretion to appoint counsel in post-conviction proceedings.¹⁴² In relation to compassionate release cases, some district courts have appointed federal defenders to determine whether indigent inmates may qualify for relief under the First Step Act and then to assist in filing motions for that relief.¹⁴³

However, a district court’s discretionary appointment of publicly funded counsel for compassionate release petitions rests on uncertain legal grounds.

140. GUIDE TO JUDICIARY POLICY, *supra* note 133, § 210.20.30(e).

141. *See* United States v. Wilson, No. 5:08-CR-50051-KES, 2019 WL 7372975, at *3 (D.S.D. Dec. 31, 2019) (holding an inmate does not have a right to counsel under the Constitution or the CJA for a compassionate release petition under § 3582(c)(1)(A)) (citing United States v. Webb, 565 F.3d 789, 793–95 (11th Cir. 2009) (holding no right to counsel for a petition under § 3582(c)(2))).

142. *See, e.g.*, United States v. Johnson, 580 F.3d 567, 569–70 (7th Cir. 2009) (holding there is no right to counsel in a § 3582(c)(2) proceeding, and that the decision whether to appoint counsel is left to the district court’s discretion); *Reddick*, 53 F.3d at 465 (noting appointment of counsel should be a matter of discretion for the district courts, depending on the apparent merits of the motion).

143. For instance, the District of Maryland has a standing order appointing the Office of the Federal Public Defender to “represent any defendant previously determined to have been entitled to appointment of counsel or who is now indigent to determine whether the defendant is eligible to petition the Court for compassionate release in accordance with Section 603(b) of the First Step Act of 2018 and to file any motions for compassionate release.” District of Maryland, Order 2019-04, In Re: Section 603(b), First Step Act of 2018, <https://www.mdd.uscourts.gov/sites/mdd/files/2019-04.pdf> [<https://perma.cc/G3B8-NN4M>]. The District of Kansas has a similar standing order appointing counsel for “any defendant previously determined to have been entitled to appointment of counsel, or who is now indigent, to determine whether that defendant may qualify to seek compassionate release . . . based on medical condition or age.” District of Kansas, Order 19-1, In Re: First Step Act of 2018, <https://www.ksd.uscourts.gov/wp-content/uploads/2019/04/19-1-FSA-Compassionate-Release-Order.pdf> [<https://perma.cc/HP5M-VU2A>]. The Western District of Washington has a standing order appointing counsel to “represent for screening purposes any defendant previously determined to have been entitled to appointment of counsel and any defendant who is now indigent, to determine whether that defendant may qualify for relief under Sections 102(b) and/or 603 of the First Step Act, and to present any petitions, motions, or applications relating thereto to the Court for disposition.” Western District of Washington, Order 03-19, In Re: Motions for Sentence Reduction Pursuant to Section 404 of the 2018 First Step Act, <https://www.wawd.uscourts.gov/sites/wawd/files/GO%20in%20re%20motions%20for%20sentence%20reduction%20compassionate%20release.pdf> [<https://perma.cc/Y39B-RK3A>]. Similarly, the Eastern District of North Carolina appoints counsel to any eligible defendant “to determine whether that defendant may qualify for relief pursuant to the First Step Act of 2018, and if so, to assist the defendant in obtaining such relief.” Eastern District of North Carolina, Order 19-SO-3, In Re: First Step Act of 2018, <https://www.nced.uscourts.gov/data/StandingOrders/19-SO-3.pdf> [<https://perma.cc/SDM3-ZLYN>].

Courts do not have “inherent power” to appoint counsel at public expense when not authorized by the constitution or by statute.¹⁴⁴ In a case about a reduction in sentence due to a change in sentencing guidelines, the Seventh Circuit rejected a request to appoint counsel. The court cited the Constitution, which provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹⁴⁵ The court reasoned that the CJA only authorizes appointment of counsel at public expense pursuant to Sixth Amendment requirements, or pursuant to certain other provisions, not including a motion to reduce a prisoner’s sentence.¹⁴⁶ Analogously, motions for reductions in sentences based on compassionate release may be similarly inappropriate for the appointment of counsel.

Relying on discretionary appointment of counsel in compassionate release petitions raises policy concerns. The fundamental concern underlying the right to counsel is one of fairness: it would be unfair for criminal defendants with resources to be represented by counsel, while indigent defendants were not.¹⁴⁷ Similar unfairness arises in the compassionate release context, where some inmates may afford private counsel, while indigent inmates may not. Providing appointed counsel may alleviate this unfairness for some. However, allowing such discretionary grants would introduce new unfairness among compassionate release petitioners, wherein an inmate’s right to counsel for a compassionate release petition depends upon the district in which the inmate is located.

IV. PROPOSAL

Compassionate release poses two thematic questions. First, who will define the circumstances that are “extraordinary and compelling”? Second, who will apply that definition to individual cases? This Note proposes, in regard to the first, that the authority remain with the Sentencing Commission. This Note proposes, in regard to the second, a divide in authority, where the sentencing courts make the final decision to reduce a sentence, but an independent executive body identifies and supports inmates in filing compassionate release petitions.

Looking to the first question, who will define the standard for compassionate release, the Sentencing Commission remains the best body. The initial legislation creating compassionate release tasked the Sentencing

144. *United States v. Foster*, 706 F.3d 887, 888 (7th Cir. 2013).

145. *Id.* (citing U.S. CONST. art. I, § 9, cl. 7).

146. *Id.*

147. Halama, *supra* note 118, at 1209 (citing *Maine v. Moulton*, 474 U.S. 159, 168 (1985) (“The right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice.”)).

Commission with developing policy guidance for how compassionate release should be implemented.¹⁴⁸ The Sentencing Commission is a bipartisan, independent agency located within the judicial branch, with wide-ranging statutory duties, including promulgating sentencing guidelines, collecting and analyzing data, and conducting research on sentencing issues.¹⁴⁹ Because of its independent status, coordinating role between all three branches of government and the actors in the federal criminal justice system, and resources for data collection and analysis, the Sentencing Commission is well-positioned to guide compassionate release policy.¹⁵⁰

Currently, there is a problem with the Sentencing Commission’s role in the compassionate release process. The First Step Act directs that judicial action must be “consistent with applicable policy statements” from the Sentencing Commission.¹⁵¹ However, the Sentencing Commission has not promulgated an updated policy statement since the First Step was enacted.¹⁵² The outdated policy statement still indicates that compassionate release may only be granted upon the BOP’s motion.¹⁵³

This outdated policy statement has created live questions in district courts. First, there is a question over whether the policy statement should be considered at all when deciding compassionate release petitions. A majority of district courts have found that the failure to update the policy means that there is no “applicable” Sentencing Commission policy to apply under the First Step Act.¹⁵⁴ These courts reason that in light of the congressional intent to increase the use and transparency of compassionate release, the First Step Act necessarily provides district court judges leave to depart from previous practice and consider all circumstances that may constitute “extraordinary and compelling.”¹⁵⁵ Several circuit courts have sided with this majority position that district court judges have discretion to define “extraordinary

148. *See supra* notes 27–28, 33 and accompanying text.

149. U.S. SENT’G COMM’N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> [https://perma.cc/DXW9-FFHP].

150. *Id.*

151. 18 U.S.C. § 3582(c)(1)(A).

152. U.S. SENT’G GUIDELINES MANUAL § 1B1.13, cmt. n.4 (U.S. SENT’G COMM’N 2018).

153. *Id.*

154. *See, e.g.*, *United States v. Young*, 458 F. Supp. 3d 838, 844–45 (M.D. Tenn. 2020) (collecting cases); *United States v. Brown*, 411 F. Supp. 3d 446, 449 (S.D. Iowa 2019) (“A growing number of district courts have concluded this means the Commission lacks an applicable policy statement regarding when a judge can grant compassionate release.”); *United States v. Beck*, 425 F. Supp. 3d 573, 580 (M.D.N.C. 2019) (“There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act.”).

155. *Brown*, 411 F. Supp. 3d at 449.

and compelling” at their own initiative.¹⁵⁶ But a minority of district courts maintain that the outdated policy still applies to curtail judicial discretion.¹⁵⁷

Second, there is a question whether the district court judge may stand in the place of the BOP to determine what falls under the policy’s residual clause of “other [extraordinary and compelling] reason[s].”¹⁵⁸ Some courts have asserted their authority to determine reasons outside of those enumerated by the Sentencing Commission.¹⁵⁹ Other courts have refrained from doing so, thereby limiting successful compassionate release petitions to those based on serious medical condition or terminal illness, the types of petitions that were most frequently approved by the BOP in the past.¹⁶⁰ The confusion in lower courts has contributed to inconsistent outcomes across districts.¹⁶¹

Such questions would be easily resolved by the Sentencing Commission promulgating a new policy statement on compassionate release. However, the Sentencing Commission cannot currently act because it has only one voting commissioner,¹⁶² and amending a policy guideline requires four voting commissioners.¹⁶³ The Sentencing Commission’s seven voting members must be appointed by the President and confirmed by the

156. See, e.g., *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 281–82 (4th Cir. 2020); *United States v. Elias*, 984 F.3d 516, 519–20 (6th Cir. 2021).

157. See, e.g., *United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) (“If the policy statement needs tweaking in light of [the First Step Act], that tweaking must be accomplished by the Commission, not by the courts.”); *United States v. Fox*, No. 2:14-CR-03-DBH, 2019 WL 3046086, at *2 (D. Me. July 11, 2019) (collecting cases).

158. The Sentencing Commission’s policy statement and application notes state that “extraordinary and compelling” reasons for compassionate release include the defendant’s medical condition, defendant’s age, defendant’s family circumstances, and any other reason as determined by the Director of the BOP. This final reason authorizes the BOP to define additional “extraordinary and compelling” reasons than those enumerated by the Sentencing Commission. U.S. SENT’G GUIDELINES MANUAL § 1B1.13, cmt. n.1 (U.S. SENT’G COMM’N 2018).

159. See, e.g., *Brown*, 411 F. Supp. 3d at 449–50 (“In the absence of an applicable policy statement, these courts conclude ‘the Court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)–(C) warrant granting relief.’” (quoting *United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019))); see also *Fox*, 2019 WL 3046086, at *3 (“I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.”).

160. Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. CIV. RTS – CIV. LIBERTIES L. REV. (Oct. 23, 2019), <https://harvardcrcl.org/the-answer-can-be-yes-the-first-step-act-and-compassionate-release/> [<https://perma.cc/SU32-JM45>].

161. *Id.*

162. *About the Commissioners*, U.S. SENT’G COMM’N, <https://www.uscc.gov/commissioners> (last visited Jan. 8, 2021) [<https://perma.cc/ZJ25-2FWA>]. Ex officio members of the Sentencing Commission are non-voting members. *Organization*, U.S. SENT’G COMM’N, <https://www.uscc.gov/about/who-we-are/organization> [<https://perma.cc/EM4S-EXRD>].

163. *Brown*, 411 F. Supp. 3d at 449 n.1; *Cantu*, 423 F. Supp. 3d at 348 n.1; *United States v. Handerhan*, No. 1:10-CR-00298, 2019 WL 1437903, at *1 n.4 (M.D. Pa. Apr. 1, 2019).

Senate.¹⁶⁴ Therefore, as an initial matter, the Biden administration must appoint and confirm at least three commissioners such that the Sentencing Commission may fulfill its statutory duty to provide policy guidance on compassionate release. The Sentencing Commission then should harmonize its policy guidelines with the First Step Act to reflect both the updated mechanism and the policy goal to increase the use of compassionate release. Updating the policy guideline will reduce confusion among district courts and promote uniform outcomes across jurisdictions.

The second question—of who will apply the “extraordinary and compelling” standard to individual compassionate release petitions—is more difficult to answer. In the initial framing of compassionate release, that authority was in practice granted to the BOP because of its gatekeeping role.¹⁶⁵ A myriad of problems with the BOP’s exercise of that authority resulted in compassionate release being rarely used.¹⁶⁶ The First Step Act sought to remedy the issues caused by the BOP’s gatekeeping role by allowing inmates to circumvent the BOP’s denial of their petitions and bring the petitions directly to sentencing courts.¹⁶⁷ However, this solution by the First Step Act has drawbacks. By allowing inmates to petition sentencing courts directly, the First Step Act has created the potential for adversarial contests between petitioning inmates and the government. As discussed in Parts II and III, the new adversarial process raises conceptual and practical concerns.¹⁶⁸

There are strong historical, policy, and separation of powers arguments in favor of vesting gatekeeping control over compassionate release in the executive branch.¹⁶⁹ Historically, legal scholars have been concerned that judicial involvement with discretionary and political questions could undermine the integrity of the legal system.¹⁷⁰ The “extralegal, discretionary, and political” decision-making involved in modifying a valid conviction and sentence is a task for the politically accountable branch, not for the judiciary that initially imposed the sentence.¹⁷¹ Keeping the initial decision in the executive branch would ensure that the decision whether to

164. *Organization*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/organization> [<https://perma.cc/SSJ8-TUJC>].

165. *See supra* text accompanying notes 40–44.

166. *See supra* notes 44–49 and accompanying text.

167. *See supra* notes 63–64 and accompanying text.

168. *See discussion supra* Parts II, III.

169. Green, *supra* note 19, at 145.

170. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1769) (“[F]or there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This . . . would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour.”).

171. Green, *supra* note 19, at 145.

extend compassionate release is attuned to public opinion by keeping it in the politically accountable executive branch, not the counter-majoritarian judicial branch.¹⁷² Locating the discretion in the executive branch would also reduce the number adversarial contests over compassionate release petitions in sentencing courts and ameliorate the fairness concerns regarding petitioning inmates not represented by counsel.

While keeping initial compassionate release decisions in the executive branch is desirable, there are reasons against keeping the discretion within the BOP. The BOP's demonstrated failure to execute the compassionate release program arises from conflicting interests. The mission of the BOP is "to protect society by confining offenders."¹⁷³ The BOP is further subject to the prosecutorial interests of the DOJ,¹⁷⁴ including interests in longer sentences, mandatory punishments, and fewer routine grants of clemency.¹⁷⁵ The DOJ's dominant mandate is that of law enforcement and obtaining convictions; when conflicts arise with other functions, such as clemency, the law enforcement interests prevail.¹⁷⁶ Basically, there is a conflict of interest when the same agency responsible for prosecuting individuals is the same agency that controls the granting of clemency.¹⁷⁷

This Note proposes vesting the gatekeeping aspect of compassionate release in an executive body that is insulated from the BOP's and DOJ's conflicting interests, specifically, in a revitalized version of the Parole Commission.¹⁷⁸ Despite the abolishment of parole in the federal system as part of the SRA, the Parole Commission still exists—it oversees the release of inmates sentenced prior to the abolishment of parole and sanctions violations by the same population.¹⁷⁹ Compassionate release resembles parole in that they are both release mechanisms deriving authority from the pardon power.¹⁸⁰ Indeed, many commentators have noted that reforms in the

172. *Id.* at 146–48.

173. *Organization, Mission and Functions Manual: Federal Bureau of Prisons*, U.S. DEP'T OF JUST., <https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-prisons> [<https://perma.cc/KE3T-G59L>].

174. Margaret Colgate Love, *Time for a Really New Broom at the Federal Bureau of Prisons*, THE CRIME REP. (Apr. 18, 2011), <http://www.thecrimereport.org/viewpoints/2011-04-time-for-a-really-new-broom-at-the-federal-bureau-of> [<https://perma.cc/UT98-5JPK>].

175. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 312 (2013).

176. *Id.* at 275.

177. Vogt, *supra* note 96. For a discussion of how the Department of Justice suffers from an actual or apparent conflict of interest in processing federal clemency petitions, see Larkin, *The Future of Presidential Clemency Decision-Making*, *supra* note 96.

178. For a discussion of this idea as it relates to the federal clemency process, see Larkin, *Reconsidering Early Release*, *supra* note 23, at 38–40.

179. U.S. PAROLE COMM'N, THE HISTORY OF THE FEDERAL PAROLE SYSTEM 2 (2003), <http://www.fedecure.org/information/TheHistoryOfTheFederalParoleSystem-2003.pdf>.

180. See discussion *supra* Part II.

First Step Act have created a new system of “parole light.”¹⁸¹ Administrators of parole faced similar challenges that administrators of compassionate release will face:¹⁸² considering the proper degree of independence from the BOP and DOJ, the proper influence of public opinion, and the danger of recidivism.¹⁸³

Empowering the Parole Commission (perhaps under a different name) to identify qualifying petitioners and advocate on their behalf would give a voice to all qualifying inmates, regardless of assistance from counsel. An executive body free from the conflicting interests of the BOP and DOJ would support a greater number of compassionate release petitions. Government support of more compassionate release petitions would limit the number of petitions subject to adversarial contests in sentencing courts. It would also provide government legal or professional staff to prepare the compassionate release petitions to appear before sentencing courts. There are massive legal and bureaucratic barriers to receiving compassionate release, and prisoners bear the burden of proof in presenting their petitions.¹⁸⁴ An adversarial procedure compounds the underlying civil rights crisis of massive race disproportionality.¹⁸⁵ An executive body is more capable than the judiciary of responding quickly and zealously to the policy mandate of increasing the use of compassionate release.

Even with an executive branch body filling a gatekeeping role, sentencing courts will still play a role in compassionate release. Under the First Step Act, a sentencing court may reduce the term of imprisonment only if three conditions are met: (1) extraordinary and compelling circumstances warrant the reduction; (2) the defendant is not a danger to the safety of any other person or the community; and (3) the reduction is consistent with the

181. *Senate Judiciary Committee Hearing on Federal Prison System* (C-SPAN television broadcast Nov. 19, 2019), <https://www.c-span.org/video/?466573-1/fbi-probing-jeffrey-epstein-death-prisons-director-reveals> (Senator Lindsey Graham asking BOP Director Kathleen Sawyer: “How would the First Step Act be different than parole?”) [<https://perma.cc/YK2K-2HWG>]; Johanna E. Markind, *Who Should Oversee Implementing the First Step Act?*, THE HILL (Dec. 4, 2019, 7:00 AM), <https://thehill.com/opinion/criminal-justice/472680-who-should-oversee-implementing-the-first-step-act> (reporting that an aide to one of the Senate co-sponsors of the First Step Act “acknowledged . . . that the risk-reduction/early release provisions are effectively parole by another name”) [<https://perma.cc/T4PJ-JTRR>]; Douglas A. Berman, *Reflecting on Parole’s Abolition in the Federal Sentencing System*, 81 FED. PROB. 18, 22 (2017) (“With the federal prison population growing from roughly 35,000 in 1984 when parole was abolished to 220,000 prisoners in 2014, it is hardly surprising that recent years have led to reforms and proposals that, in varied ways, expand federal prisoner release authority and function as a kind of ‘parole light.’”).

182. U.S. PAROLE COMM’N, *supra* note 179, at 2.

183. GOLDFARB & SINGER, *supra* note 74, at 265–66.

184. Michelle Chen, *Our Prison Population Is Getting Older and Older*, THE NATION (Dec. 11, 2017), <https://www.thenation.com/article/archive/our-prison-population-is-getting-older-and-older/> [<https://perma.cc/GD2U-WJ57>].

185. *Id.* For a discussion of racial disparity in the criminal justice system, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

policy statement.¹⁸⁶ A court's authority to grant compassionate release is discretionary. Even if extraordinary and compelling circumstances are present, the court may decline to grant compassionate release based on the 3553(a) sentencing factors.¹⁸⁷

CONCLUSION

Compassionate release, both in theory and in practice, is capable of providing for a reduction in sentence and release for only a small proportion of federal inmates.¹⁸⁸ For that reason, it is not an appropriate or effective mechanism for addressing the reality of mass incarceration or mass incarceration's rippling effects. Nonetheless, compassionate release is a mechanism that our government should strive to perfect. For the inmates who are terminally ill, who are suffering the infirmities of the aging process, or who are experiencing crisis in another area of their lives, a functioning compassionate release mechanism can make all the difference. For Steve and Marie, had compassionate release reform come a little sooner, it would have made the difference between Steve dying in prison and dying at home.¹⁸⁹ The COVID-19 pandemic only underscores the necessity of a functioning compassionate release system.¹⁹⁰ The virus has rapidly spread through federal prisons where social distancing is next to impossible, putting prisoners who are elderly or have underlying medical conditions especially at risk.¹⁹¹ Beyond the inmates and their families who are provided

186. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018).

187. *United States v. Israel*, No. 05 CR 1039 (CM), 2019 WL 6702522, at *10 (S.D.N.Y. Dec. 9, 2019) ("A court is not required to reduce a sentence on compassionate release grounds, even if a prisoner qualifies for such reduction . . ."); *see also United States v. Chambliss*, 948 F.3d 691, 692 (5th Cir. 2020) (holding the district court did not abuse its discretion by denying compassionate release despite the defendant's eligibility for that relief).

188. By its design, compassionate release is strictly limited as a form of relief. Since the First Step Act's enactment, fewer than one hundred inmates have received reductions in sentences due to compassionate release, compared to over three thousand federal prisoners who have been released due to the good time credit recalculation provision. *Oversight of The Federal Bureau of Prisons and Implementation of the First Step Act of 2018: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of Antoinette T. Bacon, Associate Deputy Att'y Gen.).

189. *See supra* note 1.

190. As of the start of 2021, 182 federal inmates have died of COVID-19, while 5,950 current inmates are positive for COVID-19, and more than 35,000 inmates have contracted COVID-19 but recovered. *COVID-19*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> [<https://perma.cc/G8SF-8QEE>].

191. *See* Timothy Williams, Benjamin Weiser & William K. Rashbaum, 'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> [<https://perma.cc/9PLZ-WAXB>]; Ann E. Marimow, Sick, Elderly Prisoners Are at Risk for Covid-19. A New D.C. Law Makes It Easier for Them to Seek Early Release, WASH. POST (Dec. 30, 2020, 5:00 AM), https://www.washingtonpost.com/local/legal-issues/sick-elderly-inmates-coronavirus-release/2020/12/29/5342816c-3fcd-11eb-8db8-395dedaaa036_story.html [<https://perma.cc/22PW-EC3N>].

relief via compassionate release, freeing elderly and ill prisoners is an effective way to affirm human dignity and morality.¹⁹² Aging prisoners suffer in prison in a myriad of ways, including psychological and physical abuse, neglect, and social isolation.¹⁹³

The First Step Act addressed a problem in the compassionate release process: the gatekeeping role of the BOP. As a result, a greater number of compassionate release petitions are being granted than were previously.¹⁹⁴ Allowing inmates to petition sentencing courts directly, however, raises new concerns over whether that is the best arrangement within the system of checks and balances in the federal system, and whether that is the best arrangement for providing the most just outcomes for similarly situated inmates. Resolving the confusion over the Sentencing Commission’s compassionate release guidelines and promulgating new guidelines that reflect the policy goals of the First Step Act will contribute substantially to fully implementing the reform of compassionate release. An independent executive branch body, insulated from the DOJ’s prosecutorial and the BOP’s correctional functions, will improve the evaluation of compassionate release petitions and increase governmental support and assistance to qualifying petitioners. Developing this body will keep compassionate release a politically accountable mechanism and contribute to giving all inmates fair review and promotion of their circumstances, regardless of their ability to hire private counsel.

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192. Vijay Das & David A. Love, *It’s Time for Compassionate Release*, TRUTHOUT (Jan. 23, 2019), <https://truthout.org/articles/its-time-for-compassionate-release/> [<https://perma.cc/Q9JC-HUPP>].

193. Chen, *supra* note 184.

194. One hundred twenty-four requests have been approved since the First Step Act was enacted (as compared to thirty-four total in 2018). Press Release, Dep’t of Just., Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departement-justice-announces-enhance-ments-risk-assessment-system-and-updates-first-step-act> [<https://perma.cc/X9ZK-C4JT>].

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