

# **RESTORING CONTROL OF PAROLE TO D.C.**

A Presentation to the D.C. Council

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# RESTORING CONTROL OF PAROLE TO D.C.

## Executive Summary

*Twenty years after the enactment of the National Capital Revitalization and Self-Government Improvement Act of 1997 (the "D.C. Revitalization Act"), it is time for the District government to reconsider whether the near-complete federalization of the system of criminal law enforcement in D.C. is still financially necessary, and to identify logical next steps in this process.*

1. In addition to changes that led to the close of the Lorton Prison Complex, the 1997 D.C. Revitalization Act also abolished the D.C. Board of Parole, vesting decision-making authority in the federal U.S. Parole Commission (USPC) for grants of parole for D.C. prisoners and for revocations of parole and supervised release for released prisoners. In 1997, the total DC prisoner population was around 11,500 – 12,000 prisoners in the D.C. Jail and the Lorton Prison Complex. In 2018, there are approximately 6,743 D.C. prisoners, with 2,043 held in local jails and 4,700 in the federal Bureau of Prisons.
2. The USPC was most recently re-authorized by the U.S. Congress through November 2018. If no action is taken, the USPC will likely be extended for another five years, or longer, maintaining federal control of D.C. Parole.
3. The USPC's caseload is almost entirely made up of D.C. parole matters, with federal parole less than 25 percent of the USPC's caseload.
4. The USPC has become a driver of mass incarceration in D.C. The decisions of the USPC have been far harsher than those of the former D.C. Board of Parole, with hundreds of D.C. prisoners denied parole under punitive parole decision-making practices and thousands of D.C. returning citizens returned to incarceration for violation of the USPC's rules. There are currently approximately 4,700 D.C. prisoners housed in the federal Bureau of Prisons (BOP). More than one-third of these prisoners are held for parole or supervised release violations (1,647). More than one-quarter of D.C. prisoners are serving sentences with parole eligibility (1,280).
5. The process for restoring local control of parole requires D.C. legislation to re-create a D.C. Board of Parole and federal legislative amendments to the D.C. Revitalization Act. It will also require new legislation reauthorizing the USPC for a limited interim transition period.
6. The FY2019 budget request for the USPC is \$12.672 million. A D.C. Board of Parole budget would likely be significantly smaller, due to the exclusion of federal parole and more limited staffing requirements.

# **RESTORING CONTROL OF PAROLE TO D.C.**

In the twenty years since the enactment of the National Capital Revitalization and Self-Government Improvement Act of 1997 (the "D.C. Revitalization Act"), the District government has yet to reconsider whether the near-complete federalization of the system of criminal enforcement in D.C. is still financially necessary, or when it might be feasible to restore at least some criminal justice functions back to the District. The District has not meaningfully evaluated whether the incredible toll to residents and their families is worth the price tag of keeping this inherently local government function under federal control. This failure to address and plan for the de-federalization of the D.C. criminal justice system has also undermined the District's credibility when striving for statehood. These are complex decisions, but they should not be delayed.

The costs of taking over the entire federalized criminal justice system would be enormous for D.C. right now, and we are not proposing such a massive first step. However, the District can and should now consider a more limited step toward autonomy in our criminal justice system: taking back control of the D.C. parole system from federal authorities and re-establishing the local D.C. Board of Parole.

## **How Did This Happen?**

In 1997, the District of Columbia government faced a financial crisis. It had been operating under a federally-appointed Financial Control Board since 1995, which had the power to overrule the actions of the D.C. Mayor and Council at a time of budget crisis in Washington, D.C.

In an effort to address the crisis of D.C.'s possible municipal insolvency, the U.S. Congress passed the D.C. Revitalization Act.<sup>1</sup> Welcomed by many D.C. government officials, the D.C. Revitalization Act transferred control over nearly all of the District's system of criminal law enforcement from local agencies to the federal government. The Lorton Prison Complex was closed and D.C. Code offenders were transferred to the federal Bureau of Prisons (BOP),<sup>2</sup> where they were no longer under the custody of the D.C. Department of Corrections. Under the D.C. Revitalization Act, the District was ordered to restructure criminal sentences, abruptly moving from a system of indeterminate sentencing (i.e. imposing a minimum and maximum term, with parole eligibility) to a determinate sentencing structure with a fixed sentence followed by a period of supervised release (with no parole eligibility).<sup>3</sup> The determinate sentencing scheme was put into effect for offenses committed after August 4, 2000.<sup>4</sup>

**For reasons that remain unclear, the D.C. Revitalization Act also abolished the D.C. Board of Parole, transferring all its duties and responsibilities to the federal U.S. Parole Commission (USPC).<sup>5</sup>** Further, under the new law, the D.C. government was barred by Congress from altering its own laws around parole without the "concurrence of the U.S. Attorney General."<sup>6</sup> The D.C. Revitalization Act also created the Court Services and Offender Supervision Agency (CSOSA), a federal agency acting under the authority of the USPC and responsible for direct supervision of D.C. parolees and those individuals serving periods of supervised release under D.C. law.<sup>7</sup>

Making decisions about granting parole and imposing sanctions on individuals in the community serving time on parole and supervised release is an essential function that every state performs. It is a

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<sup>1</sup> National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act").

<sup>2</sup> *Id.* at § 11201(b).

<sup>3</sup> *Id.* at § 11212(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at § 11231(b). *Accord* D.C. Code § 24-131(b) (2018).

<sup>6</sup> *Id.* at § 11231(c). *Accord* D.C. Code § 24-131(c) (2018).

<sup>7</sup> *Id.* at 11233(a)-(d). *Accord* D.C. Code § 24-133 (2018).

basic principle that the jurisdiction where an offense occurred and the place where the overwhelming number of returning citizens will live after a criminal sentence is best situated to make these decisions. Local officials understand and appreciate the complexity of the criminal conduct involved, they understand the needs of public safety and, most importantly, have strong interests in supporting the reintegration of returning citizens into the D.C. community.

### **The Role of the U.S. Parole Commission**

Since the enactment of the D.C. Revitalization Act, the USPC has maintained control over two basic functions formerly handled by the D.C. Board of Parole. **First**, the USPC has sole authority for granting parole to D.C. Code offenders serving parole-eligible “indeterminate” sentences (i.e., those sentenced for offenses committed prior to August 5, 2000).<sup>8</sup> The USPC has the authority to determine who will be granted release on parole and when.<sup>9</sup> **Second**, the USPC enforces conditions of parole on individuals serving parole or supervised release terms on the street, with the power to revoke parole and return parolees to prison for violations of parole rules.<sup>10</sup> For those individuals serving periods of supervised release (i.e., those with offenses that occurred after August 4, 2000), the USPC has the similar power to re-incarcerate them for violations of supervised release rules.

Until 2009, the USPC applied its own parole regulations when making parole grant decisions about D.C. Code offenders. However, after an adverse D.C. District Court decision in 2009, *Sellmon v. Reilly*,<sup>11</sup> and a subsequent settlement of a second case in the same court, *Daniel v. Fulwood*,<sup>12</sup> the USPC was forced to change its procedures (discussed in detail below). Under *Sellmon* and *Daniel*, the USPC was compelled to apply the earlier D.C. Board of Parole regulations in making its parole grant decisions

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<sup>8</sup> *Id.* at § 11231(a). *Accord* D.C. Code § 24-131(a) (2018).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 561 F.Supp.2d 46 (2008).

<sup>12</sup> 766 F.3d 57 (2014).

in most cases, although the USPC still tends to ignore aspects of those regulations in much of its decision-making.

While maintaining responsibility for the ever-dwindling number of parole-eligible federal prisoners,<sup>13</sup> the primary responsibility of the USPC has evolved into serving as the *de facto* D.C. Board of Parole. The USPC makes all parole grant and parole revocation decisions for D.C. prisoners, parolees and people serving time under supervised release. By the start of 2018, the USPC reported that 6,521 of the USPC's total caseload of 8,610 people (or nearly 76 percent) is made up of D.C. prisoners, D.C. parolees and individuals serving supervised release periods under D.C. law.<sup>14</sup> Notably, however, the USPC operates outside the control or influence of the D.C. government.

There are about 1,280 people left in the Bureau of Prisons who are still serving indeterminate sentences under D.C. law and will eventually appear before the USPC regarding a grant of parole. There are approximately an additional 1,644 D.C. Code offenders who are currently incarcerated due to revocations of their parole or supervised release terms. Finally, there are 3,597 people on parole and supervised release currently in the community, subject to the USPC's power to return them to prison for alleged violations of the terms of their release.<sup>15</sup>

USPC Commissioners (the final decision-makers) are appointed by the President of the United States. There are currently two vacancies on the USPC, although the USPC has currently recommended they not be filled. The Commissioners are not required to have – and historically have not had—any connection to DC; there is no DC residency requirement. At this time, two commissioners are Maryland

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<sup>13</sup> Under the Sentencing Reform Act of 1984, Congress eliminated parole for federal defendants convicted of offenses committed after November 1, 1987.

<sup>14</sup> U.S. DEP'T OF JUST., U.S. PAROLE COMM'N, FY 2019 PERFORMANCE BUDGET CONG. SUBMISSION 14 (2018).

<sup>15</sup> U.S. Parole Commission FY2019 Budget Request details the USPC's caseload at 2,294 prisoners. In a separate document, the USPC indicated there were 1,280 people in the BOP from D.C. with parole-able sentences. This leaves 1,644 prisoners on BOP's caseload for violations of parole or supervised release.

residents and one comes from the Kentucky prison system. Commissioners have no line of authority from any D.C. government agency or court and are not accountable to either.

### **The USPC Drives Mass Incarceration in D.C.**

The USPC helps drive mass incarceration in D.C. in two primary ways. First, by not releasing people on parole who arguably should be released from prison (based on their conduct while incarcerated), the USPC extends prison sentences beyond the terms envisioned by sentencing judges. Second, by revoking parole or supervised release (and re-incarcerating returning citizens) for minor technical violations of parole or supervised release, the USPC re-incarcerates hundreds of D.C. Code offenders every year.

There are 1,280 D.C. prisoners with parole-eligible sentences currently held in the federal BOP. There are at least 1,644 more D.C. prisoners serving time in the BOP for violations of parole or supervised release rules. With the restoration of local control of parole to the D.C. government, the D.C. prisoner population could fall significantly. The USPC currently has control over 2,980 prisoners in the BOP, either parole-eligible or serving revocation periods. *Without the unnecessarily harsh practices of the USPC, the D.C. sentenced prisoner population could readily fall to fewer than 2,000 men and women over the next few years, down from the current total of 4,700.*

#### **Denial of Parole**

D.C. Code offenders whose criminal offenses occurred prior to August 5, 2000 were given so-called “indeterminate” sentences, which are sentences that include the possibility of parole. Those convicted for offenses that occurred after that date have so-called determinate sentences, which are sentences of a fixed period of incarceration, followed by a period of supervised release in the community.

Under the older indeterminate sentencing scheme, judges sentenced individuals to a period of incarceration that included a bottom number (the number of years after which the prisoner is parole-



eligible) and a top number (the maximum years of incarceration if parole is not granted). It was the expectation of these sentencing judges – who reviewed all of the evidence and heard from witnesses, the prosecution and the defense – that if the defendant worked toward rehabilitation, he or she should be released after serving the bottom number.

After service of the minimum sentence, a D.C. prisoner with a parole-able sentence is eligible for a parole grant hearing before the USPC. Rather than focusing its assessments on evidence of rehabilitation since sentencing, the USPC more often bases its parole grant decisions on the nature of the offense of conviction itself. The USPC frequently denies parole based on the seriousness of the original offense, rather than on evidence of rehabilitation. This approach imposes the USPC as a sort of “re-sentencing” court, usurping control over sentencing from the sentencing judge and substituting its own judgment about how much time a prisoner should serve for a particular offense before he or she can be released on parole. In 2000, the USPC issued its own parole guidelines, known as the federal guidelines.<sup>16</sup> Using these federal guidelines, the USPC on its own initiative adds time to a prisoner’s minimum sentence (based on the severity of the offense and the prisoner’s institutional disciplinary history) before he or she will be considered eligible for parole by the USPC, directly undermining the role of the sentencing judge and all of the individuals who took part in the original sentencing hearing.

Prisoners have challenged the USPC in court on this issue. In 2008, in a federal District Court (D.C.) decision, *Sellmon v. Reilly*, the Court found that the USPC was applying the wrong guidelines in determining whether a D.C. prisoner should be released on parole when it applied the 2000 guidelines in all cases. The *Sellmon* Court found this practice violated the ex post facto clause of the U.S. Constitution, holding that the USPC was required to use the rules put in place by the D.C. Board of Parole at the time the offense was committed when making its parole decisions. Although the USPC has grudgingly accepted the court’s decision and stopped adding time to prisoners’ minimum sentences, in practice it

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<sup>16</sup> 28 CFR 2.80 Guidelines for D.C. Code offenders.

continues to emphasize the nature of the original offense in making parole decisions, rather than focusing on the prisoner's rehabilitation efforts.

In 2016, the USPC settled a similar lawsuit in *Daniel v. Fulwood*. Under that settlement, the USPC was required to apply the D.C. Board of Parole's 1972 guidelines when considering parole for dozens of DC prisoners whose offenses occurred prior to 1985. The USPC has largely ignored that settlement, although it claims to apply the older 1972 rules in its decisions. The *Daniel* case affects the longest-term D.C. prisoners, many of whom are aged and/or disabled. The USPC maintains that many of these men can never be released on parole solely due to the nature of their original offenses, despite the fact that D.C. Superior Court judges had handed down sentences for which parole was available to them. The USPC continues to ignore the settlement in *Daniel* and disregard the sentences of D.C. judges. The *Daniel* case is currently in litigation a second time, where the USPC's practices are once again facing judicial scrutiny.

Since *Sellman* and *Daniel*, the USPC has nominally used the frameworks ordered by the courts, citing the appropriate D.C. Board of Parole guidelines in its decisions. However, the USPC frequently "goes outside the guidelines" and rules based on its own criteria, claiming that a prisoner is a greater risk to the community than revealed by the guidelines. Despite the prisoner's parole-able sentence, the USPC has decided in many cases to never release a prisoner on parole, based on its independent, limited review of the original criminal case. The USPC is able to make such decisions contrary to established case law because it has broad discretionary powers under federal statutes. If a prisoner has strong grounds to argue that the parole decision in his or her case was inaccurate or based on the wrong law, the only avenue for release is the filing of a *habeas corpus* petition in federal court. That process is rarely successful, given nearly insurmountable legal hurdles. The USPC continues to deny parole to prisoners who, under the former rules of the D.C. Board of Parole, would have likely been granted parole by a local paroling authority.

For the 1,280 D.C. prisoners with parole-able sentences, the USPC is the sole authority for deciding if and when they will ever be released. Because prisoners cannot do anything to affect their original sentences, there is little that D.C. prisoners can do to convince this federal agency of their rehabilitation and preparation for release from prison.

### **Parole Revocations**

The USPC's second role with regard to D.C. prisoners is the adjudication of violations of parole or supervised release rules by returning citizens. There are 3,597 parolees and supervised releasees among former D.C. Code offenders living in the community. Every year, the USPC returns hundreds of them to prison for "technical violations" of the terms of their release. These technical violations are non-criminal offenses, like missing meetings with a supervision officer or testing positive for marijuana in a urine test. The decision to classify failure to report to a supervision officer or smoking marijuana (or other violations) as a technical offense and punishable by a period of incarceration is a public policy decision made by the USPC, based exclusively on its own independent criteria. The USPC has no connection with the D.C. government or the D.C. community, and it has no sound basis for making policy decisions like these without any input from D.C. officials or residents. The vast majority of the revocations of parole and supervised release that the USPC prosecutes as technical violations do not involve even allegations of a new criminal offense.

There are also hundreds of cases where a person on parole or supervised release has been charged with a new offense, but a judge has dropped the charges prior to trial or a judge or jury has found a person not guilty of the offense. Yet in many such cases, the USPC will second-guess the court's decision and revoke parole based on the charges filed for the new offense, even when a court found insufficient evidence that the person was guilty of the offense and even in cases in which the prosecutor has decided not to even paper the alleged offense. Again, the USPC is substituting its own judgment for

those of the D.C. courts and D.C. jurors. The USPC has frequently abused its power by sending people to prison for offenses where a court has already found insufficient evidence to convict.

The D.C. Department of Corrections (DOC) has recently reported that 372 of the 1,240 persons detained at the D.C. Jail are held on parole warrants.<sup>17</sup> Most of the parole warrant prisoners are housed in DOC facilities prior to adjudication by the USPC and will likely transfer to the BOP to serve out a revocation sentence after the USPC decides to revoke their parole or supervised release. All of these individuals are being held in DOC facilities on technical violations of parole or supervised release, not for new criminal offenses.

Additionally, sentences for technical violations rendered by the USPC are much harsher than the sentences issued by the former D.C. Board of Parole. Except in rare cases, the D.C. Board of Parole issued sentences for technical violations of no more than nine months, and frequently did not order incarceration at all. In contrast, the USPC regularly imposes minimum sentences of 12-16 months for most prisoners who come before them with technical violations. In cases where a parolee had committed a new offense while on parole, the D.C. Board's practice was to distinguish between misdemeanor and felony offenses in setting revocation sentences. However, the USPC issues lengthy terms for revocations even following a short misdemeanor sentence on minor charges.

## **Why Now?**

Beyond the fact that 2018 marks more than 20 years since the enactment of the D.C. Revitalization Act, the timing for transitioning now to a local parole authority is ripe because the current

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<sup>17</sup> December 12, 2017 report from Steve Husk of the USPC to Interagency Detention Workgroup). The D.C. Department of Corrections reported that, as of February 2018, there were 354 parole and supervised release violators being held at the D.C. Jail, awaiting adjudication by the USPC.

federal authorization for the USPC expires this year.<sup>19</sup> Every few years, the legislative authorization for the USPC comes before the U.S. Congress.

In 1997, the USPC was slated to sunset. With the end of federal parole in the 1980s, the USPC had a limited utility. The enactment of the D.C. Revitalization Act in 1997 gave the USPC a new lease on life. The life of the USPC has been extended on seven different occasions. (1992, 1997, 2002, 2005, 2008, 2011, and 2013), accomplished by amending section 235(b) of the Sentencing Reform Act of 1984.<sup>20</sup> The USPC was most recently reauthorized in 2013 under H.R. 3190. It passed the U.S. House of Representatives on October 14, 2013 with unanimous consent. It passed the U.S. Senate on October 30, 2013, also with unanimous consent. H.R. 3190 reauthorized the USPC until November of 2018. This section of the Act includes a sunset provision for the existence of the USPC.<sup>21</sup> In 1997, the adjudication of D.C. parole and supervised release provided the USPC with an opportunity to take on the workload it had been lacking. But now in 2018, more than three quarters of the USPC's caseload is made up of D.C. prisoners and returning citizens. The USPC is doing almost exclusively D.C.-focused work.

Based on past Congressional action regarding the USPC reauthorization, there is unlikely to be any Congressional movement on USPC reauthorization until the late summer of 2018. Without any action by the District, the reauthorization will likely be passed with unanimous consent using text nearly identical to the 2013 extension Act. Without action by the D.C. government, the USPC will likely be reauthorized, and its damaging role in the D.C. criminal system will continue.

If Congress fails to pass an extension in 2018, the USPC would cease to exist. If this were to happen, all federal statutes and federal regulations referencing the USPC would be moot. This would

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<sup>19</sup> United States Parole Commission Act of 2013, 113th Congress (2013-2014) (H.R. 3190, which was introduced on September 26, 2013, and enacted as Public Law 113-47 on October 31, 2013, extended the USPC for a period of five years).

<sup>20</sup> 18 U.S.C. 3551 Note; Public Law 980473; 98 Stat. 2032

<sup>21</sup> . The most recent authorization changed each reference to "26 years" or "26-year period" in section 235(b) to "31 years" or "31-year period", respectively. See U.S. Parole Comm'n Act of 2013, Pub. L. No. 113-47, 127 Stat. 572 (2013). This change to "31 years" places the need for another reauthorization by early fall 2018. Id. at 573.

create a chaotic situation if no replacement agency was pre-designated. Thousands of those currently under the supervision of the USPC would, in the words of Senator Patrick Leahy, “be allowed to simply walk free without any assessment of the risk to public safety.”<sup>25</sup> Such common sentiments in Congress make reauthorization of the USPC in its current form almost certain.

Localizing D.C. parole authority will involve coordinated D.C. legislation to re-establish the D.C. Board of Parole as well as U.S. Congressional action that will amend the current duties of the USPC. The original D.C. Board of Parole was authorized in D.C. Code § 24-201(a). A similar statutory authorization would have to be passed by the Council. Congress would also have to act to give D.C. back the authority to adjudicate parole and supervised release violations and parole grants, but preserve for the USPC its more limited responsibilities in federal parole matters. Because the USPC’s authorization expires in November 2018, this is a reasonable time to explore whether the USPC should continue to adjudicate individuals convicted of DC code offenses.

### **Necessary Legislative/Political Steps**

The regulations and statutes related to the USPC are numerous, and present in both federal law and the D.C. Code. Due to the D.C. Home Rule Act of 1973 (Home Rule Act), the D.C. Revitalization Act of 1997, and various Constitutional provisions, the expiration of the USPC alone would not grant the D.C. Council the power to create a replacement agency. The U.S. Constitution and statutes limit the power and role of the D.C. Council.

Any proposal to replace the USPC with a local agency could only be legally satisfactory if it involves a dual-legislative effort by the U.S. Congress and the D.C. Council.<sup>26</sup> Congress would need to

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<sup>25</sup> Press Release, Office of Senator Patrick Leahy, Statement of Sen. Patrick Leahy on United States Parole Commission Extension Act of 2013 (Oct. 30, 2013).

<sup>26</sup> A Government Accounting Office study in 2009 concluded, “Thus, transferring jurisdiction is not feasible without altering an existing or establishing a new entity, and would pose challenges related to estimating costs and

introduce legislation that would amend current federal law regarding the role and functions of the USPC, enabling the USPC to continue in its role handling exclusively federal matters. This legislation would also need to expand or amend the role of the DC Council in parole matters, which were limited under the Revitalization Act. In light of the issues discussed below regarding limitations on the D.C. Council's powers, Congress would need to empower the D.C. Council to designate a successor agency to handle D.C. parole matters. Only with that local power could the D.C. Council take action to create its own D.C. Board of Parole.

### **Transition Issues**

It likely makes sense for the District to plan for a transition to local control of parole beginning in November 2019. As noted previously, the USPC's authorization expires in November 2018. However, this will not be enough time for the District to establish a new agency, make provisions for transferring responsibilities from the USPC and develop funding streams for running the new agency. One option would be for the U.S. Congress to pass a one-year re-authorization of the USPC, with explicit instructions that this will be a transition year for the USPC. This would require that the District take necessary planning and legislative steps in 2018, but with the understanding that a new D.C. Board of Parole would not be operational until November 2019. Several of the federal legislative changes outlined below could occur after the U.S. Congress enacts a short-term re-authorization for the USPC.

### **Statutory Changes**

- **D.C. Home Rule Act**

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assessing impacts on decision making." U.S. PAROLE COMMISSION: Number of Offenders under Its Jurisdiction Has Declined; Transferring Its Jurisdiction for D.C. Offenders Would Pose Challenges. GAO-15-359: Published: May 28, 2015. Publicly Released: May 28, 2015.

The D.C. Home Rule Act places several limitations on the power of the D.C. government, many of which are relevant here.<sup>27</sup> Section 602(a)(3) of the D.C. Home Rule Act prohibits the D.C. government from enacting “any act, or enact[ing] any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District.” This bars the D.C. Council from passing any legislation that would curtail or expand the jurisdiction of the D.C. Revitalization Act with regards to the USPC as its jurisdiction is not “exclusively in . . . the District.” Congress would need to act on its own, likely through amending the relevant sections of the D.C. Revitalization Act, in order to affect changes upon the USPC.

Section 602(c)(2) of Title VI of the D.C. Home Rule Act outlines the procedure for when the Chairman of the D.C. Council transmits any act that relates to Title 22, 23, or 24 of the D.C. Code. Relevant here is Chapter 1 of Title 24, which codifies the transfer of the D.C. prison system to the federal government, as enacted by the D.C. Revitalization Act. This Chapter includes the structure of parole in the District of Columbia, the USPC’s authority, and CSOSA’s role. Section 602(c)(2) of Title VI of the D.C. Home Rule Act stipulates that any such legislation passed by the D.C. Council would take effect at the end of a 60-day period beginning on the day the act is transmitted to the Speaker of the House of Representatives and the President of the Senate. Congress can block such enactment through a joint resolution disapproving such act that is subsequently signed by the President.

The Home Rule Act also gives Congress the authority to “exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.” In short, Congress has full authority over the District of Columbia, as granted under the Constitution.<sup>28</sup>

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<sup>27</sup> See District of Columbia Home Rule Act, D.C. CODE § 1–206.02 (2016).

<sup>28</sup> See U.S. CONST. art. I, § 8 cl. 17.



Any effort to transfer D.C. parolee supervision to a local D.C. agency requires full participation and cooperation from Congress throughout the entire process.

- **D.C. Revitalization Act: Attorney General Clause**

Section 11231(c) of the D.C. Revitalization Act of 1997 states:

“The Parole Commission shall exercise the authority vested in it by this section pursuant to the parole laws and regulations of the District of Columbia regarding, except that the Council of the District of Columbia and the Board of Parole of the District of Columbia may not revise any such laws or regulations (as in effect on the date of the enactment of this Act) without the concurrence of the Attorney General.”<sup>29</sup>

The language presented here seems to indicate that any changes in parole laws must be approved by the U.S. Attorney General. Although this provision appears to violate the U.S. Constitution on its face as it places the Attorney General in a semi-legislative/executive role, the issue has never been litigated. This clause adds a further layer of complication to any efforts by the D.C. Council to establish a USPC alternative. **Congress would either need to repeal or amend this clause of the Revitalization Act.**

- **CSOSA and the USPC: D.C. Revitalization Act**

There are other federal agencies that are deeply interwoven within the role and structure of the USPC. The most prominent of these agencies is CSOSA. CSOSA was created under the Revitalization Act to supervise D.C. probationers and parolees, and provide pretrial services for D.C. Code offenders. The D.C. Board of Parole, the D.C. Superior Court and the D.C. Pretrial Services Agency previously handled these functions.

The role CSOSA performs will still be needed after the USPC is abolished. The most logical way of handling CSOSA from the federal end is simply to let it continue existing in its current form. This could be done by substituting each reference to the USPC in the relevant sections of the D.C. Revitalization Act to the name of the D.C. agency that would subsume the USPC’s responsibilities over D.C. Code offenders, presumably the new D.C. Board of Parole. This is similar to what was done when the USPC took over the

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<sup>29</sup> National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, § 11232, 111 Stat. 712, 745 (1997).

role of the former D.C. Parole Board. In this scenario, CSOSA would continue to function as it currently does, but a local agency would replace the USPC.

- **Other Federal Legislative Changes: Sentencing Reform Act and D.C. Revitalization Act**

Without Congressional reauthorization in 2018, the USPC will sunset out of existence; this will create a complicated situation for those currently under its jurisdiction. To ensure a smooth transition to a new D.C. controlled agency, there must be a number of changes within the Code of Federal Regulations and the D.C. Revitalization Act of 1997 as they relate to the USPC and CSOSA. The following is a list of statutes, regulations, and sections of the D.C. Revitalization Act that will need to be repealed, amended, or substituted.

The relevant federal statutes that outline the USPC's role and structure are: 18 U.S.C. § 4203 and 18 U.S.C. § 4204. Both of these statutes were repealed by the **Sentencing Reform Act of 1984**, Pub. L. No. 98-473, § 235, 98 Stat. 2032.

Every few years, Congress delays the sunset date of the USPC that was put into motion by the repeal of these two statutes. The following regulations were developed from 18 U.S.C. § 4203 and 18 U.S.C. § 4204:

- 28 C.F.R. § 2.200 (2016) – Authority, Jurisdiction, and Functions of the U.S. Parole Commission with respect to offenders serving terms of supervised release imposed by the Superior Court of the District of Columbia.
- 28 C.F.R. § 2.70 (2016) – Authority and Functions of the U.S. Parole Commission with respect to District of Columbia Code offenders

Within the Code of Federal Regulations (CFR), CSOSA's role and structure are outlined in 28 C.F.R. §§ 800.1 – 899 (2016). The statutory authorization for this section of the CFR is derived from the D.C. Revitalization Act. All references to the USPC and CSOSA within these sections of the Revitalization

Act would need to be amended or substituted. Most of the substance could likely remain as the new D.C. Board of Parole would likely operate in a similar fashion.

### **Necessary D.C. Legislative Changes**

Despite Congressional dominance over the majority of legislative issues discussed here, the D.C. Council would still play a role in any successor agency to the USPC. As noted, Congress first must pass the necessary legislation to amend the D.C. Revitalization Act and the D.C. Home Rule Act in order to empower the D.C. Council to act on its own. Once this is completed, the D.C. Council would be free to designate the agency or organization that would have jurisdiction over D.C. code offenders.

Congress has full legislative authority over the District of Columbia. Many sections of the D.C. Code originate from Congressional legislation and not from the D.C. Council. The sections of the D.C. Code as they relate to parole, the USPC, and CSOSA were enacted by Congressional legislation, namely the D.C. Revitalization Act. Though codified under D.C. law, these statutes could only be amended through Congressional legislation. These statutes are:

- **D.C. Code § 24-131 (2016). Parole.** The role and jurisdiction of parole in the District of Columbia is codified in D.C. Code § 24-131 (2016). The USPC is referenced several times within D.C. Code § 24-131 (2016) including, “The United States Parole Commission shall assume the jurisdiction and authority of the Board of Parole of the District of Columbia to grant and deny parole.”
- All of **D.C. Code § 24-131** would need to be amended if a new local DC agency took over the USPC’s responsibilities. One particularity within this section already noted is D.C. Code § 24-131(c), which states that the D.C. Council of the District of Columbia “may not revise any such laws or regulations” related to DC parole “without the concurrence of the Attorney General.”

- **D.C. Code § 24-133 (2016). Court Services and Offender Supervision Agency.** CSOSA’s statutory authority, role, and structure are outlined in D.C. Code § 24-133 (2016). The only changes that would need to be made in this section of the D.C. Code are the substitution of the words “United States Parole Commission” with the name of the local DC agency that will replace the USPC.
- **D.C. Code § 24-404 (2016). Authorization of parole; custody; discharge.** The structure and operation of parole in the District of Columbia is outlined in D.C. Code § 24-404 (2016). There are numerous references to the USPC within this statute. It is often referred to as simply the “Commission.” See D.C. Code § 24-404(a) (2016). All references to the USPC would need to be substituted or amended.
- **D.C. Code § 24-406 (2016). Hearing after arrest; confinement in non-District institution.** The procedure that is followed after a returning citizen is arrested for a parole violation is outlined in D.C. Code § 24-2406 (2016). There are several references to the USPC and “Commission.” All such references would need to be substituted or amended.

#### **The Costs of Restoring Local Control of Parole to D.C.**

In its FY 2019 Budget Request, the USPC seeks funding for 51 staff positions, including three USPC Commissioners. (The USPC has proposed eliminating the two vacant Commissioner openings now awaiting Presidential appointments.) The USPC also proposes “the routine use of video teleconference technology,” planning to hold most of its parole grant hearings via video rather than traveling to BOP facilities where parolees are held. The total budget request for the USPC for 2019 is \$12.672 million.

The annual budget for a D.C. Board of Parole, once it is established, would likely be much lower than the USPC’s current budget, depending on the level of staffing the District finds necessary and other factors. These operating costs will need to be figured into the District’s FY2020 budget. However, for the

FY2019 budget year beginning October 1, 2018, the District will need to budget for the costs of setting up the new agency, including the costs of creating a new legal and regulatory structure, securing office space and hiring staff.

### **The Structure and Rules for the D.C. Board of Parole and Supervised Release**

A new D.C. Board of Parole should have among its members representation from various stakeholders in the District's criminal system, which might include public defenders, returning citizens and D.C. community advocates. All members should be D.C. residents. The actual composition of the D.C. Board of Parole, along with terms of appointment and other specifics, will need to be included in D.C. legislation creating the new Board. The former D.C. Board of Parole consisted of five members appointed by the Mayor of the District of Columbia, with the advice and consent of the Council for the District of Columbia. D.C. residency was required and one member of the board was designated as Chairperson by the Mayor. Members were selected based on their broad experience in responsible positions in the fields of corrections, social services, rehabilitation, or law, or education in related fields of behavioral science. The members of the former D.C. Board of Parole had connections with the District and were familiar with the communities in which D.C. residents reside.

There should also be an appeal process for D.C. parole grant decisions and for revocations of parole or supervised released. Currently, no such meaningful appeals exist, with the only remedies for USPC decisions being appeals to the USPC itself or the filing of a new federal lawsuit. With a D.C. Board of Parole and Supervised Release, an appeal to the D.C. Court of Appeals is one possible avenue to be included in the new legislation.

### **The D.C. Revitalization Act Beyond Parole**

The effort to restore local control of parole to the D.C. government would be the first significant amendment to the D.C. Revitalization Act in twenty-one years. Restoration of parole responsibilities to

local control is an opportunity for D.C. officials and the community to address at least one significant shortcoming of the Act: parole authority. Hopefully, this will not be the last time that D.C. officials revisit the Revitalization Act and its other related shortcomings. The Act was enacted at a time when D.C.'s fiscal affairs were in serious difficulty, which is no longer the case. Although the costs of restoring local control of parole to D.C. are not insignificant, they are manageable within the current D.C. budget.

The other aspects of the D.C. Revitalization Act, which include the housing of nearly 5,000 D.C. felons in the BOP, parole supervision handled by CSOSA, and the determinate structure of D.C. criminal sentences, are issues that do not need to be addressed at the same time D.C. is restoring its responsibilities over parole. There are high fiscal costs for reversing the entire Revitalization Act, costs that the District is likely not currently in a position to bear. There are also significant public policy decisions to be made, as well as negotiations with federal authorities to accomplish them.

Nonetheless, D.C. officials should begin to sketch out a roadmap for restoring local control for the entire D.C. criminal system that includes projections of the anticipated population of D.C. prisoners. As noted in this testimony, there are 1,280 D.C. prisoners with parole-eligible sentences. There are at least 1,700 more D.C. prisoners serving time for violations of parole or supervised release rules. With the restoration of local control of parole, the D.C. prisoner population could fall significantly. Without the unnecessarily harsh practices of the USPC, the D.C. prisoner population would likely fall to fewer than 2,000 men and women, down from the current total of 4,700. Adoption of such a roadmap is crucial for achieving statehood for D.C. and for addressing the many hardships borne by D.C. Code offenders and their loved ones in the wake of the D.C. Revitalization Act. The dispersal of D.C. prisoners across the U.S., under conditions not subject to local control or remediation, is the most obvious but not the sole issue to be addressed. Revisiting the D.C. Revitalization Act is an opportunity for D.C. officials to re-think its system of criminal punishment at a time when jurisdictions across the U.S. are dealing with the

ravages of mass incarceration on their communities, and to make concrete plans to improve our criminal system.

### **Next Steps**

In order to make the necessary plans and legislative changes necessary for restoring local control of parole in D.C. as expeditiously as possible, we recommend the following steps:

1. If more input from the public about the need to localize parole functions is needed, a **public hearing** on the restoration of local control of parole at the D.C. Council should be scheduled as quickly as possible. This will provide D.C. residents with the opportunity to weigh in on these ideas in the event the Council and/or the Mayor remain unconvinced of the need for this change.
2. **Create a Taskforce** to develop a “**transition plan**” for re-establishing a D.C. Board of Parole. The Taskforce could be made up of representatives from the D.C. Council, the Office of the Mayor, the Office of the Attorney General, the Public Defender Service, community advocates, and returning citizens to negotiate the short-term and long-term steps necessary to localize parole functions, including revenue and budget projections, and operational details for the functioning of the D.C. Board of Parole and Supervised Release.
3. The transition plan developed by the Taskforce would address at least the following: (i) creation of a D.C. Board of Parole (e.g., number of members, term of members, composition of members, appointment of members, selection of Chairperson, powers and duties of the Board, etc.); (ii) logistics of transitioning from the USPC to the newly created D.C. Board of Parole; and (iii) revenue and budget projections and considerations. The transition plan would also include D.C. and federal legislation proposals and/or drafts to effect the re-establishment of a D.C. Board of Parole and the transition from the USPC.



4. Designate officials to **lead negotiations with federal officials and the U.S. Congress** on implementation and coordination of complementary federal and D.C. legislation.
5. Develop a draft timeline for restoring local control of the entire D.C. criminal system.