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Behind the surprising surge of hope for US criminal justice reform

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Two years ago it looked like criminal justice reform was doomed.

For years a glimmer of bipartisan hope amid congressional gridlock, lawmakers from both parties worked on legislation to reform a justice system riven with issues that can begin at the moment of arrest and can continue through the moment a former prisoner re-enters society. But nothing ever reached the desk of a supportive President Barack Obama, and when Donald Trump won the election to replace him after a campaign marked by tough-on-crime rhetoric, for many advocates the window of opportunity seemed to slam shut.

Yesterday, President Trump threw his support behind a bipartisan criminal justice reform bill called the First Step Act.

The bill “will make our communities safer and give former inmates a second chance at life after they have served their time,” Trump said at a press conference. “It’s a first step, but it’s a very big first step.”

The bill still needs to be voted on by Congress, but if passed – and then signed into law – it would represent the most significant revision of American criminal justice laws since the mid-1990s, when the federal government enacted a host of new tough-on-crime measures. Crafted by a diverse coalition of lawmakers and interest groups, and championed by Jared Kushner, Trump’s son-in-law and adviser, the bill would revise sentencing laws and improve conditions of confinement for prisoners, among other things.

Among its supporters, however, there is widespread agreement that the bill both contains some problems and leaves many issues unaddressed. While they are heartened by the commitment to this legislation from a Trump administration premised on “restoring law and order,” the question now becomes how enduring that commitment will be.

“I was really thinking about this moment and how truly remarkable it is that, during an unlikely time, with this unlikely president, that we’re going to pass this unlikely piece of legislation,” says Holly Harris, executive director of the bipartisan Justice Action Network.

“The effort has been under way to turn away from the [punitive] ’94 crime bill for decades,” she adds, and “when this president was elected on a ‘lock ’em up and throw away the key’ platform very few people had hope.”

KUSHNER'S ROLE

Many of Trump's actions in office hadn't given much cause for hope either.

One of his first acts was to nominate Jeff Sessions, an Alabama senator described as "the No. 1 opponent" of bipartisan criminal justice reform in Congress, as Attorney General. The president has also regularly, and falsely, decried violent crime rates and spiraling out of control around the country. (Crime remains at or near historic lows.)

Yet in a matter of days, criminal justice reform legislation has catapulted from near the bottom of the congressional to-do list to the brink of becoming law.

Mr. Sessions' forced resignation last week undoubtedly helped, experts and advocates say. As a senator he had helped derail a bipartisan bill, the Sentencing Reform and Corrections Act, in 2015. So too did a number of endorsements from law enforcement unions, including the Fraternal Order of Police and the International Association of Chiefs of Police.

Mr. Kushner's behind-the-scenes advocacy also seems to have played a major role in winning Trump's support. Earlier this year, along with celebrity Kim Kardashian-West, he persuaded the president to commute the life sentence of Alice Marie Johnson, a nonviolent drug offender who had become a grandmother and great-grandmother during her 21 years in prison.

Prison reform has been Kushner's priority, however, based in large part on his personal experiences. In 2004, his father pled guilty to 18 counts of white collar crimes, and Kushner visited him nearly every weekend of his 14-month imprisonment.

"I just never wanted to be on the other side of that and cause pain to the families I was doing that to," he said in 2014, according to The Washington Post, of his decision to not be a prosecutor.

That personal experience is likely to continue to motivate Kushner, says Clark Neily, vice president of criminal justice at the libertarian Cato Institute.

"To understand how the American criminal justice system works is to be both horrified and wildly motivated, because it's horribly unjust across the board," he adds. Kushner "probably understands the problems in these areas more clearly and on a deeper level than perhaps anybody else within that close circle around the president."

ELIMINATING 'THREE STRIKES'

The reforms in the First Step Act, Ms. Harris says, are shallow but broad. At first the bill, crafted by Sens. Chuck Grassley (R) of Iowa and Dick Durbin (D) of Illinois, had focused on reforms to prison conditions and re-entry services for former prisoners. In order to win more Democratic support it now also includes changes to sentencing laws that had been part of a failed 2015 bill (which Senators Grassley and Durbin had also co-authored).

The bill prohibits the shackling of pregnant female prisoners and expands the early-release credits for prisoners. It provides new funding for anti-recidivism programs and makes a number of significant sentencing changes, including:

- Eliminating "three strikes" laws that mandate a life sentence for three-time offenders

- Expanding the “safety valve” for judges to grant exemptions from mandatory minimum sentences for nonviolent drug offenders
- Make retroactive the 2010 Fair Sentencing Act, which reduced the sentencing disparity for crack and powder cocaine offenses
- Eliminating the “924 stacking” regulation which enhanced sentences between five years and life for possessing or using a firearm in connection with certain federal crimes.

Sentencing reform has long been a sticking point in debates over criminal justice reform, and it was the case with the First Step Act as well.

“The bill has always been a victim of election year politics and the debate within the Republican Party ... [that] showing any leniency to a drug offender would lead to massive crimewave,” says Ames Grawert, a senior counsel at the Brennan Center for Justice in New York.

When early versions of the First Step Act didn’t include sentencing reforms, the Brennan Center, among other groups and lawmakers, opposed it. “Now we’re cautiously optimistic,” Mr. Grawert says.

Making the crack and powder cocaine sentencing disparity retroactive, in particular, is “the final nail in the coffin of one of most discriminatory sentencing provisions in American history.” But he does still have some issues with the bill – the fact that eliminating 924 stacking won’t be applied retroactively, for example.

Others are concerned that it requires the use of a risk assessment system to evaluate prisoners’ recidivism risk since research suggests such systems could exacerbate racial and socioeconomic disparities in the justice system.

“It’s still the First Step Act, it’s not going to end mass incarceration, it’s not going to end unfair sentences in the federal system,” says Grawert. “There’s a lot this bill leaves untouched that we’d like to see done.”

WILL THE FIRST STEP BE THE LAST?

Some experts and advocates are concerned that there could be a flip side to Trump’s unlikely support for the bill – that the first step could be the last step.

“The fact this has taken so much wrangling to make happen, it makes me kind of doubtful there’s going to be a Second and Third and Fourth Step Act,” says Matthew Epperson, co-director of the Smart Decarceration Initiative at the University of Chicago.

The speed with which the First Step Act has risen to prominence is part of what gives him pause, along with an apparent fixation in the White House on personal or exceptional cases, such as Ms. Johnson.

“You can [support pardoning Johnson] and also be blind to, or totally resistant to, the idea this is a much more systematic thing,” says Dr. Epperson.

Lawmakers like Durbin and Grassley who have spent years researching criminal justice reforms understand the nuances and complexities of it, he adds, but “when you come to the table quickly

I'm concerned there could be this sense of, 'OK we've done this now,' and move onto the next thing."

Others are more optimistic. A broad base of support for criminal justice reform has built up over the years, a base that experts say is unlikely to dissipate quickly. Faith groups are interested in a justice system that emphasizes compassion and second chances. Business groups want a justice system that is more financially efficient. Law enforcement groups want better rehabilitation of offenders and to be able to focus their resources on violent crimes.

"I think it's also increasingly evident there's public support for criminal justice reform," says Carrie Pettus-Davis, director of the Institute for Justice Research & Development at Florida State University.

A survey released by the Charles Koch Institute after Trump's first 100 days in office found that for 81 percent of his supporters criminal justice reform was either "very important" or "somewhat important," and 63 percent of his supporters agreed that "judges should have more freedom to assign forms of punishment other than prisons."

The midterm elections Nov. 6 also brought a number of victories for criminal justice reform supporters: Nearly two-thirds of voters in Florida approved automatically restoring voting rights for people with felony convictions, except in the cases of murder and sexual offenses. Voters in Michigan, Missouri, and Utah voted to liberalize marijuana laws. And Louisianans voted to eliminate a state law dating to the Jim Crow era that allowed split decision jury verdicts.

"There's a vast sea of issues that still have yet to be addressed," says Ms. Harris. "I think we're going into a renaissance period for criminal justice reform."