

A National Response to a Global Pandemic in a Decentralized System

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THE COVID-19 PANDEMIC challenged many of the institutions that society relies on, including the criminal justice system. Changes had to be made at every stage, from hearings and trials to pretrial release and detention, sentencing, incarceration, and post-conviction supervision. The federal Judiciary, and the federal probation and pretrial services system in particular, relied on its unique governance structure, talented leaders, and commitment to the core mission to adapt operations to keep safe those being investigated and supervised, as well as staff, while continuing to keep the wheels of justice moving.

This article will outline some of the measures taken by the federal probation and pretrial services system in response to the pandemic. It will discuss the federal Judiciary's unique governance structure and will focus on the steps taken at the national level to help districts navigate through this unprecedented period of operations. In particular, the article will discuss the steps taken to secure resources, modify statutes, and collaborate with other national entities to address pandemic-related needs. Finally, it will conclude with an assessment of how lessons learned during the pandemic may shape the future of the system.

Local and National Governance

The federal probation and pretrial services system consists of 93 probation offices and 17 separate pretrial services offices (as of May 2021). Critical decisions regarding operations are shared among each district and the national Judiciary entities, including the Judicial Conference of the United States

(Conference) and the Administrative Office of the U.S. Courts (AO).

The specific duties of pretrial services are generally spelled out in 18 U.S.C. § 3154, and include, among other things, preparing pretrial services reports, supervising defendants released pending trial or sentencing, and contracting for treatment and monitoring services for defendants who are released.

The duties of probation officers are primarily listed in 18 U.S.C. § 3603, and include instructing a person on supervision about the conditions specified by the sentencing court; keeping informed, to the degree required by the conditions specified by the sentencing court, about the conduct and condition of a person under supervision, and using all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under supervision; and to bring about improvements in the conduct and condition of the person under supervision. Additionally, under 18 U.S.C. § 3552, probation officers are tasked with preparing presentence reports for the courts.

While the general policies and procedures for the work of probation and pretrial services officers are included in the *Guide to Judiciary Policy* and various procedural manuals issued by the AO, each district has wide latitude in developing local policies and procedures governing how the work is performed.

The Director of the AO is charged with, among other things:

- Investigating the work of probation and pretrial services offices,

- Formulating general rules for the proper conduct of the probation and pretrial services work, and
- Endeavoring by all suitable means to promote the efficient administration of the probation and pretrial services system and the enforcement of the probation and pretrial services laws in all United States courts.¹

Additionally, the Director, under the supervision of the Conference, is charged with developing budget requests and disbursing funds.² In ordinary times, this shared governance ensures that (1) annual budget requests reflect the branch's priorities based on Judicial Conference policies and (2) key decisions on staffing and budget utilization are made at the local level, where chief probation and pretrial services officers and chief district judges are in the best position to assess needs and deploy resources.

Supplemental Funding

In the early days of the pandemic, AO staff, on behalf of the probation and pretrial services system, performed a needs analysis to determine what additional costs might be incurred. It was clear from the outset that there would be disruptions to the delivery of treatment, testing, and monitoring services. It was estimated that there would be a shift in treatment modalities—moving from in-person, group sessions to more individual, remote (telemedicine) sessions. Additionally, it was projected that drug testing practices would change,

¹ See e.g., 18 U.S.C. § 3154 and § 3672.

² 28 U.S.C. §§ 604-605.

relying less on urinalysis and transitioning to more costly methods like transdermal patches. Finally, it was estimated that the pandemic would result in an increase in the number of people placed on home confinement with location monitoring.

To prepare for these changes in treatment, testing, and monitoring, the AO submitted a request to Congress for supplemental funding. The request was limited to treatment, testing, and monitoring services related to the supervision function, and did not address other pandemic-related requirements, such as personal protective equipment, additional IT equipment and services, or modifications to workspaces.

On March 27, 2020, the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act)³ was enacted. While the bulk of this legislation was directed at providing emergency assistance to state and local governments, individuals, and employers, Congress appropriated \$7.5 million for supplemental needs of the Judiciary, including \$5 million for the needs of probation and pretrial services offices. The AO’s ability to quickly assess the system’s needs allowed the Judiciary to submit this request in time for Congress’s expedited passage of the CARES Act. More importantly, this additional funding assured chief probation and pretrial services officers across the country that funding would be there to cover any pandemic-related adjustments needed in their treatment, testing, and monitoring programs.

Legislative Fixes

From the start of the pandemic, it was clear that prisoners and detainees were among the most vulnerable populations in society. The courts and the Federal Bureau of Prisons (BOP) were immediately confronted with the challenge of balancing the safety of the inmates and the need to ensure the execution of the sentence. There quickly emerged several strategies to move lower risk inmates out of BOP facilities and back into the community, either through a reduction in sentence or placement on home confinement.

Under the First Step Act of 2018 (FSA),⁴ the courts were authorized under 18 U.S.C. § 3582(c)(1)(A) to reduce the term of imprisonment imposed on an inmate who “fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a

motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” Before the FSA, the only way an inmate could receive a reduction in sentence was if the BOP submitted a petition to the court. But post-FSA, inmates had the opportunity to directly petition the court to reduce the term of imprisonment.

Additionally, the BOP relied on two existing authorities—one expanded under the CARES Act—to further reduce the size of the federal prison population. First, the BOP took advantage of its authority to place inmates into prerelease home confinement under 18 U.S.C. § 3624. Ordinarily, such placements would be limited to six months or 10 percent of the sentence, whichever was higher. However, under the CARES Act, the Attorney General was authorized to expand the use of home confinement. Accordingly, on March 26, 2020, the Attorney General issued guidance to the Director of the BOP, ordering that low-risk inmates be screened and placed on home confinement, notwithstanding the limitations in § 3624.⁵

The second mechanism used by the BOP was the elderly home confinement program, which was originally authorized under the Second Chance Act,⁶ and expanded under the FSA. This program allows the BOP to place certain inmates who are age 60 or older, and who have served two-thirds of their sentence of imprisonment, to complete the remainder of their prison sentence on home confinement.

While the expanded use of home confinement and compassionate release worked in reducing the number of inmates housed in BOP facilities, these remedies raised new issues and implementation challenges that would require attention. As a result, the Judicial Conference and its Executive Committee, upon recommendations of the Criminal Law Committee and the Defender Services Committee, set out to review the patchwork of statutes and make recommendations to Congress on how to improve their operation. The recommendations included:

Clarifying and Harmonizing the

⁵ Memorandum from Attorney General William Barr to the Director of the Federal Bureau of Prisons, “Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic,” March 26, 2020, available at: https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

⁶ Pub. L. 110-199.

Obligation of Probation Officers to Assist Inmates on Prerelease Custody: Several statutory provisions⁷ direct probation officers to assist in the supervision of inmates placed on prerelease custody in the community; however, these provisions are inconsistent and result in confusion about expectations. The Conference recommended adopting a consistent standard requiring probation officers to assist inmates on prerelease custody to the “extent practicable.”

Additionally, the Conference agreed to seek legislation that would harmonize the method of monitoring inmates in prerelease custody. Across the different statutes, inmates would be released to “home confinement,” “home detention,” or “electronic monitoring.” Since these terms have different meanings under the Judiciary’s policies, the Conference agreed to recommend legislation that would adopt a uniform monitoring method, such as the method adopted by the Sentencing Commission in its 2018 edition of the Sentencing Guidelines Manual.

Facilitating Early Termination of Supervised Release: Section 3583(e)(1) of Title 18 allows for the court to “[t]erminate a term of supervised release and discharge the defendant released at any time *after the expiration of one year of supervised release*, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice” (emphasis added). The requirement that a person must complete one year of supervised release before being eligible for early termination may result in some people completing longer periods of supervision than are necessary to achieve the purposes of sentencing. For example, in some instances, it may be unnecessary that a person compassionately released from the BOP complete one year of supervised release. Similarly, inmates who have served longer periods of prerelease custody in the community may have demonstrated that early termination is warranted before completing one year of supervised release. Accordingly, the Conference has agreed to seek legislation that would allow for the early termination of supervised release in some cases before the person completes one year of supervised release.

Improving Procedures Around

⁷ See e.g., 18 U.S.C. §§ 3624(c)(3), (g)(7)-(8), and 34 U.S.C. § 60541(g)(4).

³ Pub. L. 116-136.

⁴ Pub. L. 115-391.

Compassionate Release: The Conference agreed to seek several legislative provisions designed to improve the procedures surrounding compassionate release motions.

Increasing Access to BOP Medical Records for Compassionate Release Motions: One of the early challenges that courts experienced upon receiving direct petitions for compassionate release from inmates was the lack of consistent procedures to obtain the inmates' medical records. In some districts, courts shifted that duty to assistant U.S. attorneys. In others, requests were submitted directly by the court, sometimes through the probation office, to the BOP. The lack of a standard approach resulted in confusion and delays. To address this, the Conference agreed to seek legislation that would clarify the duty of the BOP to supply the medical records of inmates seeking compassionate release to the probation office, the attorney for the government, and the attorney for the inmate.

Waiving the Time Limits and Requirement to Exhaust Administrative Remedies Before an Inmate Can File a Compassionate Release Petition with the Court: The FSA's creation of a direct petition to the court for compassionate release included a requirement that the inmate exhaust all administrative remedies or wait 30 days from submitting a request for compassionate release to the warden. Both of these provisions were intended to give the BOP an opportunity to review the merits of the request before making its own recommendation to the courts. However, as the pandemic increased the risk to inmates' health and safety, these timelines served as barriers to getting petitions in front of the court expeditiously. Accordingly, the Conference agreed to seek legislation allowing a defendant, after filing a request for compassionate release relief with the BOP, to file a motion for compassionate release directly in the district court before 30 days have lapsed if the exhaustion of administrative remedies would be futile or the 30-day lapse would cause serious harm to the defendant's health. The amendment recommended by the Conference would apply to the period during the national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601 et seq.) with respect to COVID19 and end 30 days after the national emergency term.

Appointment of Counsel: Sections 3006A and 3582 of Title 18 are silent on whether an inmate may have counsel appointed to assist in filing a compassionate release petition with the court. The lack of explicit

authority resulted in judges reaching different conclusions as to whether courts may appoint counsel as a discretionary matter under the Criminal Justice Act. To address this ambiguity, the Conference agreed to recommend amending section 3582 to explicitly permit the appointment of counsel for this purpose. Having appointed counsel would facilitate the presentation of well-prepared and well-reasoned motions and the weeding out of unmeritorious petitions and acceleration of meritorious ones.

Imposing Multiple Terms of Supervised Release: Section 3624(e) of Title 18 instructs that a term of supervised release "runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release" (emphasis added). Section 3582(c)(1) includes a provision allowing the court, when granting compassionate release, to impose "a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." When read together with § 3624(e), it appears that any term of supervised release imposed in connection with compassionate release must be served consecutively to any other term of supervised release. This may reflect Congress's intent, but it raises questions about whether this results in unnecessary duplication and potentially lengthy supervised release periods that may conflict with established social science research indicating that excessive supervision is not necessary to achieve positive outcomes and in some cases may even be counterproductive. The Conference agreed to seek legislation that would clarify this result.

Interagency Coordination

During the best of times, the efficient operation of the federal criminal justice system relies on close coordination between the Judiciary and the DOJ, and especially the BOP. The need for close coordination was never clearer than during the pandemic. Driven by over-arching concerns for the safety of inmates and employees, the courts, DOJ, and BOP all took steps to alter operations, including changes to in-person court proceedings, inmate admissions and transfers, and the use of home confinement and compassionate release. No agency could make a change without considering the impact on its criminal justice partners. Accordingly, the regular means of coordinating had to be enhanced.

Before the pandemic the Judiciary and the BOP formed an interagency working group designed to address matters of mutual concern related to the execution of sentences of imprisonment. The original charter for the group called for one meeting each quarter, with agenda topics mutually agreed upon by the chair of the group (the chair of the Criminal Law Committee) and the BOP. The first several meetings of the Judiciary/BOP Working Group focused on things like the BOP's closure of several residential reentry centers (RRCs) across the country, measures to protect inmates who were cooperating witnesses, and the implementation of the FSA.

Beginning in the spring of 2020, the focus of the working group, and the urgency of the discussions, took on a new shape. First, meetings went from being held once per quarter to every other week. Additionally, to ensure the conversations were comprehensive, representatives from the DOJ's Criminal Division and the Deputy Attorney General's Office were invited. Early topics of conversation during the pandemic included limiting inmate admissions and transfers, establishing quarantine procedures within the BOP, and finding ways to promote remote court appearances by inmates. Eventually, as described above, focus shifted to understanding the BOP's use of early release procedures and facilitating compassionate release proceedings.

By the spring of 2021, the conversations shifted to inmate and staff vaccinations and the hopeful return to normal operations. The increased collaboration between the courts, the DOJ, and BOP paid off in several ways. First, AO and BOP staff enhanced discussions on inmate reentry and the placement of inmates on home confinement. These early conversations gave the BOP the opportunity to find alternate methods of supervising inmates in the community when probation officers were unable to step in. Second, critical information on changes in BOP operations were quickly shared with the courts, giving judges, defense attorneys, and probation and pretrial services officers the opportunity to adjust their own operations accordingly. Finally, the working group members identified and suggested improvements to numerous procedures developed during the pandemic, including procedures on obtaining inmates' medical records in connection with compassionate release petitions.

Other Activities at the National Level

In addition to the above, the AO and the Judicial Conference took assorted actions to help the judiciary through the pandemic.

Adjustments to Workload: Annual funding for probation and pretrial services offices is based on the results of a workload formula. Typically, workload from July 1 to June 30 is used to determine staffing allocations for the subsequent fiscal year. From July 1, 2019, to March 31, 2020, the national aggregate workload of probation and pretrial services offices increased by more than 400 positions. However, beginning in April 2020, workload began to plummet. By March 2021, the system was down almost 1,100 positions. These declines were mostly attributable to changes in pretrial services activations (due to the suspension of grand juries) and presentence reports (due to the suspension of criminal jury trials and fewer defendants pleading guilty). To track the changes in workload and other metrics, AO staff developed and deployed a series of data dashboards, allowing managers at the AO and in the courts to easily observe the trends on a weekly basis.

It was widely assumed that once the pandemic ended, workload would begin to rebound. Any loss of staff during the pandemic, therefore, would result in severe staff shortages once the work resumed. To avoid this result, AO staff proposed, and the Conference approved, a revised allotment method for fiscal year 2021. The revised method would use workload for the 12-month period starting April 1, 2019, and ending March 31, 2020. By shifting the statistical period, the sharp decline in workload at the start of the pandemic would be avoided, and the probation and pretrial services offices would be better situated for when the workload resumed.

Adjustments to Training: All new probation and pretrial services officers are invited to participate in a six-week initial training program at the training academy in Charleston, South Carolina. Additionally, each officer must complete 40 hours of annual continuing education. As the pandemic hit, AO staff were forced to shift training from mostly in person to remote. Curricula were revised, and staff quickly acclimated to the on-line platforms available. Although there were certain training components that could not be replicated remotely (e.g., firearms range training, officer response tactics training), participation in the remote training programs was high. Due to the challenges across the country of accessing firearms ranges, many of which were closed

due to local ordinances and social distancing rules, the AO extended the qualification timelines for officers and instructors until range time could be secured.

Adjustments to Office Reviews: Under 18 U.S.C. § 3672, the Director of the AO “shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges.” Pre-pandemic, reviews were conducted in-district by a team of officers led by AO staff. The move to remote operations and the restrictions on travel made the continuation of in-person reviews impossible. In an attempt to carry out the scheduled work, AO staff and the chiefs in the districts selected for reviews worked together to convert on-site reviews to remote reviews. Team members were granted access to the district’s case management system and assigned cases to review using the standard instruments. AO team leads used the Microsoft Teams platform to hold daily team meetings and to check in with the district’s management. While several components of the reviews had to be curtailed (e.g., ride-alongs with officers, visits to treatment providers), the remote reviews allowed the AO to largely stick to its schedule. The success of the remote reviews has inspired the AO to pilot a hybrid review process in fiscal year 2022. Under this revised protocol, case file reviews will be conducted off-site, but a small team will still visit the district to conduct components that cannot be performed remotely.

Adjustments to Communications: Before the pandemic, most of the communication with the probation and pretrial services chiefs was through weekly emails from AO staff. At the suggestion of the Chiefs Advisory Group, an advice-giving body of chiefs elected by their peers, the AO steadily increased communications until it was an almost daily occurrence. These communications updated the chiefs on what the national judiciary entities were doing in response to the pandemic, shared best practices and suggested adjustments to operations, announced remote training opportunities, and, quite importantly, provided advice and resources designed to promote wellness during a period when stress, personally and professionally, was at an all-time high.

Communications were also improved by chiefs sharing with fellow chiefs. With the assistance of the Federal Judicial Center, and under the leadership of people like Chief Probation Officer Connie Smith from the Western District of Washington, nationwide videoconferences were arranged to give chiefs an opportunity to hear from one another and share important

information about how each of them was adjusting operations. Chief Smith, headquartered in Seattle, had the unfortunate distinction of witnessing the effects of the pandemic earlier than the rest of the country, and her experiences and advice helped all of her colleagues prepare for what was to come. Moreover, these videoconferences allowed chiefs to see and hear one another, which offered a benefit that could not be achieved through emails or memoranda.

Conclusion

Like all other criminal justice agencies, the federal probation and pretrial services system had to adapt in response to the global pandemic. At the district level, chiefs and chief judges took the necessary steps to evaluate conditions and transition to remote operations. Interviews and court appearances were conducted over video, and fieldwork was facilitated by mobile phone video applications. Time will tell if the interruption in regular supervision services had an impact on the ability of people under supervision to succeed.

Despite the unprecedented nature of the pandemic, the Judiciary responded as it often does—with a commitment to the fair administration of justice. Judiciary personnel identified and secured resources needed to continue critical operations. They analyzed statutes, policies, and procedures and made recommendations to improve their effectiveness. Staff from the DOJ, BOP, and the courts enhanced their communication and collaboration, meeting regularly to solve problems as they emerged. Training and other critical services were modified so they could be delivered remotely and keep officers’ skills honed while they worked out of the office and travel opportunities were limited.

Clearly, the lessons learned during the pandemic will inform future policies and procedures. For example, there will most certainly be ongoing discussions and evaluations of telework. Operationally, AO staff are already evaluating data on virtual contacts to see if there is a way to continue these practices and increase officers’ productivity, efficiency, and effectiveness. There is a commitment to preserve promising practices that reduce costs and improve service delivery, which may impact future training programs and, as noted above, how office reviews are conducted.

The world hopes to never again endure the pain, loss, and disruptions experienced during the pandemic. While the federal probation and pretrial services system was tested, it will emerge stronger and better prepared to take on the challenges to come.