

Decarceration Nation Episode 41 “First Step Act Implementation”

Hello and welcome to Episode 41 of the decarceration nation podcast about radically reimagining America's criminal justice system. I'm Josh Hoe, among other things, I'm formerly incarcerated freelance writer, criminal justice reform advocate and the author of the book “Writing Your Own Best Story: Addiction and Living Hope.”

Happy New Year. I wasn't planning on starting my slate of episodes until Martin Luther King Day, which is some of you may remember was the date Joel and I recorded the very first episode of decarceration Nation way back in January of 2018. I decided to do this episode now because I know a lot of incarcerated folks and their families have a lot of questions about implementation of the first step act and also to address some of the early snack foods like the problem with good time credit which turns out to have been a drafting air in the senate version of the bill and the pendant and hearings from Attorney General candidate William Barr and the implications that will have on implementation of the first step act.

I was very fortunate to get to incredible experts to come discuss all of this with me. Kevin ring of families against mandatory minimum and aims ground of the browser or the Brennan Center will get to those interviews in just a second.

First, the news about a week ago, USA Today ran a story by a reporter named Kevin Johnson, which strongly implied that people in federal prisons should not be fed their annual special holiday meals as long as the correctional officers were not being paid because of the government shutdown. They claim that the people in prison were being fed steak and Cornish game hands all while the correctional

officer slaved away for no pay a dangerous job the article was riddled with factual errors like that the holiday meals were over well before and he correctional officers missed one paycheck. As you may recall, the first time anyone missed a paycheck was last Friday and that the special meals have been around since the 80s, and are budgeted for well in advance. They also don't include stake. In fact, the CO's union, who was their source, admitted later that it was roast beef and not steak which had been served that correctional officers can themselves eat out 365 days a year anytime they clocked out and that they have full access to the same food that the folks in prison eat anytime they want it also that stopping people in prison from having holiday meals would have done nothing to stop the government shutdown and letting people eat holiday meals in prison wasn't no way responsible for causing the shutdown. So the point of this story was a little hard to fathom aside from just demonizing and other rising people in federal prisons. This article and the many articles that followed it spawned a whole bunch of articles only quoted representatives from the corrections office teachers union and never tried to interview one current or formally incarcerated person, in fact, this USA Today article might actually have printed a person in prisons mail without permission or quote from prisoners mail without permission. We've asked for clarification on this but never received any from USA Today.

Anyway, as a result of this story, me in a group over at other formerly formerly incarcerated activists came together to oppose this media narrative. Thankfully, since we started working there been a large number of press outlets pushing back against the USA today and other stories that came out after there were stories from the Washington Post NBC News, the New York Daily News and the Atlanta Journal Constitution, many of whom literally published a

picture of a steak served in a fancy restaurant as the header for the whole story, it was just a really gross and ugly set of stories as really proud of the group of us who came together to fight back against it. And like I said, we get a lot of different press outlets to come out and support our argument. And our goals for this were kind of simple. First, we wanted to ask journalists to do better work and ensure that their stories were accurate and fair to the people in prison. Secondly, we want to ensure that journalists stopped doing stories that talk about people in prison without first interviewing people in prison, or people who have formerly been in prison for context. Third, we want to educate journalists about how to get in touch with folks in prison, how to provide resources for people who are wondering how best to do interviews with folks inside or to just let them know that there are a lot of lots of us out here who will talk to them if they only ask I will attach a link to a piece I put together that catalogs kind of the whole story and has links to all the different articles and all the different responses etc.

I also would like to bring some attention to a story that was published by my friend Steve Bailey, who's reporter in South Carolina this week, Steve went out of his way to make for your request to obtain a report on South Carolina's prison system that was released prior to the Lee Riot and then was basically swallowed up yo covered up so that no one ever got to see it. Aside from the governor. The report proves that the South Carolina Department of Corrections either new or should have known that they were critically understaffed that Lee and other state facilities prior to the ryan the Lee Riot was the deadliest prison riot in the United States in the last 25 years and seven people died in addition, many South Carolina facility remain on complete lockdown today.

Remember, this is only a few months short of a year since the riot ended. And this isn't just the facility where the riot was. This is almost the entire South Carolina Department of Corrections. Steve was actually one of my guests last March on my episode about the Lee riot. I just think this is an incredible job. He's done not just on this story about all the stories that he's done on the South Carolina Department of Corrections and the just unbelievable problems they're having.

Finally one of my articles about the importance of passing the first step act was published in the Federal sentencing reporter in December. My article was also accompanied by incredible art by Alan combo, who's a formerly incarcerated artist from Michigan so I was really glad to be able to include that as well. Alright, let's get to my interviews about implementation of the First Step Act.

Kevin Ring is the president of families against mandatory minimums. A former Capitol Hill legislative aide, former executive director for the Republican Study Committee and a former lobbyist He is the author of Scalia's court, a legacy of landmark decisions and dissent. He's also a graduate of Syracuse University and the Columbia School of Law Catholic University. And like me, Kevin is also formerly incarcerated. I should probably mention one other thing Kevin was is also the first person ever to be a two time guest on the decarceration nation podcast. I invited him back because this organization has been one of the organizations doing the hard work trying to answer questions from incarcerated people and their families about implementation of the first step back welcome back to the decarceration nation podcast.

Kevin thanks, but I'm not I didn't I was the first timer

Yeah, the second timer will be on right after you.

Ames, always stealing my glory.

Almost immediately after passage, you're putting out messages, warning people about attorneys offering to help folks take advantage of the first step act. Would you like to let people know what to watch for?

Yeah, this happens all the time.

And you have some who are just, you know, preying on people there for profit attorneys, some are advocates who are part time advocates, but in their spare time they are for profit attorneys. In any event they will offer people were incarcerated and their families, you know, the file motions for different reforms for, you know, a couple thousand dollars up to \$5,000, depending on what it was with the crack retroactivity. And we want to make sure that people knew that they did not need to hire an attorney to do this we wouldn't tell anybody not to if they wanted to, but that the public vendors, the federal defenders, in most cases, we're going to handle these and, and things like good time good time credit expansion. They didn't need to file anything at all that that was going to be taken care of automatically by the Bo P. So we always get worried this happens every time the Sentencing Commission changes its guidelines or Congress passes reform, you get these vultures who prey on this very vulnerable population and try to, you know, act as if they'll expedite something which they they can't do or help them achieve something they can and people get taken for a ride and it's they don't like to admit it. And so we really go out of our way to say feel, you know, be warned about this because they'll be

embarrassed if it happens to them and they won't share that so we just tried to put that fire out right away. So if you were someone who was a family with someone inside or you were someone inside getting advice about something like this, what should they be waiting for?

Looking for in particular, because you said that the Federal attorneys would deal with it at some level?

Yeah. And I think what was hard was this bill, for instance, passed over, you know, right before the holiday, and families were ready the minute after it passed to see it take effect for their loved one. And so they were calling Federal Defenders offices, some of whom said, you know, we're happy to help as soon as this becomes law, and they said, well, it's already been signed into law, are you following this, you know, so they were getting very anxious that the reforms weren't taking effect immediately. And so that's, you know, that's what happens. But now the defenders offices are up and running. So, for instance, on the crack retroactivity they're keeping lists are making lists of who's eligible the Sentencing Commission is sending information out to the defender offices, so all of its moving forward now, but in those early days, there was a lot of pent up demand. Anxiety people thought they might get their loved ones home for Christmas, frankly. And so that's why there was that push and you mentioned crack retroactivity.

So I should probably raise one of the real good stories that came out of the early implementation. Would you like to talk about since you were my guest on my episode about Matthew Charles, would you like to talk a little bit about Matthew coming home

Sure. As you know, Matthew with federal prison sentence as a career offender he served about 20 years was led out mistakenly by Judge Kevin sharp federal judge in Tennessee who thought that one of the previous crack reforms applied to him the Obama Justice Department appealed that release and the Circuit Court upheld agreed with the justice department so Matthew was about was sent back to prison for to serve another decade. And you know, everyone you me Sean Hopwood, a bunch of other advocates tried to call attention to his case, Sean, you know, prepare to come and see petition for him because Matthew had been out for two years showed he had been rehabilitated didn't need to go back there was no public safety benefit to him going back as it turns out the first step act gave the court an opportunity to reset and him so his public defender was ready the day after past filed motion that's in one of his charges was a crack charge that contributed to his career Fender guideline. And so if the court wanted to re sentence him, it had the opportunity this time the Justice Department said, Look, we don't disagree that this is opportunity and if the judge now feels that she wants to give him a shorter sentence, including time served, we would even oppose that so open the door right away. The judge sign the order and Matthew came home you have since seen him on NBC News and Fox News. It's just a tremendous story. And I, you know, I keep saying I can't think of a more fitting beneficiary of this reform because his power second chances,

Yeah, for sure.

Such a great first recipient of some of the effects of the bill before we get to some of the implementation issues. your organization has been working very hard to answer questions for incarcerated folks and their

families. Since the bill passed. I looked at your most recent frequently asked questions document and I figured I would ask you what you think some of the most important things people should know who have someone who's in prison or someone who's in prison would want to know about the first step back?

Sure. I mean, we think it's important because Josh, you know this The intimate rumor mill is only strong and a lot of rumors are flying around. And we want folks inside to have hope. But we don't want them to have fall. So. So getting accurate information into the facilities is really important to us and has been for 20 years. So we prepared that FAQ and scrubbed it up and down to make sure we know what we're talking about. And that we were only answering questions we knew the thing that people care most about is, you know, is their loved one affected and if so, how a lot of questions about can talk about the problem with implement implementation, their confusion about the difference between good time and earn time, because people thought they were hearing about programming and this other stuff and people who are gonna be excluded from that, and they thought that meant they were gonna be excluded from the good time benefits which they're not and the crack retroactivity. Obviously people were asking questions some people who didn't even have crack sentences were asking if that would apply to them. So mass confusion frankly, and what gets difficult is sometimes even families were advocating for their loved ones really don't always know the particulars of their loved ones case. So they'll ask us and we you know, we can't give legal advice and so that's why going back to this issue we started with we tell them to reach out to the Federal Defenders because they need to get information that is specific to their case it's usually legal advice and it depends on the facts and you know, like I said, they don't always

know the facts of their case you really have to dig deep to figure out if something's going to apply to somebody you really can't speculate or you should so the question is they really had where you know what was going to apply to them how quickly would go into effect you know compassionate release was something we push they want to know if they can file for that immediately the elderly offender release pilot program is back in they want to know if they can apply for that so really specific questions tied to their loved ones cases which was you know, which makes sense but mostly around those areas.

So way back in the in the battle days prior to passage, the first step act the Bureau of Prisons was insisting on a good time credit calculation that was different than what Congress originally intended. Can you flush this out a bit?

Sure. So the language looks like and we all thought that people in prison should get 54 days per year for good time and then prorated if they you know served a portion of your the BOP interpreted it to give 47 we were one of the groups that litigated that to the Supreme Court and lost in a case called Barber, in in that case the Supreme Court said 54 is really the most natural reading and so we've lost and have ever since I've been looking for fix what's interesting is we have been trying to get that legislated willfully to 54 days, and those in Congress, including Senator Grassley, believe it or not, and others oppose the expansion of good time. And the earned-time credit was really seen as a way around that. They said, No, we're not going to give you any more free days off. But if you take programming and do other reset of recidivism reducing activities, you can earn time off your sentence. So that really was supposed to be the alternative but in the end, they change this bill in the House to get more support and increase it to 54 days.

And so now that's finally the call and everyone is it seems so small, the people on the outside, you know, who haven't been in or who don't have loved ones, but you know, for 10 year sentence, an extra 70 days off your sentence that means something to people, you know, you're talking about two and a half months. So it was it was a nice thing to have here. The fact is important. So now we get to some of the complications given that fix that was in the bill.

You know the problem is that in the final drafting something happened that has complicated that do you want to explain

Sure, in an effort to do the right thing, they added this fix to the good time but they put it in a section where the earn time credit is and the earn time credit depends on folks in prison participating in this programming. And so the effective date of that whole section is as would make sense once the risk and needs assessment system that the attorney general is tasked with devising is completed and released. So even though Good Time goes to everybody except those serving life sentences and isn't dependent on your risk it got put into that section and so any fair reading of the actual text of the law would seem to suggest that it has to wait the up to 210 days that the bill gives the Attorney General to devise the risk and needs assessment. It was completely an oversight. I have no doubt that Congress intended for the good time to go into effect immediately. Every sponsor of the bill says as much every advocate says as much, we certainly believe that I think all of us were looking closely to make sure because we were fighting get that good time provision in that it did what we wanted to which was not only increased the 54, but would apply retroactively and make sure that that was explicit. So once seeing that was there, it seemed like that language was good, and

people frankly, just didn't catch the language that was further down. That said, all of these amendments in this section don't apply until the risk and these assessment is done. And so it was just a snafu. It happens sometimes with major bills I mean they fixed Obamacare 1000 times. Both administratively I'm legislatively And that's what happened here. And so BOP immediately took the position I, you know, people will say good faith, bad faith. But again, I haven't seen a attorney read that not to mean what BOP says it means that it had to wait. And from that point on while families were calling Grand Prairie and and trying to figure out if their loved ones can be released in time for Christmas or New Year's, we were hearing that this is how Bo p was interpreting it. And so we put notice out that look, you may be the language of the law that needs to be fixed. And that's, you know, that's caused a lot of commotion. I hate to deliver that news because I know the White House is trying to fix this administratively. But it's an uphill slog because the language is so bad. So what do you think the potential is for a legislative fix or options we have for legislative fix in the short term because it becomes kind of irrelevant after six months or so. Right? Yeah, that's right. And yeah, we're already you know, 20 something days. into the bill went to the 210 days, although frankly because of the shutdown, I'm not so sure the Attorney General's you know, we have a new one coming in, you know, are they going to finish the risk and needs assessment and 210 days? That's another question that's going to require oversight and pressing. But in terms of the good time to fix is easy. We've already drafted it. We've talked to champions on the hill, we've shared it with the White House and others the problem isn't normal world, you would have a budget bill, some must pass bill that would be going through right now either continuing resolution to keep the government funded or something to that effect. As you know, we're not in a normal world and we have a

shutdown and so there's nothing that's must pass right now. So it doesn't matter that the White House you know, the Speaker of the Democratic speaker and the Republican Senate Majority Leader all support this or would support it, we just don't have a place to put it. So that's our problem.

But your hope is that this shut down ends relatively quickly. And then this gets attached to the continuing resolution or whatever ends the shutdown?

Yeah, that's our hope. I mean, if the White House can't find a way around this, and look, none of this should be viewed as a criticism of the White House. The White House didn't create this problem. They didn't draft the bill. They were handed this thing that with this legislative sort of malpractice in it, they've been doing everything they can to figure a way around it. As I said, the problem is, I haven't met a lawyer yet who doesn't see the interpretation problem that exists including a judge in Illinois who was an Obama appointee and was sympathetic to the defendant who was seeking to get out. So it's a real problem. And if the White House can't figure out a way around it, which I would understand if they can't, Yeah, we are. We do want to get it passed as soon as possible. It's ready to go. You know, look, that's not even a slam dunk either because a lot of times with these budget bills everyone has something that they want to add that they think is a must pass thing. So, you know, it's not a foregone conclusion that even if the government opens, this will be part of that bill. But we're trying to put it in as many hands and get as much support and have people realize this is a no brainer, because our other problem is unless it's something like the budget bill, we're going to have the same issue we had with Tom Cotton before. Whereas if

it's a free standing bill, technical fix, you know, he'll hold it up, and we'll have to waste floor time and go through that whole rigmarole again, so you know, things are complicated when you're trying to pass bills

As much as I would like a second go around with Tom Cotton. I think I would prefer a different solution.

Yes.

So there's one more pending issue in regards to whether there's more than one but at least one more issue with regards to implementation this week, the Senate Judiciary confirmation hearing start for William Barr as the next Attorney General the United States, and historically he's not been a very big fan of criminal justice reform but he will also in many ways be responsible for implementation of the First Step Act Do you have any thoughts on this or where are you at with the bar hearings?

Yeah you know I I like to think that people can change I changed my views on this I had the same views probably started in 1992 but my view has changed I worry that he hasn't because as recently as 2015 he signed a letter to the Senate and seeing reformed assessor to the first step back so it's there's not a lot of good evidence that he's changed his view articles came out last week saying you know that he's going to assure senators Hill support implementation, but, you know, a lot of times personnel is policy and if you have somebody who's really not committed to the same goal, you Even to the same with the same vigor, you get foot dragging. And you know, you've seen this over the years with the Bureau of Prisons, so, you know, he

may support overall, you know, like be a good soldier and say, you know, I'll help implement this. But there's so much discretion here, there's gonna be so many times where it's going to rely on the Justice Department really pushing forward with the creation of the Risk and Needs Assessment Tool, things like, you know, we changed the 500 mile rules so people can be closer to their loved ones, are they going to do that? Or they're going to keep saying, Oh, no, there's a security risk, why we can't move somebody closer. So it's going to take a lot of oversight. And this is a situation where, you know, we're probably not likely to stop stop him over this issue. So we're just going to have to take his word that he supports it, but then really press hard to make sure these things get implemented the way Congress intended.

I know personally, having done a lot of research and thinking about the risk assessment tool I would want to have him on The record on a lot of questions about how that would be published and implemented. Are there particular things aside from the 500 mile rule that you want to have on the record when the you know, when the hearing happens?

Well, yeah, a lot of things and, and big and small. I mean, let me just mention, for instance, the elderly offender release program, which, you know, had been a pilot program in the second chance act. And this gives people who are, you know, older or some terminally ill a chance to get to home confinement and get out of prison sooner people thought since this was an extension of that, that it would just take effect immediately. But the bill requires the AG to designate institutions where this can happen and there's no timeline in the bill for when the ag has to designate institutions so one people thought it was going apply everywhere and and you know maybe that is how it will be interpreted in the Attorney General just say all be okay. facilities are

part of the system. Maybe not. I mean, the language doesn't require that. And so, you know, dragging your feet there would slow things down. compassionate release, are they going to now families and frustrated folks are going to be able to appeal denials or if they don't get timely answers, go to federal court to get early release? Is the Justice Department going to go fight those motions in court? So there's a lot of discretion here, and we're going to know, you know, sometime soon, how the Justice Department is going to operate here, but we know from the first step legislative fight that there's a lot of holdovers back there, you know, who don't love this, and, you know, they were trying to gum it up in the Senate. And so I just think it's going to take vigilance.

Do you see any other possible implementation problems that we need to alert people to?

Well, I think the final thing is going to be the sentencing reforms. And the bill was pretty good about setting forth who is going to be eligible because most of it wasn't retroactive. But there's other cases where people, you know, they might have pled guilty, but haven't been convicted or haven't been sentenced. And so how those things play out, it's going to be important to make sure that as many people benefit from the act as possible, I think that will work itself out soon, too. But, you know, again, it's all going to be in the spirit in which it's implemented. If it's going to be with the idea of getting relief and reform to as many people as possible then then just department can do that and we're going to be fully supportive. But if they really have crabs interpretations of these provisions, then there's going to be a fight and fewer people will benefit and that will be you know, a frustrating outcome. I think, because there's a democratic house now.

I think oversight will be more likely. But again on this issue as I'm so many others, it's hard to get oxygen to it because you know, there's so much about Russia and independent counsel and every day Trump tweets something different and everybody's running in a million directions so we got to make sure our champions stay focused they deserve a lot of credit for getting this bill passed and but the implementation is gonna be very important and that follow ups gonna matter.

Okay, last question. You know we talked about the First Step so I'm sure all of us have a wish list for the second step I know it's a little hard to get fired up right after this big battle but do you have any thoughts on what you want in the Second Step Act?

Well I've been reading a lot of what others have been saying and I really sort of cosine all of those things I do think that you know for instance I think we need come and see reform I think that part in Part of the reason I made but always believe that but the other reason I believe that is because these three of the forces Sentencing reforms in this bill were not retroactive. That's incredibly unfair. The people who are serving those ridiculous senses for 924 see gun stalking charges. Once again, just like with the crack bill in 2010, we told those stories so that people knew there was a problem with this law they change the law but they didn't fix it for those who were punished the ones that were most in most cases right right and so you're getting relief to them whether that's through you know, retroactive application of a down the road or whether it's through a clemency process that you know, looks at that that group as a group and goes through those cases. I've heard people talk about clemency reform, I could see that I could see an interesting mix of clemency and mens rea reform tied

together. I also liked the idea of going after some of these long sentences look fixing 848 51 meant that you know, for your third offense now you don't get life but you still get 25 years and the system without You know parole you know there's people like Matthew Charles out there who deserve a second look at some point during that long sentence to see if they've you know use their time to rebuild it themselves and so I think I'm interested in looking at that that that type of second look provision but you know there's a there's a million good ideas Pell Grant repealing that ban is something anybody who's been talking about getting more programming in prison these last two years and support a first step should support that because you know access to college education we know that's a recidivism reducer so that's another thing that I think people should be able to get behind so there's a million pieces big and small I think the key is just keep pushing do not rest on our loyal laurels here we need to implement this act but then we need to keep pushing where we see other problems couldn't agree more.

Well thanks so much for coming back on Decarceration Nation, you'll always be the first second visitor and for sharing

Oh yeah.

Thanks for sharing so much important information with our listeners. Hopefully it'll be helpful to people trying to figure out if the First Step applies to them.

Well, I appreciate what you're doing. Thanks so much. Kevin.

Okay.

Ames Grawert is a senior counsel the Brennan centers justice program and the John L. Neu justice Council is work seeks to develop an understanding of the cost of America's criminal justice system to defendants in made some nation as a whole and to translate translate that information into legal change. Previously, Mr. Grawert served as an assistant district attorney and the appeals bureau of the Nassau County District Attorney's Office.

Now the bad news sadly, I have to break the news to Ames that he lost out on being the first second time guest in the history of decarceration Nation because I interviewed Kevin ring for the second time yesterday. So I guess that makes him now and forever. The second second time guest.

Hello Ames. Welcome back.

Hi, thanks so much for having me back. It's great to be back on the show.

It's great to have you.

So let's jump right in. I talked a bit about the good time credit problem with Kevin yesterday if he and he agrees with you that it probably has to be a legislative fix. But before we get to that, can you explain why you think it has to be a legislative fix?

Yes, for sure. I hope I won't be a feeling to deliver the tension required for you know, the podcast format because I largely agree with Kevin

on most things related to this so hopefully you're not looking for a dramatic

some of the questions for you and ask him somewhat different questions.

So perfect. So So from my perspective, why it needs a legislative fix is by by a quirk of legislative drafting everyone involved in writing the first step back and advocating for it was under the impression and, you know, supported the bill, in part because we expected the good time fix would take effect immediately. What it looks like none of us fail, or none of us reckoned with was that the good time fixed provision was slotted into part of the bill that takes effect with the development of the risk and needs system and not immediately everyone I've talked to seems to think that was a mistake. I mean, there there are some people who say, you know, the conspiracy theory that aha, this is the secret concession to the bills. opponents. I don't make it was it would be weird.

It would be a weird one because it would only last for six months.

Right. Exactly. It'd be it'd be very, very odd. But this is actually this is such an interesting problem because I think you could take this to a law school class almost and teach it as a course and statutory interpretation because you have a very clear legislative history around the bill now that everyone expected, even members of Congress expected to take effect immediately. But on the other, on the other hand, you have the text of the bill that says it doesn't. So how do you analyze the statute? Do you look to the text? Or can you try to import some of what you know, that's actually not on the page of the of the

bill itself to try to interpret it? This is a debate that goes back centuries and and it's it's as old as you know, English common law. But to be candid, this is a pretty tough one, because the clear meaning of the text does seem to say that it takes effect with the risk of need system not immediately, and as you noted, your guests, I used to be a prosecutor and the appeals bureau of a district attorney's office. And you know, technicalities like this are the bread and butter of prosecutors. Like if I were a assistant US Attorney looking to figure out how I should answer it. claiming that I was entitled The good time credit immediately, I would pull up the effective date and feel like I had a slam dunk case. There's an argument to be made. And some of our, you know, mutual friends on Twitter have made the argument that the legislators intent should control and you know, I am very sympathetic to that type of of legal reasoning not just because I want the provision to take effect immediately, but because that's how I do statutory interpretation personally. But I think it's a very difficult case with any court and with any prosecutor and we've already seen some evidence of that there's been one decision on this already, right, right. Yeah, actually, I didn't know about that until Kevin brought to my attention. It was a it was a federal judge, I forgot exactly where they're located. But he points out and he's pointed this out on Twitter a couple times that the judge who ruled that the good time fixed doesn't take effect immediately in that was the brunt of the legal ruling as an Obama appointee. And what he means by that is there's a there's a tendency among progressive judges to be more sympathetic to consulting, legislative intent and legislative purpose as opposed to just the hard text on the page. But even even this, even the clear legislative history around this, he's he's suggesting or not not to sway this judge from what it says, you know, and so a couple of our friends, as you mentioned, like David Safabian and Mr. Berman and I know, for

instance, Jessica Jackson Sloan has been working with the White House to try to find a non legislative fix to this is the only argument that they're making the argument for legislative intent of that statutory language. Sure.

Is there any other hope for us forcing a new way to get the actual meaning of the legislation?

So so you can go down an extremely nerdy route. And I will endeavor to do that for y'all. Which is, which is that Congress doesn't always pass particularly clear legislation. So a lot of the time that falls to agencies to interpret what Congress net precisely and there is a well developed body of law around, you know, how much leeway agencies get an interpreting statutes that affect them from, you know, very little to quite a bit. And one of the famous rulings is called Chevron differences out of out of a case the one of the parodies of which was was Chevron that gives agencies pretty significant latitude to interpret a statute. So technically you could see a world where the Bureau of Prisons decided to interpret the statute to mean effective immediately based on the you know, the the transcript of the law or the transcript of legislative history and other parts about the law, like there's no reason in the bill for this good timeto be tied to the risk and need system. So you know, BOP officials could say it was clearly a drafting oversight, so I'm going to ignore it. The problem is that if BOP was so inclined to do that, they've already taken a position in court in the opposite direction, as as, as Kevin pointed out, and as you brought up in that in that case, and in my experience, it's not particularly easy to get an agency to reverse itself. That's one problem.

Another problem is well, that that that I think is the big problem. But the other problem is that it's not clear that this would be a natural reading of the statute. I don't know who would sue them over it, but I suspect their agency attorneys who would be uncomfortable enough with us, even if they were wanting to do the right thing? But it strikes me as a real uphill battle.

Well, that's unfortunate.

Oh, you know, you know. So there's there's one. There's one additional argument to this. It's that, you know, when when, when the good time law was originally passed way back in the day, you could say that the Bureau of Prisons could have interpreted it to me in the full 54 days, even without the first step back. So now that Congress has made itself perfectly clear what they meant by it, why can't they just interpret it the original way and not wait for the bill to come into effect and that that's a another argument that I think ends in the same problem that they've already decided not to do that and it'd be very hard to convince them to change their minds

So almost like double congressional intent, we really we really meant it

Yeah, yeah. And I would love to, you know, being a criminal justice reform advocate being personally a progressive liberal whatever adjective you choose to ascribe all those things lead me to want to say you should be able to interpret this to be taken effect immediately. But I just think it's it's very very tough territory so is there any before I get into more specific questions about the bar hearings which start

tomorrow Attorney General does the fact that the Bureau of Prisons sort of will be under new management have any impact on any yeah I mean it might but I think you'd still you'd still run into a situation where a new suppose that bill bar was the most favorable person to criminal justice reform ever or suppose that Trump withdraws the nomination for bar appoints Kevin ring tomorrow Kevin sales through nomination hearings in his attorney general by Friday

that'd be great.

I'm all for that. That is he most people who would be in that position And Kevin might be the exception to that. But would would probably be loathe to be appearing to take a different position than their predecessor dead because it would because it would look political agency staff would not like it because it it looks like it's it looks like it's a it's a political choice rather than something informed by the law and you run to do having been a prosecutor you run into a lot of inertia and organizations that are engaged in law enforcement because they love consistency. They love regular order, as Senator McCain would have said, and they don't like making breaks with their predecessors like that.

Okay, well, I'm hearing this episode tomorrow, which snow permitting will be the first day of the bar of the William Barr hearings for attorney general. I know that you and other folks have been writing about Mr. Barr over the last month or so. Can you fill us in on some of the potential problems you see with Mr. Barr becoming our next Attorney General?

Yes, so it's a really interesting case. I mean, it Barr wrote a number of articles in the 1990s and said a number of things publicly that strike us today as especially those of us in the criminal justice reform world as just patently absurd, like he's circulated a memorandum to his staff called the case for more incarceration. so yeah I mean you could say he like literally wrote the book and mass incarceration is not sure he circulated the book and little better Yeah, little better he one of my colleagues Brian is a was a fellow in the Justice Program here at turned up a quote where he gave an interview to USA Today where they USA Today interviewed bar and 94 or something might not have it in the early 90s, at least on the occasion of the Federal of the US prison population, passing 1 million for the first time in history and Barr's reaction was good. going to have to go a lot higher.

Yikes. Sounds a bit like our friend Tom Cotton.

Oh, yeah, exactly. It sounds it sounds a lot like some of the opponents of criminal justice reform. It sounds a lot like Jeff Sessions to the caveat to that is that if you go back to the 1990s, and that sounds like a lot of what people were saying back then, like you could find similar quotes probably from Newt Gingrich. And Newt Gingrich now is, you know, a very devoted advocate of criminal justice reform. You could find similar quotes from Secretary Hillary Clinton and President Bill Clinton as well and all of them are crime bill hits the 94 crime bill, and all of them have had very public reversals of their opinions. and you could handle it. That away as you know, this is the courtesy one Attorney General extends to the other and not bashing them in public sure. But bar also wrote bar also co signed letters to Congress opposing sentencing reform in 2014 to 2015, it's including the 2015

letter was directly opposing the sentencing reform and corrections act key provisions of which just became laws. The First Step Act,

Which is a good bridge I know in I haven't read it yet. I just got the link earlier today. But I heard in his prepared testimony which was released today that Mr. Barr says that he's supportive of the first step act. Do you have concerns about implementation of legislation under Mr. Barr?

Yes. So I read his written testimony very briefly. So I probably fair to say I skimmed it, but he the one big thing he says, He says he will faithfully implement the first step act. But the other one is he does seem to acknowledge that there's been a huge change of heart about how the criminal justice system should work. He doesn't give specifics. He doesn't by any means, say like I am a new convert to the criminal justice reform movement, which, you know, Donald Trump did in his remarks signing the first step back.

Yeah, so I can't say there's a lot of times I say to his credit in relation to President Trump, but in this case, I say to his credit...

Exactly and Barr does not say that in his written testimony. It may be that he says that and it's oral testimony tomorrow but there's a lot that Barr has control over once he becomes Attorney General if he does become Attorney General one of them is the First Step Act to appropriate or the first step back authorizes but doesn't appropriate money to be spent on the risk and needs program on the recidivism reduction programming it's technically up to Congress to actually appropriate that money to actually allow it to be spent. But it's really up to the Attorney General and the Attorney General Staff to advocate

for that money. Congress won't just spend the money because it's there. They need someone to tell them they need it. So you need an attorney general who number one believes in rehabilitation and number two, is willing to fight for the money to do right by the people who the first step back is supposed to help. So that that's that's one thing. Another is I know a lot of our progressive allies like the leadership conference, and ACLU and NAACP. LDF we're we're very concerned about risk and needs tool that the attorney general supposed to develop to help award credits for participating in programming. I think you know a lot more about risk and needs tool than I do.

About the only area

I would not go I would not say that

but but having that amount of discretion over it means he has significant amount of discretion over how the how the prison reform side of exactly who's eligible and who gets who gets credits too I think. Yeah, so there's a lot that he can do i mean what one other thing we've seen that I privately worry about is you know we've seen people start to apply for federal send or blue Fair Sentencing Act retroactivity.

Matthew Charles applied and the DOJ didn't depose it and so he got his relief. The government doesn't have to enter no opposition. The government could say we oppose retroactivity or we oppose relief. In this case, if an attorney general came in, and this is what I would have expected of Jeff Sessions, they could fight every one of those cases, tooth and nail and a judge may say, I don't really care and override them, but that probably wouldn't happen in every case.

Do you feel like maybe that since they didn't contest Mr. Charles case might be a good sign?

Yes. Yes. In in, in part, but I also know that was a very well publicized case where he was an extremely deserving case. And I know people are working very hard on getting Trump to hear about that case too. So it wouldn't be surprising if you know some word had made it to Trump who then hinted something to do j that you guys better you guys better do right by him. So I I'm encouraged by it, but I won't I won't pop champagne cork yet.

Yes. So if you had questions that you thought or hoped that the senators will give Mr. Barr on the record about what would a few of those be?

Yeah, we actually and I know a bunch of Civil Rights groups are doing this as well. We actually we sent some proposed question and background too senators on the hill over the weekend and anyone who is interested we'd be happy to talk to your republican or democrat on that. But we asked specifically if if if or we asked them to ask typically if bar had an interest in developing rehabilitative programming or what types of programming he would want to implement whether he would be willing to fight for the full 75 million annually for first FM implementation. We we asked point blank you know have your views changed on mass incarceration you're you're pro Are you anti now i i actually and another thing that I am curious about it's not an issue that I we work on directly but I think it's you probably can't end mass incarceration without rethinking marijuana penalties so I wonder if Barr

has sessions same views about marijuana sessions was famously almost fanatically opposed to marijuana legalization and every type I know and often would try to apply federal law even when state law had allowed her right indeed indeed and we've done a lot of research and try to see what Barr has said about this and isn't really said much so that's an honest to god open question and the good news is that you know when the sessions confirmation hearing came around we sent similar questions to the hill and ask them to ask you know probing questions about his criminal justice record and people did ask about that at the sessions confirmation hearing but it felt a lot like it was you know pro forma because Republican majority was going to confirm sessions and were determined to do so this time around. I'd be surprised if there isn't a real thorough and thorough probing of what he really thinks about criminal justice reform. Because we saw, you know, the first step act clear by such an overwhelming majority, it would be extraordinarily frustrating if the senators, you know, granted, Grassley who expanded so much political capital and time to see the first step that get past decide that they don't care enough to ask tough questions about implementation.

Hopefully they do. I'm definitely very hopeful

Yea, I buy. I don't listen to all the hearings, but I think I'll be listening to this one for just that reason. I would be shocked if it doesn't come up at length. I'm really hopeful.

So beyond good time fix and beyond Mr. Barr?. Do you have any other outstanding implementation concerns about the First Step Act?

So we're we're also mean another thing to worry about the Attorney General for is we're trying to think internally about what a second step should look like.

That was going to be one of my next questions

Yes. So I'll toss it back to you then.

Oh, but I think I know well, just for the question

Yeah, I was gonna say on that all I was gonna say was what are some of the things you'd like to see him in a potential second step back although I know all of us are still a little bit tired from fighting for the first?

Indeed, so yeah, what what I was gonna say about Barr and why the original matters for that is, you know, we saw how sessions tried to sabotage every step of the way. The First Step Act sending the highly critical letters to the Judiciary Committee about the sentencing from a corrections act. I wouldn't there was something reporting and I wouldn't be surprised to learn it. It was born out that he was behind adding some of the odd poison pill amendments to first step over the summer and early fall, although I know the the ones that were the subject of the final floor fight where we're pure Cotton, but you need an attorney general who believes in this stuff to to have it sail through easily. And and I would want to know if Barr is the type of person who either you know, won't say anything or will be affirmatively helpful.

So that still leaves the question of what do you think should be in the second step? Yes, yes, it does. Yes. So I have seen some

encouraging things. And I think this is one of our one of our private hopes is that you know, coming out of coming out of the First Step Act fight you, you have President Trump asserting ownership over criminal justice reform he he put out through Sarah Sanders the other day something saying like of course I can't be racist I just passed criminal justice reform which is interesting but I'm hoping what I'm hoping comes next for you know the reform movement and over the next year is the competitive primary process you're going to see democrats who don't want to let the president claim ownership of that and that means they're going to have to come up with their own ideas and they're going to have to sound bigger and more exciting the First Step Act and we've already seen that happen somewhat. Senator Kirsten Gillibrand before before the holidays, held a press conference here. She was talking about significant bail reform efforts, a bill that I'm not sure her specific bill has bipartisan support, but the issue sure does.

Sure

I think that would be, that would be a good second step I don't know if we've decided on what specific one we want to say or sort of putting together some of our policy proposals right now and in the hopes of generating that competition between Trump and republicans and Democratic candidates but I don't know if we've set up our own wish list yet but one of them one of them were one item on that list but almost certainly be bail another would probably be you know we have we have a an older proposal that we'd like to revisit that talks about changing the way federal grants are allocated to states rather than having that money go to them on autopilot tie it to metrics about building a fair justice system so

Lauren Brook's little book,

Right exactly the Reverse Mass Incarceration Act, we we think that



57:00

some room for improvement on it so we're going to revisit how how we talk about it and and what it should accomplish but that's something we'd still like to see implemented.

If I remember correctly the short form as it kind of creates funding incentives to the states to base things more on successful outcomes then on for instance just actually housing people etc. Is that more or less correct?

That's exactly right. Yeah I thought it was a really interesting idea at the time.

Is there anything else that you all are thinking about or concerned about right now in terms of criminal justice reform before I let you go?

yeah something that would be, this is this is farther afield from prison and sentencing reform but sessions we'll did the you know exactly. You know prosecutorial discretion ability to great effects during his tenure and he largely shuttered police civil rights investigations he you know, opposed consent decrees that being entered over trouble police agencies, he directed federal prosecutors to always seek the most dangerous charge even in lower level drug cases. I wonder if Barr continues those initiatives or changes pace a little. On the one hand,

you have I bet there's some amount of decorum about it's rude to overrule your immediate predecessor when you were appointed by the same president, which I hope would not Trump you know, legitimate policy concerns about their actions. But actually in the written testimony that bar submitted, he alludes to concern for voting rights, which I safe to say I did not expect I would be I'm saying that would be very interesting. So I wonder if that signals some interest in making the Civil Rights Division back into what it was under previous presidents I will be cautiously I won't even be cautiously optimistic elder a street internally confusing from a GOP perspective given the last week it was me but I'd certainly be happy to see it yes

yeah alright man, thanks so much for coming back on the show really appreciate you sharing your time and expertise with us I wish either you or Kevin had a magic answer to how we're going to get the good time credits fixed on our side of legislation.

Yeah and I don't I don't mean to cast aspersions on you know, what kind of 50 is trying to do to to get an executive solution. I think if anyone can achieve it they can so I think the like all of the above approach to getting a solution is is a good one, but we'll see Yeah.

There's always hope.

Exactly. All right. Thanks so much for doing this again. Thank you. And I look forward to talking to you more about what comes next. Excellent. I'm sure we'll have plenty of time to do. Yes, I'm sure. All right, man, talk to let her talk to you later. Bye. Bye.

Now, my take. I understand how frustrating this has been. I mean, I worked every day for months to help get this bill passed and hopes that day one people would start coming home. It makes me very angry that this drafting error happened because there are men and women who should already be home. But for this mistake, I can only hope that they'll keep holding on and know that we're doing everything we can from the outside to make sure that the relief comes that the Bureau of Prisons implements the bill as intended and that as many people as possible to be back with their families as soon as humanly I hope everyone will remember that in the worst case scenario, and I know it's already really bad for anyone who could have gone home already that what we're dealing with is delay. I'm hopeful that we can do better and that some fix will be found either as part of the end of the shutdown or by convincing the powers that be the congressional intention matter. More than a less obvious legislative error. Whatever happens lots of people are working hard to help right now. As for Mr. Barr's nomination again, he could certainly have impacts on how this bill is implemented, but he cannot roll it back. This is now the law of the land. As Kevin ring suggested. We have a democratically controlled House of Representatives now will be much more willing to check executive agency power and as aim suggested, we have a lot of potential presidential candidates on both sides. We have a vested interest in ensuring that the criminal justice ball continues to move forward over the next two years. Another thing that despite has taught me is that this really is a bipartisan fight and then we have strong allies on both sides of the aisle working hard to make sure this law results in the changes that we have demanded that it that it makes in particular there you know I think games is 100% right that it's very unlikely that like Charles Grassley and Dick Durbin who expended unbelievable political capital make this happen, aren't going to fight for

it in the hearings that happened tomorrow will actually today because I'm putting this out tomorrow, but you get my point. So anyway, Ames also raised the question what would you like to see in the second step act? I agree that there's a lot of unfinished business that was left over from the first step back that we must deal with. And the second step back, I believe we must roll back the carve outs in the first step back to using the evidence from our experience with good time over the last several decades and evidence from the States who have implemented similar reforms to prove that there was no need for these exclusions in the first place. I believe that we must make the sentencing reforms and the first step back retroactive, it makes no sense to enshrine moral opposition to mandatory minimums and a piece of legislation but then deny relief to the very people who have been most harmed by those mandatory minimums in the first place, just like it was morally wrong to legislate a fix for the crack versus cocaine disparity but not matrix make it retroactive in 2010, it was wrong to not make our sentencing reforms retroactive in the first step act. We must make certain that 924 stalking relief is made retroactive and we must make sure that people on a third strike all have their sentences reduced from life to 25 years. We also need as Kevin mentioned, to go farther and deeper in sentencing reform and we need as aim said to reform bail. We should also certainly fix supervision. And try to address the larger questions of policing and surveillance of impacted communities. We need to try to make sure and deal with the exclusion of formerly incarcerated folks from the public square. And from the voting booth in Colorado this year, they made it illegal to continue prison slavery. We also should make a federal case of ending prison slavery, we need to send a loud signal to the rest of the country through our federal government. slave labor of any kind is immoral and unjust. We'd work on sentencing less people to prison. As James mentioned, we just

start caring more about outcomes and less about incarceration when incarceration is not the best answer and it rarely is let's stop incarcerating folks period and as long as people are incarcerated. Let's make sure prison is creating opportunities and hope so that when people return they have a path back to meaningful citizenship and to hope in the form of a job with them. real future. As always, you can find the show notes or leave us a comment at decarceration Nation. com. If you want to support the podcast directly, you can do so from patreon.com slash on pirate settler. You can also support us by leaving a five star review from iTunes or like us on Stitcher or Spotify. Special thanks to Andrew Stein who does the editing and post production for me. additional things to Robert Alvarez, who redesigned the decarceration nation. com website just this week. Thanks so much for listening decarceration Nation podcast. See you next time when my guests will be Pulitzer Prize winning author James foreman juice.